Minimum standard non-parole periods

CONSULTATION PAPER

June 2011

SENTENCING ADVISORY COUNCIL

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Contents

Tables

Figures

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Queensland data included in this report are reported in full in the Council's research paper *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011). This information was developed from administrative data provided by the Department of Justice and Attorney-General (DJAG) and Queensland Corrective Services, Department of Community Safety (QCS). The Council thanks DJAG and QCS for making these data available to us.

Call for submissions

The Sentencing Advisory Council invites submissions on the introduction of a standard non-parole period (SNPP) scheme in Queensland.

Submission deadline: Friday 22 July 2011

What is a submission?

A submission is a response representing an organisation's or an individual's opinion or view.

Things to consider when preparing your submission

Your submission should address the Terms of Reference set by the Attorney-General. The Council in most cases will not investigate matters outside the Terms of Reference.

You should include any facts that support your views, with details of where they come from.

How long should my submission be?

Try to keep the information you provide as succinct as possible and add supporting documents as appendixes. If it is a long submission, please include a short summary.

How will your submission and any personal information be used?

Your submission will be used as part of the Council's current reference to gauge the community's response to the issue of SNPPs and their introduction in Queensland. Information you provide will inform the Council in responding to the Terms of Reference.

Any personal information you provide or include in your submission will be collected by the Council for the purpose only of responding to the Terms of Reference issued under section 200(1) of the *Penalties and Sentences Act 1992* (Qld).

Unless you indicate otherwise in your submission, your submission and the information in it may be directly quoted or referred to by the Council in its final report and other publications related to the review, and this may include your or your organisation's name. Submissions may also be provided to interested parties on request.

If you do not want your submission to be quoted or your name disclosed, please advise us at the time of providing your submission. If you intend your submission to be public and agree for it to be referred to but would like your or your organisation's name to remain confidential please let us know this also. Contact information is removed from all submissions before they are provided to other people. The Council may also remove any identifying information from a submission – for example, any information that discusses specific cases, personal circumstances or the experiences of individuals other than the author. Submissions that are made anonymously will not be published.

Submissions that contain offensive or defamatory comments, or that are primarily concerned with issues outside our Terms of Reference, will not be published or referred to in the Council's final report and may not be considered.

How do I make a submission?

Please title your email or written correspondence 'Submission Standard Non-Parole Periods'.

Online

Provide a submission using our online form.

Email us

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Write to us

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Fax: 07 3405 9780

Talk to us

Phone 1300 461 577
TTY Service (FreeCall) 1800 810 586

Or visit us in person (by appointment)

Level 30, 400 George Street, Brisbane

Participate in our community meetings

A schedule of the meeting details will be posted on the Council's website at <www.sentencingcouncil.qld.gov.au>

Other languages

If you would like to contribute to this consultation but require a translator or interpreter, please let us know.

Abbreviations

ABCA	Alberta Court of Appeal (Canada)
A Crim R	Australian Criminal Reports
A-G	Attorney-General
AIC	Australian Institute of Criminology
Carswell Alta	Carswell Alberta Cases (Canada)
CCA	Court of Criminal Appeal
CJ	Chief Justice
CLR	Commonwealth Law Reports
Cth	Commonwealth
Cr App R (S)	Criminal Appeal Reports (Sentencing)
DJAG	Department of Justice and Attorney-General (Qld)
DPSOA	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)
HCATrans	High Court of Australia transcript
Hon	Honourable
IQR	inter quartile range
J	Judge, Justice (JJ plural)
JIRS	Judicial Information Research System
MAD	median absolute deviation
MMS	mandatory minimum sentence
MP	Member of Parliament
n	number
NPP	non-parole period
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLR	New South Wales Law Reports
NT	Northern Territory
NTSC	Supreme Court of Northern Territory
NZ	New Zealand
NZLR	New Zealand Law Reports
ODPP	Office of the Director of Public Prosecutions
para	paragraph
QCA	Queensland Court of Appeal
QCCA	Queensland Court of Criminal Appeal
QCS	Queensland Corrective Services
Qd R	Queensland Reports
Qld	Queensland
QPS	Queensland Police Service
QSC	Supreme Court of Queensland
QSIS	Queensland Sentencing Information Service
R	Regina (the Crown)
s	section
SA	South Australia
SASC	Supreme Court of South Australia
SASCFC	Supreme Court of South Australia Full Court
SCR	Supreme Court of Canada
SNPP	standard non-parole period
SVO	serious violent offence pursuant to Part 9A of the *Penalties and Sentences Act 1992* (Qld)
ToR	Terms of Reference
UK	United Kingdom
v	against
Vic	Victoria

EXECUTIVE SUMMARY

What have we been asked to do?

The former Attorney-General and Minister for Industrial Relations, the Honourable Cameron Dick, issued Terms of Reference to the newly established Sentencing Advisory Council (the Council) on 20 December 2010 asking the Council to examine and report on:

- the offences that a minimum standard non-parole period (SNPP) should apply to, and
- the appropriate length of the minimum SNPP for each of those offences identified.

The Council was also asked to consider a range of related issues, including whether or not the NSW SNPP approach should be adopted in Queensland. The Terms of Reference are set out in full on the Council's website.

The Council must report to the Attorney-General by 30 September 2011.

In addition to this Consultation Paper, the Council has prepared a separate research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland*, which is available on the Council's website (sentencingcouncil.qld.gov.au) and in hard copy by request. The research paper explores current sentencing and parole practices in Queensland in some detail. Much of the data in this Consultation Paper is drawn from the research paper, and it is intended that the two papers be read together.

What is a SNPP?

A SNPP is a legislated non-parole period – that is, it is the minimum length of time an offender should spend in prison if found guilty of an offence before being eligible to apply for release on parole.

In NSW, SNPPs have been in place since 2003. In that state, the scheme has led to an increase in the length of sentences for some serious violent offences and sexual offences and an increase in offenders pleading guilty overall for those offences included in the scheme (from 78% to 86%). A 2010 evaluation found the scheme has led to greater uniformity and consistency in sentences.

What is parole?

Parole is the conditional release of a prisoner after serving part of their sentence. The offender is then supervised in the community until the expiration of their sentence.

The 'non-parole period' is the time an offender serves in prison, before they are eligible to apply for release on parole.

When will an offender be released on parole?

Under the *Corrective Services Act 2006* (Qld), parole is the only form of early release available to all prisoners and it can be ordered by the court or by a parole board. While parole results in release from prison, it is not a release from serving the remainder of the sentence. Offenders remain under Queensland Corrective Services' supervision until the end of their sentence, and if they breach parole they can be returned to prison.

For many offenders parole is not automatic. An offender may be kept in prison beyond this period if a parole board considers it appropriate and, based on the Council's research, this is often the case.

What is happening in other states?

Possible changes to the NSW SNPP scheme have been referred to the NSW Sentencing Council. The Victorian Government has announced the introduction of baseline sentences (equivalent to a non-parole period) and referred the matter to the Victorian Sentencing Advisory Council. Neither Council will have finalised their reports before the Queensland Council is required to report back on the operation of SNPPs in Queensland.

The High Court of Australia is also considering some aspects of the NSW SNPP scheme after two appeals relating to the constitutional validity of the scheme and other aspects of its operation. The outcome of these applications may affect decisions made about how a Queensland scheme should work. The judgments of the High Court are not likely to be handed down until late 2011.

Purpose of this consultation

During the consultation period, the Council will explore relevant issues to enable it to present options to address the questions raised in the Terms of Reference. The Council will collect relevant feedback in the consultation period, which is 8 June to 22 July 2011. Following the consultation period, the Council will consider the information provided and then present a final report, informed by the Council's research and submissions and feedback received, to the Attorney-General outlining the Council's advice.

What is the aim of a SNPP scheme?

The Queensland Government has stated that the aim of a SNPP scheme in Queensland is to ensure sentences reflect community expectations and to provide consistency and transparency in sentencing decisions. SNPPs are also intended to provide additional guidance to courts in setting sentences. This includes giving appropriate consideration to the actual time an offender spends in prison before being eligible for parole. Courts are currently guided in setting sentences by legislation, sentencing principles from previous cases, actual sentences given in similar cases (comparative sentences) and sentencing principles and outcomes in appeal decisions handed down by the appellate courts.

Legislation enabling guideline judgments was introduced in Queensland in late 2010, enabling the Court of Appeal to publish a formal guideline judgment to guide the courts in sentencing.

How do SNPP schemes operate in other jurisdictions?

In addition to the NSW SNPP scheme, the Northern Territory and South Australia also have SNPPs or similar schemes in place. Each scheme applies to different offences, although most apply to more serious offences against the person such as murder, rape or sexual offences against children. Some schemes set the non-parole period as a fixed percentage of the full sentence, while others set a specific

period of time for the non-parole period. Most schemes include various grounds on which a sentencing judge may depart from the scheme, that differ depending on the type of scheme. More information on these schemes can be found in Chapter 3 of this paper.

Each scheme also has its own definition of a SNPP. For example, in NSW a SNPP is defined as the non-parole period for an offence in the 'middle of the range of objective seriousness'. This means a court must impose a SNPP if a case is assessed as being of mid-range seriousness. Only factors related to the offence itself can be considered in making this decision under this definition.

It is clear from feedback about some schemes, and appeal cases arising from them, that interpretation of SNPPs is not straightforward. There is discussion and debate, particularly among legal stakeholders, about the merits of such schemes and their proper operation. The Council appreciates the complexity of this issue and its implications, which are discussed in detail in this paper

What are the options for structuring a SNPP scheme?

The Council has put forward for consultation two approaches to structuring a SNPP scheme:

- Option 1 is a defined term scheme, where the length of time in years and months is specified in legislation as the minimum period that must be spent in prison if a person is found guilty of an offence.
- Option 2 is a standard percentage scheme, which specifies a set percentage of the prison sentence that an offender found guilty must serve before being eligible for parole.

The advantages of option 1 (a defined term scheme) include more transparency in sentencing, as the legislation would clearly set out how long the offender must spend in custody. It would also provide clear guidance to the court in setting the non-parole period for an individual offence.

Disadvantages include difficulty in deciding the non-parole period that should apply to each offence, restricting the ability of courts to respond to individual circumstances, and requiring well-defined grounds for departure from the scheme. Specifying defined terms would also be likely to have a marked impact on the current approach to sentencing in Queensland, making the process more complex. Consequently, this option would be likely to increase the time taken by courts to set sentences.

The adoption of option 2 (a standard percentage scheme) may overcome the disadvantages of a defined term scheme, but would not provide the same level of guidance to courts on appropriate sentences (in years and months) in given cases.

How would each SNPP option work?

In considering the two options, the Council must make decisions about whether it will recommend that the scheme should apply to:

- offenders sentenced to life imprisonment or indefinite imprisonment terms
- offences that can be dealt with in the Magistrates Court rather than in the higher courts (matters that can be heard summarily), and
- offenders who are aged 17 years (based on the fact that the scheme will not apply to children, but taking into account that 17-year-old offenders are treated as adults in most cases for the purposes of sentencing in Queensland).

The Council also has to recommend how the scheme will apply in relation to current legislative requirements relating to parole, including court-ordered parole (currently, for some prison sentences of

3 years or less, the court can set the date on which the offender is eligible for parole, which therefore determines when they will be released).

A defined term scheme (option 1) will require legislative guidance to the courts on what type of offending the SNPP should apply to – for example, if a NSW-style definition was introduced, how serious an offence attracting an SNPP would have to be on the 'range of objective seriousness'. Likewise, if the SNPP was defined in terms of the non-parole period for a 'typical' case, legislative guidance would be required on an appropriate non-parole period for a typical (or common) offence without mitigating or aggravating circumstances.

Both approaches, therefore, present some difficulties.

Deciding on what grounds a court should be allowed to set a higher or lower non-parole period than the SNPP is also likely to be challenging. For example, if the SNPP is defined as a non-parole period for an offence in the 'middle of the range of objective seriousness', any factor which brings the offence below this level of offending, as well as mitigating factors personal to the offender, would need to be recognised as possible grounds for departure. This may not be the case for a standard percentage scheme because it may not be necessary to define the exact length of a SNPP and what this represents.

The standard percentage scheme (option two) may overcome some of these difficulties, and would be consistent with existing Queensland schemes that already provide forms of minimum non-parole periods set as a percentage of the full sentence, these are:

- a standard non-parole period of 50 per cent for offenders sentenced to imprisonment for more than 3 years, or found guilty of a sexual offence, and who are not declared convicted of a serious violent offence, in circumstances where the court has not set a parole eligibility date; and
- a standard minimum non-parole period of 80 per cent of the sentence or 15 years (whichever is less) for offenders declared convicted of a serious violent offence under Part 9A of the *Penalties and Sentences Act 1992* (Qld).

Under a standard percentage scheme, the percentage that should apply would have to be decided. Possible options are to:

- strengthen the existing 50 per cent non-parole period for those offenders referred to above, to require a SNPP period of not less than 50 per cent of the total period of imprisonment
- create a new fixed percentage SNPP that accommodates the existing 50 and 80 per cent schemes, or
- set the percentage based on current average sentence lengths served (although this would have to account for the individual circumstances of the case).

SNPP options and Queensland's Serious Violent Offence provisions

As discussed earlier, offenders declared as having been convicted of committing a serious violent offence (SVO) are only eligible for parole after serving 80 per cent of their sentence, or 15 years (whichever is less). The court may also set a later parole date.

If a defined term scheme (option 1) was adopted in Queensland, and the SVO scheme under Part 9A remained in the same form, the court would have to:

- consider the SNPP for the SVO
- consider whether the offence warrants a longer (or shorter) non-parole period than the SNPP due to its relative seriousness and set the non-parole period accordingly
- make a declaration that the offender is being convicted of a SVO, and
- calculate the total sentence based on the non-parole period.

Alternatively, a defined term SNPP scheme could exclude offences that attract an SVO declaration, for example on the basis that these offences are likely to result in significant terms of imprisonment regardless of the existence of a SNPP.

Adopting a standard percentage scheme (option2) could work more effectively with the existing SVO provisions, should they be retained. For example, the scheme could be structured to allow sentencing courts to choose to either make a SVO declaration (resulting in a non-parole period of 80%), or to refrain from making such a declaration (resulting in the non-parole period being set by virtue of the SNPP percentage). How a standard percentage scheme (option 2) would work with SVO provisions is explored further in Chapter 4 of this paper, and is a critical issue under the Terms of Reference.

What offences should be included in a SNPP scheme?

The following factors could be taken into account when deciding which offences should be included in a SNPP scheme:

- offences already defined by the *Penalties and Sentences Act* as 'serious violent offences' and 'sexual offences'
- offences included in SNPP-style schemes elsewhere
- the current maximum penalties for offences
- current sentencing practices
- community views on the seriousness of certain offences and whether current non-parole periods are appropriate
- current appeal rates
- information about the time offenders actually spend in custody
- the degree of case variability and sentence variability
- selecting offences where the guidance provided to courts (for example, by the maximum penalty, similar cases and appeal court decisions) could be enhanced, and
- selecting offences based on the potential of a SNPP to deter offending.

These factors are discussed in detail in Chapter 5 of this paper.

Offences currently defined as 'serious violent offences' and 'sexual offences'

Under the *Penalties and Sentences Act* in Queensland, there are 59 offences listed as 'serious violent offences' or 'sexual offences'. Twenty-six of these can be dealt with in the Magistrates Court, although some only in specific circumstances.

A SNPP scheme could apply to the 59 offences already defined as a serious violent offence or a sexual offence. If this criterion was to be used to decide which offences should be included, each offence should be assessed to decide whether it should be categorised this way. It should also be noted that certain drug offences are included in SVO list in the Act, and consideration needs to be given as to whether these offences should be included if the current list of serious violent offences in Schedule 1 of the *Penalties and Sentences Act* is adopted for the SNPP scheme.

Offences included in SNPP style schemes elsewhere

New South Wales

The offences initially included in the NSW SNPP scheme were:

- murder, conspiracy to murder and attempted murder
- wounding or grievous bodily harm with intent to do bodily harm or resist arrest
- certain assault offences involving injury to police officers

- certain sexual offences, including sexual intercourse with a child under 10 years
- certain robbery and break and enter offences
- car-jacking
- certain offences involving commercial quantities of prohibited drugs, including manufacture and production
- unauthorised possession or use of firearms, and
- intentionally causing a bushfire.

Over time, the offences that attract SNPPs in NSW have been expanded to include new offences and sub-categories.

South Australia
The South Australian scheme does not identify specific offences to which SNPPs apply, but the scheme applies to 'serious offences against the person' (defined as an offence other than murder resulting in the death of the victim or the victim suffering total incapacity). The definition includes conspiracy to commit such an offence, or aiding, abetting, counselling or procuring such an offence. A person suffers total incapacity if he or she is permanently physically or mentally incapable of independent function.

Northern Territory
In the Northern Territory, the scheme applies to murder and certain sexual offences. The offence of murder carries a SNPP of 20 years, which can be increased to 25 years in certain cases. Fixed non-parole periods of 70 per cent of the total sentence apply to sexual offences involving sexual intercourse without consent where a prison sentence is imposed. Similar rules apply to sexual offences committed against children under 16 years. The court can also choose not to fix a non-parole period in such cases. If no non-parole period is set by the court, the offender must serve the whole of their sentence.

Current maximum penalties

Current maximum penalties that apply in Queensland could also be taken into consideration in applying a SNPP scheme, as a measure of seriousness of the offence. Chapter 5 of this paper provides the maximum penalties for a selection of offences.

The following offences have a maximum penalty of life imprisonment:
- murder and attempted murder
- manslaughter
- rape
- maintaining a sexual relationship with a child
- carnal knowledge of children under 16
- sexual assault, where the offender is or pretends to be armed, or is in company, or the assault involves penetration by something other than a penis
- acts intended to cause grievous bodily harm and other malicious acts
- unlawful sodomy
- incest
- burglary in circumstances of aggravation, such as where the offence involves breaking into a dwelling, is committed at night, where the offender uses or threatens to use violence, or is or pretends to be armed, is in company or damages or threatens to damage any property
- robbery, where the offender is armed, or is in company, or wounds, or uses other personal violence, and
- attempted robbery, where the offender is armed and wounds, or uses personal violence.

Current sentencing practices

Current sentencing practices could also be used as a basis for selecting offences. Data on current sentencing practices for serious violent offences and sexual offences can be found in the Council's research paper *Sentencing Serious Violent Offences and Sexual Offences in Queensland*, which can be obtained from the Council's website (www.sentencingcouncil.qld.gov.au).

The data show that the serious violent offences and sexual offences most likely to receive full-time imprisonment or a partially suspended sentence are:

- manslaughter (99%)
- acts intended to cause grievous bodily harm and other malicious acts (98%)
- attempted murder (96%)
- maintaining a sexual relationship with a child (98%), and
- rape (97%).

The serious offence categories that have the highest average length of imprisonment are:

- attempted murder (11.5 years)
- manslaughter (8 years)
- acts intended to cause grievous bodily harm and other malicious acts (6 years)
- rape (6.5 years)
- unlawful sodomy (6 years), and
- maintaining a sexual relationship with a child (6 years).

Community views on offence seriousness

It is important to know how members of the community view the seriousness of certain offences and their thoughts on the appropriateness of non-parole periods. For example, particular conduct such as assaults on police officers, emergency workers, taxi drivers and community workers raise considerable community concern. There is no available data at present to measure community views in this regard.

Current appeal rates

Current appeal rates (the number of sentences appealed as a proportion of all cases heard by the courts) may show that some offences and sentence lengths are more likely to be appealed than others. However, appeal rates alone are unlikely to be a useful indicator of offences which should be subject to a SNPP scheme.

Time spent in custody past parole eligibility

Targeting offences that, on average, result in offenders spending a longer period of time in custody past their parole eligibility dates, could be another approach to selecting offences for a SNPP scheme, although there are a number of reasons why offenders might not be released at, or close to, their parole eligibility date.

Council research (published in *Sentencing of Serious Violent Offences and Sexual Offences in Queensland*) found that the offence categories with the longest non-parole periods were:

- attempted murder (4.6 years)
- manslaughter (3 years)
- rape (3 years), and
- unlawful sodomy (3 years).

The offence categories where the highest average time was served in custody were:

- attempted murder (6.1 years)
- unlawful sodomy (5.3 years)
- rape (4.3 years), and
- manslaughter (4.1 years).

These are offences where parole boards are reluctant to release prisoners at their eligibility date. This may indicate that a longer non-parole period is warranted.

Variability between cases and sentences

Selecting which offences to include in a SNPP scheme should also take into account case variability and sentence variability within the offence. An offence within which there is a wide variety of behaviour (and a wide variety of sentence outcomes) may not be suitable for a single SNPP. The issue could be solved by excluding this kind of offence from a SNPP, or the scheme could include several SNPPs for different types of behaviour within an offence category.

An approach that considers variability as a criterion for including offences in a SNPP scheme would need to consider issues like the scope of behaviour within particular offences and broader sentencing practices.

Guidance to courts on SNPPs

In Chapter 2 of this paper, the Council discusses a number of different forms of guidance for courts in arriving at an appropriate sentence.

On an individual offence basis, arguments in favour of including a specific offence in a SNPP scheme might include that the level of guidance provided (for example, by the maximum penalty, sentencing guidelines set out in legislation, similar cases and appellate court decisions) could be enhanced.

Conversely, reasons for excluding an offence from the scope of a SNPP scheme might include that there is appropriate guidance for courts at first instance in sentencing offenders convicted of the offence and that there are good levels of consistency in sentencing, or that any significant variation in sentencing outcomes can be explained by the nature of the offence itself.

Capacity for deterrence

Another way of selecting offences to be included in a scheme might be on the basis of deterrence to potential offenders. In some Court of Appeal cases, general deterrence has been suggested to be most beneficial in relation to offences:

- that are prevalent
- where public safety is at risk
- that are hard to detect
- that involve a breach of trust, or
- where people in a vulnerable position need protection.

One of the arguments against selecting offences to be included in a scheme on this basis is that there is limited evidence that general or specific deterrence works in reducing offending.

Focusing on specific criminal conduct

Another approach to deciding what offences to include in a SNPP scheme is to single out specific types of criminal conduct, such as 'glassing', rather than the specific offence or offences that would ordinarily capture that conduct. 'Glassing' refers to an act of violence by a person that involves the use of glass and causes injury to a person. Glassing has been raised in the Terms of Reference as a specific behaviour to be considered by the Council for a SNPP.

Crime data collected by the QPS indicate that while the number of reported assault offences where glass was used as a weapon increased between 2005 and 2009, before decreasing in 2010, the rate per 100 000 Queenslanders has been relatively stable over that period.

This approach becomes complex, however, when specific criminal conduct falls within a range of different offences with different maximum penalties. For example, an incident involving a glassing may result in the offender being charged with unlawful wounding (7 years), assault occasioning bodily harm while armed (10 years) or grievous bodily harm (14 years).

Another example of specific criminal conduct that could be targeted under a SNPP scheme is sexual offending against children. There are a wide range of child sexual offences that carry different maximum penalties ranging from 5 years to life imprisonment, and these are discussed in Chapter 6 of this paper.

How do these indicators apply to specific offences?

The Council has examined a number of specific offences in light of the considerations outlined above (for more information, see Chapter 6 of this paper). The offences are those listed in the Terms of Reference. Arguments for and against inclusion of these offences in a SNPP scheme are summarised below.

Murder

The offence of murder has a mandatory penalty of life imprisonment. Murder already has a minimum non-parole period of either 15 or 20 years or a later date as set by the court, before a prisoner is eligible to apply for parole.

The NSW SNPP scheme excludes offenders sentenced to life imprisonment or for any other indeterminate period.

Manslaughter

Manslaughter has a maximum penalty of life imprisonment but, unlike murder, courts can sentence an offender convicted of manslaughter to a lesser term of imprisonment. The average prison sentence for manslaughter is 8 years, but there is a wide range of prison sentences imposed – from 1.5 years to 14 years. On average, offenders convicted of manslaughter serve about 1 year of imprisonment past their parole eligibility date (representing 55.2% of the average sentence length).

Manslaughter is an offence that may not be open to a single SNPP, because of the broad range of circumstances in which it can be committed.

Manslaughter is excluded from the NSW SNPP scheme due to the broad range of cases that fall into this offence. A 2004 review of the Northern Territory Criminal Code also recommended against including manslaughter in its SNPP scheme.

Other offences of serious violence against the person

Other than murder and manslaughter, there are several offences involving serious violence against the person, including:

- acts intended to cause grievous bodily harm and other malicious acts (maximum penalty, life imprisonment)
- assault occasioning bodily harm (maximum penalty, 7 years imprisonment)
- serious assault – the assault of specific groups of people such as police officers and corrective services officers (maximum penalty, 7 years imprisonment)
- grievous bodily harm (maximum penalty, 14 years imprisonment), and
- unlawful wounding (maximum penalty, 7 years imprisonment).

NSW has included some violent offences against the person in its SNPP scheme, such as wounding with intent to do bodily harm (which carries a SNPP of 7 years) and reckless wounding (which carries a SNPP of 3 years).

Information on sentence lengths in Queensland shows good consistency in the courts' approach to sentencing offenders where a period of imprisonment is set for these offences. There is also consistent guidance from appellate courts on sentencing levels for offences involving serious violence against the person.

A final issue to consider in including specific serious violent offences in a SNPP scheme is the impact this may have on Aboriginal and Torres Strait Islander offenders. Data show these offenders are more likely than non-Aboriginal and Torres Strait Islander offenders to have an offence involving violence as their most serious offence. As a result, including these offences in a SNPP scheme would affect a higher proportion of Aboriginal and Torres Strait Islander offenders.

Rape

Rape also has a maximum penalty of life imprisonment.

The NSW SNPP scheme applies to the offence of sexual assault (sexual intercourse without consent), which is the NSW equivalent to the Queensland offence of rape. Sexual assault in NSW carries a SNPP of 7 years (or 10 years for the aggravated form and 15 years for aggravated sexual assault in company).

Under the Northern Territory scheme, offenders sentenced to imprisonment for sexual intercourse without consent must serve 70 per cent of their total sentence in prison before being eligible for parole.

In Queensland, from 2005–06 to 2009–10, 96.7 per cent of offenders found guilty of rape were sentenced to an immediate term of imprisonment. The average sentence length was 6.5 years, with sentences ranging from 8.4 months to 25 years. Offenders convicted of rape spend on average 4.3 years in prison; a year longer than the average non-parole period of 3 years. This means that on average, offenders are spending additional time in prison past their parole eligibility date.

In 2000 in Queensland, the offence of rape was expanded to include a wider range of behaviour (penetration by the offender of a vagina, vulva or anus of a victim by any body part or object, and penetration of a victim's mouth by a penis). This may be one reason why rape appears to attract a higher level of sentence length variability than other offences, although the offence of rape already includes a wide range of offending behaviour. This greater level of sentence length variability may present an argument for including rape in a SNPP scheme, but may also be a reason to exclude rape from the scheme on the grounds that it would be difficult to assign a single SNPP appropriate for the offence.

Another approach to providing courts with additional guidance in sentencing for rape is that taken by the New Zealand Court of Appeal in the case of *R v AM* ([2010] 2 NZLR 750), which has issued a sentencing guideline for rape identifying bands within which offenders can be sentenced. One reason the NZ Court of Appeal chose to issue this guideline was a lack of clarity by NZ courts in applying a single starting point of 8 years imprisonment for a contested rape case.

This experience suggests that it may be difficult to adopt a defined term SNPP that assigns a single period of time to be served as a guiding point, as there is no 'typical' case of rape. Taking into account the broader definition of rape now in place in Queensland, this problem may be magnified.

Sexual offences against children

The Terms of Reference direct the Council to consider including the following child sexual offences in a SNPP scheme:

Maintaining a sexual relationship with a child
This offence involves sexual conduct with a child such as sodomy, indecent treatment, carnal knowledge, incest, rape, attempted rape or sexual assault over an often extended period of time as part of a relationship. It carries a maximum penalty of life imprisonment.

Indecent treatment of children
This involves a range of criminal conduct and carries a penalty of 14 years, or 20 years where the child is under 12 years.

Sodomy
This offence relates to anal intercourse with a person under 18 years. It carries a maximum penalty of 14 years, or life imprisonment where the child is under 12 years.

Unlawful carnal knowledge
This offence involves penetration of the vagina to any extent of a child aged under 16 years; consent is not a lawful defence. The maximum penalty for unlawful carnal knowledge is 14 years, or life imprisonment where the child is under 12 years.

In addition to the offences singled out for consideration in the Terms of Reference, there are a range of other contact and non-contact offences that are sexual offences against children.

The maximum penalties for these offences in Queensland indicate the seriousness with which they are regarded by Parliament, with a number of offences carrying a maximum penalty of life imprisonment.

The Council's research paper - *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* - confirms that courts consider these serious offences by the severity of the sentences imposed. For example, the offence of maintaining a sexual relationship with a child and sodomy attracted an average sentence of 6 years (just under the average sentence for rape). Guilty plea rates for these offences tend to be quite high.

Information about sentence length variability shows relatively good consistency in sentence lengths for these offences although this varies by offence. The use of non-custodial orders also needs to be taken into consideration in some cases.

Appeal decisions of the Queensland Court of Appeal provide some guidance to courts on the appropriate sentencing range for some child sex offences, such as maintaining a sexual relationship with a child.

Added to this is the recent amendment to the *Penalties and Sentences Act* which requires a court to impose an actual term of imprisonment when sentencing an offender for a sexual offence against a child, unless there are exceptional circumstances.

The NSW scheme includes some sexual offences against children but not others, and the NSW Sentencing Council has been asked by that State's Attorney-General to consider whether the SNPP scheme in NSW should be extended to include other sexual offences.

In the Northern Territory, a number of sexual offences against children carry a fixed non-parole period of at least 70 per cent of the sentence of imprisonment.

Other offences

Analysis of other offences that have been defined as serious violent offences and sexual offences under the *Penalties and Sentences Act* could be undertaken to explore whether they should be included in a SNPP scheme. These offences include:

- robbery and attempted robbery
- aggravated burglary
- sexual assault
- torture
- trafficking, supplying or producing dangerous drugs
- making, involving a child in making, distributing or possession of child exploitation material, and
- dangerous driving.

Possible impacts of a SNPP scheme in Queensland

The possible impact of a SNPP scheme in Queensland needs to be considered in light of the NSW experience, in particular:

- the ability of defendants charged with SNPP offences to be granted bail
- more work for the prosecution to determine if a matter including a SNPP offence should be heard summarily and therefore, the possibility of more matters being dealt with in the higher courts
- greater complexity in sentencing, with more time and work needed to prepare for sentencing hearings, for making submissions on sentence and for judges to draft their sentencing remarks
- court backlogs as a result of greater complexity, and an increase in appeals arising from errors in applying the scheme
- possible changes in sentencing patterns that may result in increased prisoner numbers and higher associated costs, as has occurred in NSW
- a likely increase in appeals, particularly initially while the scheme is being tested, as has also occurred in NSW, and
- raising the expectations of victims of crime and other lobby groups that such a scheme will reduce crime and make the community safer, leading to dissatisfaction if it fails to deliver these outcomes.

These issues are explored in more depth in Chapter 7 of this paper.

Another issue related to implementation is whether the scheme should apply prospectively (that is, to offenders who commit an offence after the scheme's introduction), or to all offenders regardless of when the offence for which they are being sentenced was committed. The NSW SNPP scheme did not apply retrospectively and only applied to those listed offences after the commencement date of the

scheme, while later amendments to the legislation applied the new SNPPs to offences 'whenever committed'.

The Council will need to consider whether to recommend the scheme should operate prospectively only, or retrospectively, and to consider whether a retrospective application would cause difficulties in Queensland, including in light of the fundamental legislative principles set out in the *Legislative Standards Act 1992* (Qld).

It is unlikely the full effects of a SNPP scheme will be known for some time. Ongoing monitoring and evaluation of any scheme introduced should be considered. This will require improved data collection and better linking of information between police, courts and corrections.

Role for a SNPP scheme in Queensland

Finally, it must be considered whether a SNPP scheme in Queensland will enhance current sentencing practices in this state. Current approaches to sentencing should be considered and questions asked about whether there are other legislative and non-legislative approaches that might enhance current practices. The role for a SNPP scheme in Queensland is considered in more depth in Chapter 8 of this paper.

CONSULTATION QUESTIONS

Chapter 3

1. What should be the primary purpose or purposes of a Queensland standard non-parole period (SNPP) scheme?

Chapter 4

2. What type of SNPP scheme should be introduced in Queensland:
   - a defined term scheme (with the SNPP representing a set number of years), or
   - a standard percentage scheme (with the SNPP representing a set proportion of the head sentence), or
   - some other type of scheme?

3. What forms of detention (if any) should be exempt from the application of a Queensland SNPP scheme?

4. How should a Qld SNPP scheme interact with court-ordered parole?

5. Should offences dealt with summarily (by the Magistrates Court) be excluded from the operation of a Queensland SNPP scheme?

6. Should young offenders be excluded from the operation of a SNPP scheme?

7. If so, how should a young offender be defined?

8. Should SNPPs in Queensland apply to all offenders convicted of specified offences, or to repeat offenders only?

9. If the scheme is limited to repeat offenders, how should this be defined (for example, further conviction for another scheme offence committed after the conviction for the first offence)?

10. If a defined term SNPP scheme is adopted, what should a SNPP represent? For example:
    - a non-parole period for an offence in the mid-range of objective seriousness, or
    - a non-parole period for an offence in the low range of objective seriousness, or
    - a non-parole period for a typical example of the offence (based on factors relevant to the offence and the offender), or
    - other?

11. If a standard percentage SNPP scheme is adopted, should the SNPP represent a particular level or type of offending? If so, what level or type of offending should the SNPP represent?

12. How should courts be required to take the SNPP into account in sentencing?

13. If a defined term SNPP scheme is adopted, how should the SNPP levels be set?

14. If a standard percentage SNPP scheme is adopted, how should the standard percentage (or percentages) be set?

15. If adopted, how should a standard percentage interact with current parole provisions in Queensland? For example, should the scheme be confined to sentences of imprisonment over 3 years for serious violent offences (where no SVO declaration is made) thereby retaining the power for a court to set a court-ordered release date for sentences of 3 years or less?

16. If a defined term SNPP scheme is adopted, on what grounds should courts be permitted to set a longer or shorter non-parole period than the SNPP?

17. If a standard percentage SNPP scheme is adopted, on what grounds should courts be permitted to set a longer or shorter non-parole period than the SNPP?

18. What changes are required to the existing SVO provisions to ensure their complementary operation with a SNPP scheme if:
- a defined term SNPP scheme is adopted, or
- a standard percentage SNPP scheme is adopted?

Chapter 5

19. What criteria should be used to determine the offences to which a Qld scheme should apply?

20. Should consideration be given to setting a separate SNPP for specific types of conduct or should SNPPs apply on an offence by offence basis?

Chapter 6

21. To what offences should the scheme apply, and should there be any exclusions or specific grounds of departure for these offences? For example, in the case of carnal knowledge, should closeness in age between the offender and the victim be a basis for departing from the SNPP?

Chapter 7

22. What are the probable impacts on the Queensland criminal justice system of introducing a SNPP scheme?

23. What are the most important issues for the Council to consider in modeling the possible impacts of a SNPP scheme?

24. Should a SNPP scheme apply only to offences committed on, or after, the date the scheme commences (prospectively), or to all offences whenever committed (retrospectively)?

25. Should a Queensland SNPP scheme be monitored and evaluated? If so:
- What matters should be included as part of this monitoring and evaluation?
- How long should the scheme be permitted to operate before it is formally evaluated?

Chapter 8

26. Is the current system already adequately meeting the objectives of a Queensland SNPP scheme (transparency, consistency in sentence, ensuring that serious violent offenders and sexual offenders serve an appropriate period in prison, and providing courts with guidance in sentencing)?

27. Should any changes to existing sentencing and parole provisions as they apply to offenders convicted of serious violent offences and sexual offences be considered? For example, are there any ways to improve the operation of the current SVO provisions, or the setting by the courts of parole eligibility dates more generally?

28. Are there any other options that should be explored to support the objectives of a SNPP scheme, including to ensure that serious violent offenders and sexual offenders serve an appropriate period of imprisonment and to promote public confidence in sentencing?

CHAPTER 1
INTRODUCTION

1.1 Background to the reference

In October 2010, the Bligh Government announced its intention to introduce standard non-parole periods (SNPPs) for serious violent offences and sexual offences in Queensland.

The former Attorney-General and Minister for Industrial Relations, the Honourable Cameron Dick, issued Terms of Reference to the newly established Sentencing Advisory Council (the Council) on 20 December 2010 asking the Council to examine and report on:

- offences to which a minimum SNPP should apply, and
- the appropriate length of the minimum SNPP for each of those offences identified.

The Council was also asked to consider a range of related issues, including whether or not the NSW SNPP approach should be adopted in Queensland. The Terms of Reference are set out in full in Appendix 1 of this Consultation Paper.

Implicit in the Terms of Reference is a need to consider and provide advice on the structure of a SNPP scheme as it might operate in the Queensland sentencing environment.

The former Attorney-General, in referring to the matter to the Council, had regard to a number of matters, including existing sentencing principles and practices, and the need to maintain judicial discretion to impose a just and appropriate sentence. The Council must similarly have regard to these matters in providing its advice.

As requested in the Terms of Reference, the Council will consider a number of specific matters in providing its advice:

- the Queensland Government's intention that the new scheme will apply to serious violent offences and sexual offences and, at a minimum, to the offences of murder, manslaughter, rape and child sex offending
- whether the offence of manslaughter is consistent with a SNPP, given the range of circumstances in which it is committed
- the appropriate length of SNPPs for rape, given the range of conduct which is covered by this offence;
- with in respect to carnal knowledge, how the situation of a young offender engaged in a consensual, but unlawful, sexual relationship with an underage partner might be dealt with

- the appropriateness of singling out specific criminal conduct (such as 'glassing') as the subject of SNPPs or whether whether SNPPs should apply to specific offences that would ordinarily capture that conduct (for example, unlawful wounding, assault occasioning bodily harm while armed, or grievous bodily harm)
- how a SNPP scheme is to operate in light of Part 9A of the *Penalties and Sentences Act 1992* (Qld) relating to non-parole periods for offences declared by a court as being a 'serious violent offence', including consideration of any reforms to ensure their complementary operation with the new scheme, and
- what the grounds for departure from SNPPs should be, to either increase or decrease those periods.

The Council is to report to the Attorney-General by 30 September 2011.

1.2 What is parole and what is its purpose?

Parole is the conditional release of a prisoner after serving part of their sentence of imprisonment. The offender is then supervised in the community until the expiration of their sentence. The 'non-parole period' is the time an offender serves in prison, before they are eligible for release on parole, or to apply for release on parole.

An offender who is 'on parole' is not free from serving the remainder of their sentence, which continues as the penalty imposed by the sentencing court. Rather, offenders on parole serve the remainder of their sentence in the community under supervision 'so as to facilitate their reintegration back into the community'.[1]

The broader purpose of corrective services, as set out in section 3 of the *Corrective Services Act 2006* (Qld), is 'community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders'. Parole, in this context, serves the purpose of community protection and crime prevention through the rehabilitation of offenders and their reintegration back into the community.

1.3 When will an offender be released on parole?

Under the *Corrective Services Act*, parole is the only form of early release available to all prisoners and it can be ordered by the court or by a parole board.

A Queensland court must set a parole release date when sentencing offenders to a term of imprisonment of three years or less, with the exception of offenders declared convicted of a serious violent offence, or sentenced for a sexual offence.[2] This form of parole is known as 'court-ordered parole'. An offender is released to parole in accordance with the order of the court on the date specified.

For sentences of more than three years, and in the case of sentences for a serious violent offence or a sexual offence, the court may fix a parole eligibility date, but in most cases is not required to do so.[3] If the court has not set a parole date, an offender can apply for parole after serving half of his or her sentence. The exceptions to this are offenders sentenced to life imprisonment, an indefinite sentence or declared convicted of a serious violent offence under Part 9A of the *Penalties and Sentences Act*. An offender who is declared convicted of a serious violent offence is only eligible to apply for parole after serving a minimum of 80 per cent of his or her sentence or 15 years (whichever is less).[4] The court may

also set a later parole eligibility date, in which case the offender is only eligible to apply for release on parole after this date.[5]

The effect of these provisions is that, for the majority of offenders sentenced for a serious violent offence or sexual offence, parole is not automatic. An offender with a parole eligibility date may be kept in prison beyond this date if a parole board considers it appropriate to do so (for example, in the interests of community safety) and, based on the Council's research published in its companion research paper, this is often the case.

1.4 What are 'standard non-parole periods' and how do they operate?

What is a SNPP?

A SNPP is a legislated non-parole period that establishes the minimum length of time an offender should spend in prison if found guilty of an offence before being eligible to apply for release on parole.

There are two forms of SNPPs explored in this paper:

- a defined term scheme – which sets out a period (in years) for each offence as the minimum non-parole period in a given case where a term of full-time imprisonment is imposed, and
- a standard percentage scheme – under which offenders sentenced to imprisonment for an offence that has a SNPP must serve a fixed proportion of their sentence before being eligible to apply for parole.

1.5 Developments in other jurisdictions

In responding to this reference, the Council has been asked to consider applying the NSW approach to SNPPs, and to examine the impact of the introduction of SNPPs on the NSW criminal justice system.

The operation of SNPPs in NSW, including additional offences to which the scheme might apply and standardising SNPP levels, has been referred to the NSW Sentencing Advisory Council for review.[6] Details of the NSW Council's review can be found on the NSW Sentencing Council's website.[7]

The Council is also aware that the High Court has granted special leave to appeal in relation to the operation of the NSW scheme in the matter of *Muldrock v The Queen*.[8] The outcome of the High Court's decision may well affect decisions about how a Queensland scheme should be structured.

Victoria does not currently have a SNPP scheme, but the Victorian Government has recently committed to the introduction of a similar scheme of 'baseline sentences'. Terms of Reference have been issued to the Victorian Sentencing Advisory Council requesting its advice on the introduction of baseline sentences for 'serious offences' as defined in the *Sentencing Act 1991* (Vic)[9] and for additional offences such as arson, recklessly causing serious injury, aggravated burglary, and major drug trafficking.[10] The Council is to report by 29 February 2012. Details of the Victorian Council's review can be found on the Victorian Sentencing Advisory Council website.[11]

The Victorian Government has also recently announced it will be conducting an online survey on sentencing commencing in July 2011 that will seek the community's views about the levels at which the new 'baseline' minimum sentences should be set.[12]

1.6 Our approach

Preparation of the Consultation Paper

As part of initial consultations on the Terms of Reference, the Council hosted four Roundtables in February 2011 attended by a range of stakeholders. A list of these consultations is set out in Appendix 2.

The main objective of these Roundtables was to invite input on the Council's proposed approach to responding to the reference.

This Consultation Paper has been developed taking into account the initial comments from these Roundtables.

To gain a better understanding of the impacts of SNPPs in NSW, members of the Council Secretariat travelled to Sydney in March 2011 to meet with representatives of the courts, legal practitioners, Corrective Services NSW and victim support service providers. A list of these meetings is provided in Appendix 2.

Understanding current sentencing and parole practices is an important part of this review. The Council has therefore prepared a companion Research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland*. Much of the information in this Consultation Paper is drawn from this report, and it is intended that the two papers be read together.

Release of the Consultation Paper

The Council considers it important to receive input to the consultation process from as wide a range of interested parties as the reporting time frame allows. Distribution of the Consultation Paper will occur both electronically and by hard copy.

The Council will be conducting face-to-face meetings throughout Queensland across the State commencing in June 2011. A schedule of meetings will be posted on the Council's website <www.sentencingcouncil.qld.gov.au>.

The Consultation Paper and the research paper will also be available for download on the public consultations section of the Queensland Government's Get Involved website at <www.getinvolved.qld.gov.au> for the duration of the consultation period.

CHAPTER 2

PURPOSES OF A QUEENSLAND STANDARD NON-PAROLE PERIOD SCHEME

2.1 Why introduce standard non-parole periods in Queensland?

The Queensland Government announced its intention to introduce a standard non-parole periods in Queensland in October 2010.[13] The Queensland Government's position is that it is:

> imperative that offenders who committed violent or sexual crimes spent appropriate periods in detention – and enabling the justice system to impose standard non-parole periods would achieve that.[14]

In making this announcement, the government noted that in NSW, where SNPPs had been in operation for eight years, they 'have been credited with making sentences tougher, more consistent and more reflective of community standards', and 'have promoted consistency and transparency in sentencing decisions'.[15]

In referring the matter of SNPPs to the Sentencing Advisory Council, the Queensland Government makes reference to:

- its view that the penalties being imposed for serious violent offences and sexual offences may not always meet community expectations
- its expectation that offenders who commit serious violent offences and sexual offences serve an appropriate period of actual incarceration in prison
- its belief in a need to promote public confidence in the criminal justice system
- its belief in a need to maintain judicial discretion to impose a just and appropriate sentence in individual cases
- the impact of the introduction of the SNPP regime in NSW on its criminal justice system
- current Queensland sentencing practices for offenders 17 years and over, and
- the sentencing principles in the *Penalties and Sentences Act 1992* (Qld).[16]

2.2 Objectives of a Queensland SNPP scheme

1. Sentences that are 'commensurate with community expectations'

One of the Queensland Government's considerations in referring the development of a SNPP scheme to the Council is its concern that penalties being imposed for serious violent offences and sexual offences are not always commensurate with community expectations.

Although there is a current research gap when it comes to understanding Queensland community expectations regarding sentencing practices, a review of international and national sentencing research shows a number of consistent findings on public sentencing opinion:[17]

- there is no one 'community view' regarding sentencing practices
- people often base their opinions on sentencing on information reported by the media, which tend to focus on a small number of atypical cases
- when asked for their opinion in abstract terms, often people believe that sentences are too lenient[18]
- people are often thinking of violent and sex offences or offenders when they give their opinions about the adequacy of current sentencing practices
- when research participants are put in judges' shoes (that is, they are provided with the same facts as those considered by judges) they generally hold similar sentencing views to those of judges[19]
- despite their apparent punitiveness, members of the public are more supportive of offender rehabilitation than criminal justice interventions as a way to reduce crime
- increasing the severity of sentencing does not necessarily result in greater public confidence in the criminal justice system, and
- existing views on sentencing may be difficult to change and those with more punitive views on sentencing are less likely to change their views than those with less punitive views.

These results highlight the importance of distinguishing between 'public opinion' and 'public judgment' when trying to measure 'community expectation' regarding sentencing matters. Public opinion measures are sometimes criticised for evoking shallow, unconsidered views on an issue, while public judgment is 'the state of highly developed public opinion that exists once people have engaged an issue, considered it from all sides, understood the choices it leads to, and accepted the full consequences of the choices they make'.[20]

Perceptions of crime and criminal justice

Previous studies of public perceptions of crime and criminal justice have found:

- people believe that crime is increasing, even though this is not the case
- people overestimate the amount of crime that involves violence
- people overestimate the proportion of offenders who re-offend, and
- people underestimate the proportion of offenders sentenced to prison and the length of those prison sentences.[21]

The Australian Survey of Social Attitudes conducted in 2007 found that the source of information also influences how accurate people's perceptions of crime are. This survey found that 64 per cent of people surveyed incorrectly believed that crime had increased 'a lot or a little more' during the previous two years.[22] The results further suggest that the perceptions of people who rely on talkback radio, family and friends or commercial television as the source of their information are less accurate than those of people who rely on other sources.[23]

Key findings of international and interstate studies are that, when measured appropriately, community expectations are not dissimilar to sentencing patterns of the courts. Research also provides evidence that increasing sentence severity will not necessarily lead to greater community confidence in the criminal justice system.

What do we know about community expectations of sentencing for serious violent and sexual offences?

A small number of Australian studies include measures that provide insight into community expectations regarding the sentencing of serious violent offences and sexual offences.[24]

Two recent Australian studies have developed our understanding of general community expectations regarding sentencing and use methods that aim to measure public judgment, rather than public opinion.

One Victorian study measured differences in sentences imposed by the judiciary relating to real cases, compared with sentences imposed on the same cases by informed participants.[25] Research participants (n=471) were provided with information on sentencing principles, available sanctions and case information before proposing a sentencing decision. Four cases were considered and each case involved a different type of offence. These cases related to the offences of armed robbery, rape, intentionally causing serious injury and theft offences.

The results showed that the average sentence length imposed by research participants was less than the court's sentence for the cases of armed robbery, rape and theft. However, the average sentence proposed by research participants for the case involving the offence of intentionally causing serious injury was slightly more than that provided by the judiciary. Research participants also suggested that offenders in the cases involving intentionally causing serious injury, armed robbery and rape should participate in a treatment program as part of their sentence. The judges imposed a prison sentence only in all cases.

The research design of this study means that it is difficult to establish whether or not the sentencing views measured by the study adequately represent the views of the general community. Furthermore, the study only measures differences between various offence types rather than differences within the same offence type. That is, the study does not explore case variability within broad offence categories. Sentencing decisions relating to sexual offences committed against children were not explored by the study. Having said this, the results do give an indication that in Victoria there may be some disparity between community expectation and judicial sentencing practices in relation to serious violent offences in Victoria.

A more recent study accessed Tasmanian jurors in order to collect informed views on sentencing matters.[26] This research involved surveying jurors involved in case trials (1) before a sentencing decision was made, and (2) after the sentencing decision was made and researchers had provided information on crime and the purposes of sentencing to participants. Some jurors participating in the survey component of the study also participated in in-depth interviews. Six offence categories were developed for analysis: 'sex'; 'violent'; 'drugs'; 'property'; 'culpable driving' and 'other'.

The study found that informed community members are generally satisfied with the sentences given by judges. Before the sentencing outcome was known, participants tended to propose more severe penalties than judges across most offences categories, but informed of the actual sentencing outcome they were highly likely to endorse the judge's decision. On being informed of the sentence, almost 90 per cent of jurors involved in the study reported that they believed that the judge's decision was either very or fairly appropriate.

Within high levels of satisfaction, sentencing decisions relating to 'sex' and 'drug' offences were least likely to be viewed as 'very appropriate'. Eighty-nine per cent of participants involved in 'sex' offence trials believed that the sentence was appropriate, and 36 per cent believed that it was very appropriate. Similarly, 83 per cent of participants involved in 'drug' offence trials indicated that the sentence was appropriate, and 35 per cent believed that the sentence was very appropriate. This is in contrast to cases relating to 'violent' or 'property' offences. Just over 92 per cent of participants involved in 'violent' or 'property' offence trials agreed that an appropriate sentencing decision was provided by judges. However, 50 per cent of jurors involved in 'violent' offence trials and 57 per cent of jurors involved in 'property' offence trials believed that the sentence was 'very appropriate'. Although the majority of respondents felt that the sentences imposed were 'appropriate', almost half of them reported that they

would have preferred a more severe sentence for 'sex' and 'drug' offences, compared with 35 per cent for 'violent' offences and 28 per cent for 'property' offences.[27]

These findings suggest that there may be a slight disparity between community expectation and the sentencing outcomes for 'sex' and 'drug' offenders. However, it is worth noting that the study did not measure participants' views on different types of offenders and information provided to participating jurors about specific offence typologies was limited.

Understanding people's views about particular types of offenders is important as these views will contribute to sentencing expectations, yet may be contrary to empirical evidence. Research undertaken in the United States, for example, found that community members understand sex offenders to have very high re-offending rates, view sex offenders as a homogenous group in terms of their risk of re-offending and are sceptical about the benefits of sex offender rehabilitation programs.[28] Although sex offending is considered to be undercounted by official statistics, research demonstrates that convicted sex offenders have low re-offending rates (in terms of subsequent contact with the criminal justice system) when compared with other types of offenders and there are different re-offending rates across the various types of sex offenders.[29] Research on the treatment effect of sex offender rehabilitation is not definitive and very few empirically sound evaluations of sex offender treatment programs exist in Australia.[30]

Summary

While Australian research measuring informed public opinion does not demonstrate high inconsistency between general community expectation and judicial practices, there is evidence to suggest that sentences relating to serious violent offences, sexual offences and drug offences are least likely to meet community expectation.[31]

2. Consistency and transparency

Two related objectives in introducing a Queensland SNPP scheme are to promote consistency and transparency in sentencing.

Consistency

In a sentencing context, the principle of consistency generally relates to a consistency in the *approach* of the courts to the sentencing process, rather than sentencing *outcomes* for individual cases - that is, a uniformity of approach rather than outcome.[32]

Consistency of approach in the sentencing of offenders is one of the stated purposes of the *Penalties and Sentences Act*.[33]

An examination of sentencing consistency in an empirical sense as it relates to variability in the distribution or spread of prison sentences has been undertaken by the Judicial Commission of NSW as part of its evaluation of the impact of the NSW SNPP scheme. The findings of this evaluation are discussed in Chapter 3.

The Council explores sentencing and parole practices in Queensland, include the issue of sentencing consistency, in its companion research paper *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).

Transparency

Transparency is paramount in promoting the principle of consistency as '[t]he law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public'.[34]

Transparency and accessibility of sentencing 'provides a basis for confidence in the working of the justice system and also ensures individual's rights of appeal are secured'.[35] The need to promote public confidence in the criminal justice system is specifically referred to in the Terms of Reference as a relevant consideration in referring the issue of SNPPs to the Council.

By making the reasons for a particular sentence transparent and accessible, the likelihood of other people being deterred from committing the offence is increased, and the system as a whole becomes accountable when held up to public scrutiny.

The value of transparency is reflected in one of the purposes of the *Penalties and Sentences Act* which is to promote public understanding of sentencing practices and procedures.[36]

In the context of devising a SNPP scheme, transparency is relevant in determining how the scheme should be structured and the levels at which SNPPs are set. The extent to which the scheme is able to achieve this objective is also relevant in assessing other approaches that might support this objective (discussed in Chapter 8).

3. Guidance to courts in sentencing

Another of the objectives of the Queensland Government in introducing a Queensland SNPP scheme is to provide additional guidance to courts in sentencing to ensure that appropriate consideration is given to the actual minimum time an offender must spend in prison.[37]

Judges and magistrates must act in accordance with legislation (including maximum penalties and relevant sentencing factors), common law principles and appellate court guidance, as well as the outcomes of similar cases. The discretion of judges in sentencing is not, therefore, wholly unfettered, but rather it is guided by existing law and practice.[38]

In this section we briefly review some of the main sources of guidance available to sentencing courts in Queensland.

Legislation

There are key pieces of Queensland legislation that affect the discretion of the courts when passing sentence.

The *Penalties and Sentences Act 1992* (Qld) is the legislation that sets out the courts' power to sentence adult offenders, and also outlines those factors the court must take into consideration when deciding what sentence should be imposed for a specific offence, including any mitigating or aggravating factors that may increase or decrease a sentence respectively.

Section 9 of the Act gives the basic guidelines relating to sentencing offenders in Queensland. These guidelines include a non-exhaustive list of the subjective and objective principles and factors that the court must consider when sentencing an offender.

Leading the principles in section 9(2) are that a sentence of imprisonment should only be imposed as a last resort[39] and that a sentence that allows the offender to stay in the community is preferable.[40] However, these two principles are excluded from application to offences:

- that involve 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[41]
- an offence of a sexual nature committed in relation to a child under 16 years[42] - an offender must serve an actual term of imprisonment unless there are exceptional circumstances;[43] in determining whether there are exceptional circumstances, the court may have regard to closeness in age between the offender and the child[44], and
- an offence under the *Classification of Computer Games and Images Act 1995* (Qld) or the *Classification of Films Act 1991* (Qld) or the *Classification of Publications Act 1991* (Qld).[45]

The *Criminal Code 1899* (Qld) and other legislation, such as the *Drugs Misuse Act 1986* (Qld), set out the maximum penalties for criminal offences committed in Queensland.

The maximum penalty is an important reference point for courts in determining an appropriate sentence in an individual case. As the High Court affirmed in the decision of *Veen v The Queen (No 2),* the maximum penalty is reserved 'for cases falling within the worst category of cases for which that penalty is prescribed'.[46] The maximum penalty is therefore set by Parliament with the worst offences in mind.

Most offences in Queensland do not carry a minimum sentence, and this means that the courts have discretion (within the boundaries of the maximum penalty) to decide the appropriate sentence.[47] The sentencing process provides the court with discretion, within the boundaries of the maximum penalty, to decide on the appropriate sentence. However, the courts must have regard to a range of factors in doing so, including current sentencing practices and existing legislation.

The *Corrective Services Act 2006* (Qld) provides for the containment, supervision and rehabilitation of offenders. This Act also has provisions relating to prisoner management and eligibility for parole.

Comparative sentences

Courts have discretion to impose a sentence below the legislated maximum penalty, except in the case of offences carrying a mandatory sentence (such as murder).

Typically courts approach the task of sentencing by reference to cases of a similar nature that have been decided previously. This is referred to as using 'comparative sentences', or 'case comparators'. This ensures a level of consistency in sentencing.

Although comparing a particular matter with others that have been before the courts to arrive at an appropriate sentence is a longstanding approach to sentencing, it relies on both the prosecutor and the defence identifying the appropriate cases and accurately arguing for their application. In Queensland, the Queensland Sentencing Information Service (QSIS) provides useful information to sentencers in this regard.[48] QSIS was launched in 2007.

Statistics

Courts are increasingly making use of statistics to assist them in sentencing. In Queensland, QSIS is the principal source of sentencing statistical information.[49]

It is generally accepted by the courts that statistics should not be relied upon in isolation to guide sentencing.[50] Statistics on sentencing outcomes are still seen as important guides to 'assist in assuring

consistency and be useful in determining whether a sentence is manifestly excessive or manifestly inadequate'[51] but they are not sufficient on their own.

The proper use of statistics in sentencing was considered in *R v Bloomfield* by Chief Justice Spigelman, in what has become one of the leading cases in NSW on this issue. His Honour reviewed a number of decisions from NSW, South Australia and Victoria and set out eight points on the proper use of sentencing statistics.[52]

Appeals

Most serious violent offences and sexual offences are dealt with in the higher courts.[53] Unless the sentence imposed on an offender is fixed by law (that is, it is mandatory), the offender sentenced or the Attorney-General can appeal a sentence handed down by the Supreme or District Court.[54]

The Attorney-General may appeal against any sentence pronounced by the court of trial or a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court. Although the Criminal Code does not list any specific grounds on which the Attorney-General can appeal, it is often the case that an appeal will be in relation to a sentence that is seen as too lenient and therefore not meeting community expectations.

An offender can appeal where he or she has grounds to believe that the sentence imposed was too severe or was wrong in law, and wants it reduced or replaced with another sentence or that the judge erred in the sentencing process by acting on a wrong principle of law or on a mistake of the fact or failed to take into account some relevant consideration.

The court will review the grounds of appeal and if the court decides that a different sentence is warranted in law, it will allow the appeal.

In determining if an appeal should be allowed, the court may compare the sentence being appealed with sentences imposed in other similar cases. If the court allows the appeal it must vary or set aside the original sentence and pass another sentence that the court believes is appropriate.[55]

There is also a power to appeal Magistrates Court decisions to the District Court, subject to some exceptions.[56]

On hearing such an appeal, the District Court judge:

- may confirm, set aside or vary the appealed order[57]
- may make any other order in the matter that the judge considers is just[58]
- if the judge sets aside an order, may send the matter back to the Magistrates Court with directions[59]
- may make an order for costs to be paid by either party as the judge thinks appropriate[60] and
- may refer the matter to the Court of Appeal in the form of a special case seeking the Court of Appeal's opinion on any question of law arising from the facts of the case.[61]

Appeal decisions provide sentencers with a crucial guide in sentencing for future cases, and are another method by which consistency of approach can be achieved.

The role of appellate courts also allows for a level of monitoring of the lower courts, with the appeal process giving the opportunity to set and maintain appropriate sentencing levels and practices.

Guideline judgments

The appellate courts can have a legislated role of providing formal 'guidelines judgments', as a way of guiding the discretion exercised by the lower courts when pronouncing a sentence.

Guideline judgments were first developed in England in the mid-1970s by Lord Justice Lawton.[62] By the late 1990s, a number of guidelines had been issued covering a limited number of offences. Guideline judgments were intended, and accepted, as binding the lower courts.[63]

Guidelines judgments have been described as:

> a judgment of an appeal court which goes beyond the facts of the particular case before the court and suggests a starting point or range for dealing with variations of certain types of offences.[64]

It has also been said of guidelines judgments that they:

> [a]re not prescriptive in character but they do establish a system in which sentencing judges have to take the guideline into account as a check or indicator or guide, with a requirement to address the guideline and to articulate reasons for its applicability or inapplicability to the case in hand. The principal objective of a guideline judgment is to promote consistency.[65]

NSW has made the most use of guideline judgments in Australia, although the issuing of guidelines has been in decline since the introduction of SNPPs. The last formal guideline judgment was issued by the Court of Appeal in September 2004.[66]

The power of the Queensland Court of Appeal to issue formal guideline judgments was introduced by the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).[67]

The reason for introducing this power was identified in the Explanatory Memorandum to the Bill as being to:

> enhance public confidence in the integrity of the sentencing process and further support consistency of approach in sentencing criminal offenders. It will provide a means by which the court 'can give guidance to the primary judges charged with the exercise of judicial discretion' (*Wong v The Queen* [2001] HCA 64, per Chief Justice Gleeson).[68]

Guideline judgments are not aimed at directing sentencers in the lower courts to make certain decisions, but aim to promote consistency in decision-making by providing guidelines to assist decision-makers in the future. It has been suggested that guideline judgments, in their proper form, should be 'a considered response to allegations of inconsistency, and serve to *structure* rather than *restrict* judicial discretion'.[69]

Because the power to issue formal guideline judgments has only recently been conferred on the Queensland Court of Appeal, it is as yet unclear how (if at all) guideline judgments will be used in Queensland.

Commenting on the Victorian experience, the Chief Justice of Queensland, the Honourable Paul de Jersey AC, has expressed some openness to the possible value of this form of guidance:

> As to guideline judgments, it is interesting that none has been given in Victoria over some years. Again, that more structured mechanism in the Court of Appeal could be potentially useful, notwithstanding the appeal court in Queensland has over the years given a number of judgments of comparable status.[70]

Sentencing bench books and manuals

Bench books are a series of guidelines made available to the courts on relevant topics, to assist the courts in a number of areas.

A bench book exists in Queensland for the Supreme and District Courts; however it does not include information on sentencing.[71]

Some jurisdictions, such as NSW, have quite detailed sentencing bench books.[72] In Victoria, the Judicial College has developed a comprehensive sentencing manual- the *Victorian Sentencing Manual* – which is accessible to judges, legal practitioners and the broader community online.[73] A similar subscription service exists in Queensland – the *Queensland Sentencing Manual*.[74]

Parole requirements

In passing a sentence of imprisonment, the courts may be required to consider the question of parole. The options available to the courts in relation to making orders concerning an offender's release on parole are set out in the *Penalties and Sentences Act 1992* (Qld) and the *Corrective Services Act 2006* (Qld). Although parole is in some cases a discretionary part of the sentencing process and in other cases the time frames are mandatory, the courts are guided by the provisions of the *Penalties and Sentences Act* and the *Corrective Services Act* in relation to making orders for parole.

For example, in Queensland offenders declared by the court as convicted of a 'serious violent offence' (SVO)[75] are required to serve, at a minimum, 80 per cent of the head sentence or 15 years imprisonment (whichever is the lesser),[76] or for a life sentence for murder, 15 years,[77] or 20 years where the conviction is for more than one murder or the offender has been previously convicted of murder.[78] Courts have discretion to set a longer non-parole period.

In less serious matters, the courts have discretion to set the non-parole period or, in the case of offenders sentenced to imprisonment for 3 years or less who are not SVO offenders[79] or convicted of a sexual offence,[80] the parole release date (referred to as 'court-ordered parole').[81] The court in these circumstances can look to the facts of an individual case to influence longer or shorter periods of actual imprisonment. There are, however, certain mitigating factors that the courts must take into account when sentencing generally, and that can extend to the setting of non-parole periods. The most important of these is where an offender submits a plea of guilty or, more particularly, a timely or early plea of guilty. For example, it has been recognised that the fixing of a shorter non-parole period in relation to a substantial head sentence 'may be an important way of properly recognising the significance of pleas of guilty and other mitigating circumstances'.[82]

The discount that applies for a guilty plea was discussed in the case of *R v Blanch*, where it was noted that the common practice of Queensland sentencing courts 'is to recognise the value of an early plea of guilty and other circumstances in mitigation by ordering that the offender be eligible for parole after serving one-third of the term of imprisonment imposed as the head sentence'.[83]

2.3 Conclusion

In this chapter we considered the purposes of introducing a Queensland SNPP scheme and how these purposes are currently being met. We also explored some of the issues associated with meeting these objectives, including the challenges of determining what 'community expectations' are about sentencing.

Properly defining the purposes of introducing a SNPP scheme in Queensland is important to ensure the scheme is structured to meet these objectives.

The Council invites comments on what the primary purpose or purposes of a Queensland SNPP scheme should be.

QUESTION:

1. What should be the primary purpose or purposes of a Queensland SNPP scheme?

The need for, and potential benefits of a SNPP scheme, are explored further in Chapter 8.

CHAPTER 3
SNPP SCHEMES IN OTHER JURISDICTIONS

The three Australian jurisdictions with some form of SNPPs are NSW, the Northern Territory and South Australia.

NSW has the most extensive recent experience with SNPPs. The current Terms of Reference ask the Council to consider applying the approach to SNPPs in NSW. A NSW-style SNPP scheme is presented as Option 1 (in Chapter 4) in this Consultation Paper.

In this chapter we explore how SNPP schemes operate in other jurisdictions, including:

- how these schemes are structured
- what offences they apply to
- grounds for departure, and
- some of the challenges associated with these schemes, including evidence of their effectiveness and impacts.

Each scheme differs slightly in the way it is structured and how SNPPs are defined. Some schemes are quite prescriptive, while others retain quite broad discretion for judges to depart from the set period provided certain criteria are met.

In this chapter, we also review standard minimum sentencing schemes operating in New Zealand and Canada. These schemes share a number of common elements with SNPPs, including the objectives of ensuring that sentencing levels are commensurate with community expectations, and providing additional structure and guidance to courts in sentencing.

Although New Zealand and Canada are not alone in introducing these schemes, like Queensland, they are common law sentencing jurisdictions, and many of the same broad sentencing principles apply. For this reason, they are a useful point of comparison in considering how a Queensland SNPP scheme might be structured.

3.1 New South Wales

The NSW SNPP scheme came into operation on 1 February 2003[84] and, when introduced, applied to a broad range of offences.[85]

The then NSW Attorney-General, the Honourable Robert Debus, identified the primary aims of the new scheme as to promote 'consistency and transparency in sentencing', and 'public understanding of the sentencing process'.[86]

While noting that the scheme would provide 'further guidance and structure to judicial discretion', the Attorney-General was careful to distinguish the scheme from 'mandatory sentencing' and to affirm the NSW Government's commitment to preserving judicial discretion.[87]

How are SNPPs structured in NSW?

An overview

The NSW SNPP scheme applies to a broad range of serious violent offences (including drug offences) and sexual offences.

Unlike minimum non-parole period schemes that require an offender to serve a set proportion of their sentence before being eligible for parole (standard percentage schemes), the NSW SNPP scheme attaches specific non-parole periods (in years) to individual offences. These are set out in Table 1 (below).

Because the scheme identifies what standard minimum period of imprisonment in years should attach to a given offence, it gives rise to a need to define what this period represents. In the case of NSW, a SNPP has been defined as 'the non-parole period for an offence in the '*middle of the range of objective seriousness*' (emphasis added) for the relevant offence.[88] This definition and what it encompasses is discussed below.

The NSW SNPP scheme does not apply to:

- offences dealt with summarily[89]
- offenders sentenced to life imprisonment or for any other indeterminate period, or to detention under the *Mental Health (Forensic Provisions) Act 1990* (NSW) [90], and
- offenders less than 18 years of age at the time of the offence.[91]

How were the original SNPPs set?

Limited information is publicly available about the basis upon which the original SNPP levels were set in NSW. The Second Reading Speech for the NSW Bill introducing the SNPP scheme refers to the relevant considerations as being:

- the seriousness of the offence
- the statutory maximum penalties
- current sentencing trends for those offences as evidenced by sentencing statistics compiled by the Judicial Commission of NSW, and
- 'the community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence'.[92]

As recognised by the NSW Court of Criminal Appeal in the leading decision of *R v Way,* although there was no stated legislative intention to *increase* sentence lengths through introduction of the scheme, the levels at which SNPPs were set for particular offences made this a possible (if not likely) outcome.[93]

Many factors were considered in setting the SNPP levels, which is confirmed by the number of offences that carry the same maximum penalty but different SNPPs.

Although it is not clear how sentencing statistics were used in the setting of these levels, if the original levels were set in part by reference to median or average non-parole periods at the time of the scheme's introduction, such an approach could be viewed as problematic given that SNPPs 'may be taken to

express a legislative intention as to the minimum periods of actual imprisonment which are appropriate for the relevant offences',[94] and specifically those falling within the mid-range of objective seriousness.

The median non-parole period represents the midpoint of all non-parole periods for which a prison sentence has been imposed during the period in question and after aggravating and mitigating factors personal to the offender have been taken into account.[95]

Table 1: Standard non-parole periods in NSW

Item no	Offence	Standard non-parole period
1A	Murder - where the victim was a public official exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years
1B	Murder - where the victim was a child under 18 years	25 years
1	Murder - in other cases	20 years
2	Conspiracy to murder	10 years
3	Attempt to murder	10 years
4	Wounding etc with intent to do bodily harm or resist arrest	7 years
4A	Reckless causing of grievous bodily harm in company	5 years
4B	Reckless causing of grievous bodily harm	4 years
4C	Reckless wounding in company	4 years
4D	Reckless wounding	3 years
5	Assault of police officer occasioning bodily harm	3 years
6	Wounding or inflicting grievous bodily harm on police officer	5 years
7	Sexual assault	7 years
8	Aggravated sexual assault	10 years
9	Aggravated sexual assault in company	15 years
9A	Aggravated indecent assault (s 61M(1) of *Crimes Act 1900*)	5 years
9B	Aggravated indecent assault (s 61M(2) of *Crimes Act 1900*)	8 years
10	Sexual intercourse - child under 10	15 years
11	Robbery with arms etc and wounding	7 years
12	Breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation	5 years
13	Breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation	7 years
14	Taking motor vehicle or vessel with assault or with occupant on board	3 years
15	Taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation	5 years
15A	Organised car or boat rebirthing activities	4 years
15B	Bushfires	5 years
15C	Cultivation, supply or possession of prohibited plants), not less than a large commercial quantity	10 years
16	Manufacture or production of commercial quantity of prohibited drug, excluding cannabis, and (if relevant) involves less than the large commercial quantity of that prohibited drug	10 years
17	Manufacture or production of commercial quantity of prohibited drug, excluding cannabis, and (if relevant) involves not less than the large commercial quantity of that prohibited drug	15 years
18	Supplying commercial quantity of prohibited drug, excluding cannabis and (if relevant), involves less than the large commercial quantity of that prohibited drug	10 years
19	Supplying commercial quantity of prohibited drug, excluding cannabis and (if relevant) involves not less than the large commercial quantity of that prohibited drug	15 years
20	Unauthorised possession or use of firearms	3 years
21	Unauthorised sale of prohibited firearm or pistol	10 years
22	Unauthorised sale of firearms on an ongoing basis)	10 years
23	Unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol	10 years
24	Unauthorised possession or use of prohibited weapon	3 years

The database relied on to set SNPPs – the Judicial Information Research System (JIRS) – also has limitations. JIRS statistics are presented by reference to the principal offence (the offence attracting the highest penalty) only, and the sentence may have been imposed for multiple offences.[96] At the time SNPPs were introduced, sentences for offences where there had been partial or total accumulation of different sentences were also excluded in most cases.[97]

Delays in correcting the JIRS statistics are also experienced when a sentence is altered after an appeal.[98]

Criticisms of SNPP levels

The lack of a transparent rationale and principles for setting the SNPP levels, as well as the significant disparities in SNPPs for offences by reference to their maximum penalties has been the subject of judicial comment.[99] The high SNPP levels for some offences have also been criticised.[100]

The variation in SNPP levels is one of the anomalous aspects of the current scheme. For example, the offence of aggravated indecent assault has a maximum penalty of 10 years imprisonment, yet carries a SNPP of 8 years. Even though the maximum penalty is intended to be reserved for the worst case examples of an offence, because of the combined operation of the Part 4, Division 1A of the NSW legislation (the SNPP provisions) and the presumption in NSW that the non-parole period should represent a minimum of 75 per cent of the head sentence,[101] this theoretically could result in offenders convicted of mid-range examples of the offence, where there are no other factors operating to reduce the SNPP, being sentenced to the maximum penalty for the offence.

Taking these issues into account, in its submission on the NSW Sentencing Council's review of SNPPs, the NSW Bar Association has recommended that 'consideration be given to standardising the SNPPs for sexual and other offences within a band of 25–40 % of the available maximum penalty'.[102] The basis for their argument is that the maximum penalty is usually reserved for the worst case and, even where imposed, it would be usual sentencing practice to impose a non-parole period that is 75 per cent of the maximum penalty. Given that the SNPP represents the non-parole period for an offence in the middle of the range of objective seriousness, the Association argues that it is very difficult to see any reason for adopting a standard non-parole period (for a middle-range objective seriousness offence) that is greater than 40 per cent of the available maximum penalty.

This position reflects the reasoning of Justice Howie in the NSW case of *Marshall v The Queen*.[103] In this case, Justice Howie questioned the appropriateness of an offence carrying a maximum penalty of 20 years having a SNPP of 5 years and suggested, 'as a matter of logic and the application of ordinary sentencing principles', that it could be expected that offences in the mid-range of seriousness 'would carry a sentence of half the maximum penalty' and, by virtue of the application of the NSW non-parole provisions,[104] a non-parole period of 7.5 years.[105] Applying that rationale, a non-parole period in the mid-range in NSW might be set at half of the maximum non-parole period (75% of the maximum penalty), or 37.5 per cent of the maximum penalty.

This approach is discussed further in Chapter 4, along with other possible means of setting SNPP levels.

What is the 'middle of the range of objective seriousness'?

The NSW legislation does not define what is meant by the 'middle of the range of objective seriousness', but its meaning has been considered at length by the NSW Court of Criminal Appeal.

In the leading decision of *R v Way*[106] the Court of Criminal Appeal noted that as a consequence of the new scheme there were now two reference points available when passing a sentence, being the maximum penalty available and the SNPP, both of which were prescribed by legislation.

After considering the NSW provisions, the Court made a number of relevant conclusions, including:

- a reason for departing from the SNPP includes that the individual offence falls outside the mid-range of objective seriousness, and
- the SNPPs in the table must be taken as having been intended for a middle-range case where the offender was convicted *after trial* (on the basis that a plea of guilty is a mitigating factor that might justify a departure from the SNPP).

The court rejected an approach involving identification of an offence with the aggravating and mitigating factors 'in perfect balance', or attempting to attribute numerical values to specific factors.[107] Instead, the court preferred an approach that would reflect the long standing practice whereby judges have been required to make an intuitive assessment of where the offence before the court sits in terms of objective seriousness.[108]

Although the court endorsed the assessment of where an individual offence lay in terms of objective seriousness being approached intuitively, it recognised that this would introduce a somewhat novel approach to sentencing. Where previously the court had looked at the objective features of the offence in conjunction with the subjective features of the offender, with the introduction of the SNPP provisions, this had now changed to an examination of the objective features of the offence only, without consideration of factors not connected with its commission.[109]

In deciding what factors should be considered in assessing objective seriousness of a given offence, the court focused on factors that have a connection with the carrying out of the offence. This is distinct from factors relevant to punishment of offenders. The court identified the following as part of the objective circumstances:

- physical acts
- the harm caused
- why the offender committed the offence
- the offender's mental state, and
- mental illness or intellectual disability.[110]

In determining what constitutes a mid-range offence, the court found that the offence 'should not be regarded as one that is necessarily "typical" of those charged', and nor should the mid-range 'be assumed to occupy a relatively narrow band'. In making this finding, the court acknowledged:

> An offence will acquire the characteristic of being "typical" or "common" by reference only to the numerical frequency of its occurrence, and not by reference to any assessment of the objective seriousness of the offending, or its consequences.[111]

This question takes on additional significance when considering at what levels (expressed in years) SNPPs for specific offences should be set. This is because an assessment has to be made regarding the minimum sentence of imprisonment that is appropriate for cases falling within the mid-range.

Taking into account the fact that the SNPP is expressed in terms of the objective seriousness only, the task cannot be approached simply by considering sentencing statistics that represent the final sentence after all the aggravating and mitigating factors (what is referred to by NSW courts as 'the subjective case') have been taken into account. Neither can the mid-range be set by focusing on the median sentence for a given offence, which may be skewed up or down depending on the frequency of different 'common' types of offending that may be either more or less serious than the abstract mid-range offence.

What problems have there been with applying the NSW definition?

The approach to sentencing in NSW has led to some confusion in the identification of what should be considered as part of the 'objective circumstances' of the offence and as relevant to assessing where an offence falls in terms of objective seriousness. Examples are:

- sentencing judges inappropriately considering the fact that an offender was on conditional liberty at the time of the committing the offence,[112] and
- a lack of clarity concerning where a subjective circumstance (such as mental illness or a drug addiction) is relevant to objective seriousness because of it being *causative* of the offence.[113]

Other issues have arisen in terms of sentencing courts failing to adequately specify where, in terms of the range of objective seriousness, the specific example of the SNPP offence lies.[114] The NSW Court of Criminal Appeal has consistently said that, when sentencing for SNPP offences, it is necessary for judges at first instance to specify the extent or degree to which an offence departs from a notional offence in the mid-range of objective seriousness.[115] Although there have been some slight differences of interpretation concerning the degree of precision required,[116] it does seem that some degree of specificity is required.

Even where there is a plea of guilty, bringing the offender outside the strict application of the SNPP, the Court of Criminal Appeal has said that simply because an offender has pleaded guilty this does not relieve the sentencing judge from indicating where in the range of offending the particular offence falls and the reasons for coming to that conclusion.[117]

Two appeals to the High Court were recently initiated, and special leave granted in one case, on issues relating to the operation of the NSW scheme.[118] These appeals include the question of whether the Court of Criminal Appeal's position that, even for matters that fall below the mid-range of seriousness, the SNPP ought still be regarded as a benchmark or a guidepost is inconsistent with the wording of the NSW legislation.

There are also practical problems in determining where a particular offence lies by reference to the mid-range, despite claims when the scheme was first introduced that '[t]he concept of a sentencing spectrum is well known to sentencing judges and criminal law practitioners'.[119] Some NSW practitioners with whom the Council Secretariat met commented that, although it is easy to consider a case representing the worst example, or one that is at the lower end, it is conceptually quite challenging to imagine an offence that falls within the mid-range.[120]

Another issue that has arisen in the context of sentencing for non-SNPP offences, is that of sentencing courts unnecessarily adopting a 'two-step' approach in first considering where an offence falls in terms of objective seriousness (required only for SNPP offences), in contrast to the accepted approach of determining the appropriate sentence based on the seriousness of the offence taking into account both subjective and objective factors.[121] The NSW Court of Criminal Appeal has cautioned against this approach as likely to give rise to 'confusion and misinterpretation'.[122]

When can a court depart from the SNPP?

Under section 54B(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), when imposing a sentence of imprisonment for an offence that is subject to a SNPP, the court *must* set the non-parole period specified unless the court determines that there are reasons for setting a non-parole period that is longer or shorter.

According to section 54B(3) of this Act, the reasons for which the court may set a non-parole period that is longer or shorter than the SNPP are only those referred to in section 21A of the Act. Section 21A includes a broad range of aggravating and mitigating factors, and 'any other matters that are required or permitted to be taken into account by the court under any Act or rule of law'.[123]

If a court decides it appropriate to either increase or reduce the SNPP, under section 54B(4) it must record its reasons for doing so and identify *each factor* that it took into account, although under section 54B(5), the failure of a court to comply with this requirement does not invalidate the sentence.

By virtue of section 54C of the Act, NSW courts retain discretion to impose a non-custodial sentence for a SNPP scheme offence, but must record their reasons for doing so and each mitigating factor that they took into account. However, as for the specific grounds for departure, the failure of a court to comply with this requirement does not invalidate the sentence.

Providing broad grounds for departure support the retention of judicial discretion; arguably, this may reduce the scheme's capacity to deliver transparency as there is less certainty about the sentence an offender will receive. This criticism is consistent with comments made by NSW victim support service providers discussed below.

What process does a court follow in sentencing for a SNPP offence?

Under section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court is required to first determine the non-parole period (NPP) and then set the head sentence. The section requires that the balance of the sentence must not exceed one-third of the non-parole period unless there are 'special circumstances'. Effectively this means that a NPP must constitute at least 75 per cent of the head sentence.

Section 44(2) was introduced with the intention 'to ensure that only a limited portion of a sentence may be served on parole'.[124] This section must be read in combination with the SNPP provisions to inform the setting of an appropriate non-parole period.

In *MLP v The Queen*,[125] Justice Kirby (as he then was) usefully outlined the key questions a sentencer must answer when imposing a custodial sentence for a SNPP offence, which in summary are:

- What term of imprisonment is appropriate having regard to the offence and the circumstances of the offender?
- Should the offence be characterised as being in the mid-range of objective seriousness?
- Are there other reasons in the matters identified in section 21A (relating to the offender) for departing from the standard non-parole period?
- Are there any special circumstances? Ordinarily, the non-parole period bears a relationship to the term of the sentence defined by section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) - that is, the non-parole period must not be less than three-quarters of the term, unless there are special circumstances. The sentencing judge is therefore required to address that issue.

Interestingly, the Judicial Commission of NSW in its study of the impact of SNPPs on sentencing patterns has found that in the cases examined 'special circumstances' were found in 84.4 per cent of

cases where full-time imprisonment was imposed.[126] The most common ratio between the non-parole period and the full term of sentence was 50 per cent, which occurred in 19.8 per cent of cases.[127]

The process of sentencing under the NSW scheme is further complicated in the case of multiple offences, as a court must make a determination concerning where individual offences lie in relation to the middle of the range of seriousness, rather than making a global assessment of the seriousness of the total offences.[128]

When sentencing an offender convicted of some SNPP offences and some non-SNPP scheme offences, courts also need to approach the task differently in sentencing for each offence. For example, while courts identify where the SNPP offences falls in terms of the mid-range of objective seriousness, this process is unnecessary (and in fact discouraged) in the case of non-SNPP offences.

Recent changes in NSW allow courts to impose an aggregate sentence of imprisonment for multiple offences, rather than individual sentences for each offence.[129] However, in the case of offences carrying a SNPP, the court must still indicate the SNPP that it would have set for each SNPP offence included in the aggregate sentence.[130] If the court indicates that it would have set a longer or shorter non-parole period in relation to the SNPP offences, it must also identify in its sentencing reasons each factor that it would have taken into account in making that decision.[131] In effect, this means the court still has to go through the process of considering what the appropriate non-parole period should be for a SNPP offence forming part of an aggregate sentence, rather than simply identifying the non-parole period for the sentence as a whole.

The complexity of the NSW scheme has been criticised both during initial consultations with Queensland stakeholders and in recent discussions with NSW legal practitioners. NSW practitioners noted that the scheme had a number of unintended consequences, including contributing to preparation and court time, and to court delays, which could not be justified by its apparent benefits in terms of improving transparency. These problems are discussed further below and in Chapter 8 of this paper.

Impact of SNPPs in NSW

To the Council's knowledge, there is no research that has specifically examined whether the NSW SNPP scheme has improved community satisfaction with sentencing levels for SNPP offences in NSW.

However, in May 2010 the Judicial Commission of NSW published an evaluation report analysing the impact of the NSW scheme on sentencing patterns. The evaluation findings are summarised below.

Sentence severity

- There was no real change in the overall incarceration rate for offenders subject to the scheme, with the majority of offenders imprisoned in both the pre- (83.9%) and the post- (82.1%) scheme implementation period. However, the imprisonment rate grew significantly for some offences including aggravated indecent assault (37.3% in the pre-period compared with 59.3% in the post-period) and aggravated indecent assault – child under 10 (57.1% in the pre-period and 81.3% in the post-period).
- The evaluation found no real change in the incarceration rate for offences not included in the scheme which was 64.2 per cent in the pre-period compared with 65.8 per cent in the post-period.

- The evaluation found evidence to suggest that the new sentencing scheme increased the length of sentences and non-parole periods for offenders subject to the scheme. The impact of the sentencing scheme on sentence length and non-parole period varied in relation to type of offence and the plea status of the offender with significant increases recorded for offenders pleading not guilty.
- The median sentence for offenders pleading not guilty increased from 6 to 8 years between the pre- and post- periods. There was no change in the median sentence for offenders pleading guilty (remaining at around 4 years and 6 months).
- An increase in non-parole periods for some offences (especially those with increases in sentence length) was apparent. The greatest growth in non-parole periods for offenders pleading not guilty occurred for wounding etc with intent to do bodily harm or resist arrest (125%), sexual assault (60%) and sexual intercourse – child under 10 (41.7%).
- A relationship between increases in sentence lengths and non-parole periods is consistent with the way sentences are determined in NSW.

Sentence consistency

- The interquartile range (IQR) of sentence lengths and deviation from the median sentence length reduced for a number of offences after the implementation of the scheme suggesting an increase in sentencing consistency.
- For example, for offenders who pleaded not guilty to wounding with intent to do bodily harm there was a significant reduction in the IQR from 4 years and 10.5 months in the pre-period to 3 years and 1 month in the post-period. The median absolute deviation (MAD) also reduced from 24 to 16 months.
- It is important to note that reduced sentence ranges and deviations from median sentence lengths did not occur for all offences and the evaluation report did not include measures of consistency for offences not subject to the statutory scheme. The latter would have assisted in determining whether indicators of sentencing consistency reflected the implementation of the statutory scheme or whether they reflected general trends in the criminal justice system.

Sentence appeals

- The evaluation found that sentences were slightly less likely to be appealed by offenders and slightly more likely to be appealed by the state after the introduction of the scheme. The rate of severity appeals declined from 15.0 per cent in the pre-period to 12.6 per cent in the post-period, while the rate of Crown appeals rose from 2.8 per cent in the pre-period to 3.9 per cent in the post-period.[132]
- There was also an increase in the success rate of severity appeals. The rate of severity appeals allowed grew from 37.6 per cent in the pre-period to 47.4 per cent in the post-period. This finding suggests that the application of the scheme took time to establish without appellate guidance.
- The rate of Crown appeals allowed remained relatively stable – 67.9 per cent in the pre-period compared with 66.7 per cent in the post-period.

Other findings

- The evaluation found that the introduction of the sentencing scheme coincided with an increase in the proportion of offenders pleading guilty. The percentage of offenders pleading guilty grew from 78.2 per cent in the pre-period to 86.1 per cent in the post-period.
- The increase in guilty pleas is likely to reflect application of the scheme, where a plea of guilty in itself might be reason to depart from a SNPP.[133]

Limitations of the evaluation

The evaluation is subject to a range of research limitations.

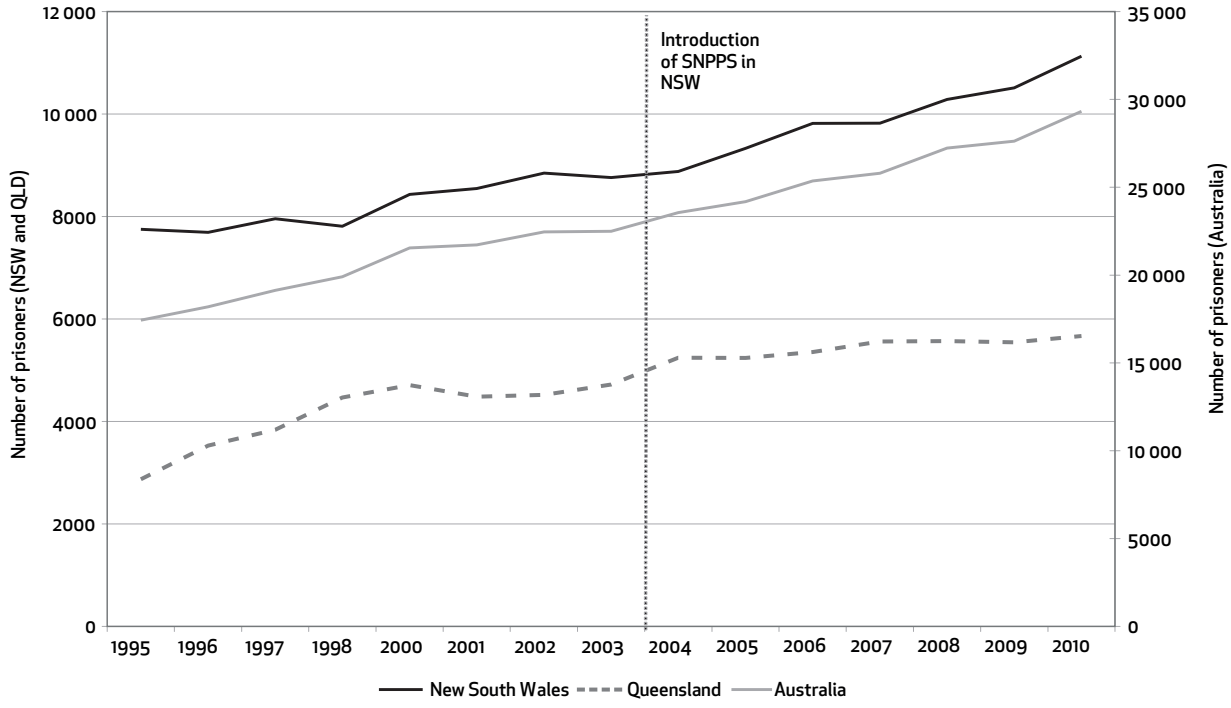
The evaluation report acknowledged that employed measures of consistency are not sensitive to case variability. The limitations of the IQR and MAD measures also mean that it is not possible to determine whether or not more consistent sentence lengths actually represent better sentencing outcomes.

Furthermore, the evaluation did not measure whether or not the scheme provided proper regard to community expectation or promoted greater public understanding of the sentencing process, which were raised as objectives of the scheme in the Second Reading Speech of the Amendment Bill introducing the scheme.[134]

Other data sources

The increase in average sentence length and non-parole periods for offences subject to the scheme found by the Judicial Commission of NSW evaluation for offences subject to the scheme is consistent with information reported by the Australian Bureau of Statistics and the Australian Productivity Commission. These data shows an increase in prisoner numbers and increases in associated prisoner management costs. Figure 1 shows the number of prisoners at 30 June between 1995 and 2009 for NSW, Queensland and Australia. The number of prisoners grew for each jurisdiction; however, the rate of prisoner growth varied between jurisdictions as well as between the periods before and after the introduction of the sentencing scheme in NSW within jurisdictions.

Figure 1: Number of prisoners at 30 June 1995–2009, NSW, Queensland and Australia

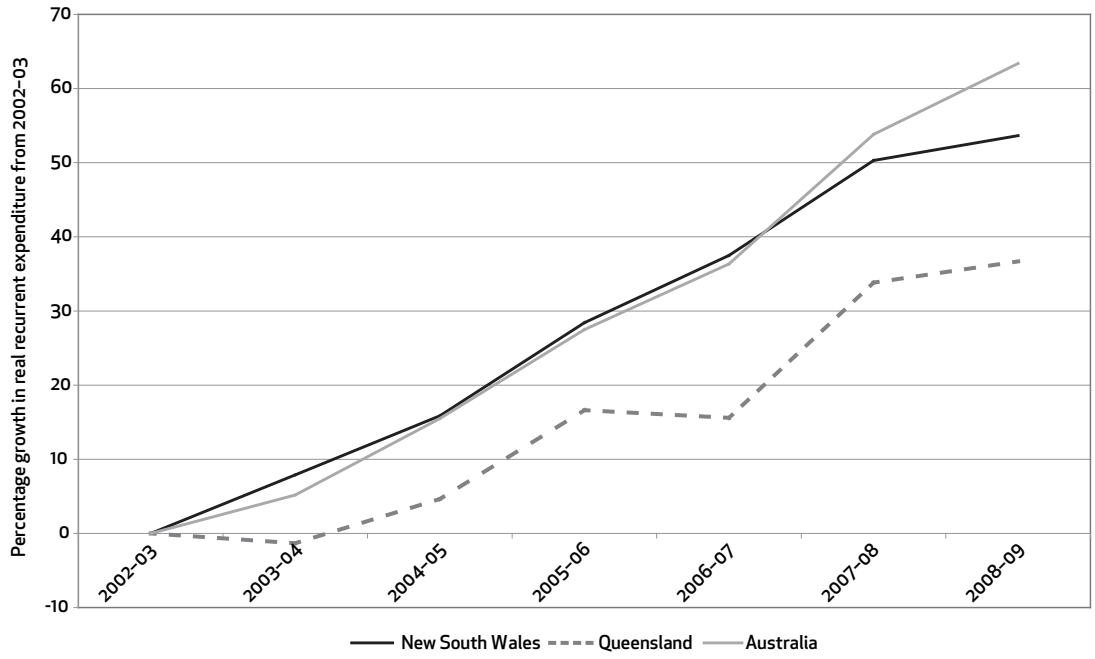


Source: ABS, 4517.0 Prisoners in Australia, 2000 and 2009

The growth in prisoner numbers across jurisdictions coincided with increases in the cost of managing offenders. The Australian Productivity Commission reports that NSW expenditure on prisons was approximately $503 million in 2002–03, increasing to more than $773 million in 2008–09. The comparative expenditure costs for Queensland were $270 million and $369 million.[135]

Figure 2 demonstrates that percentage increases in recurrent prison expenditure grew at a greater rate for NSW from 2002-03 than those occurring for Queensland. NSW prison costs rose by 7.9 per cent between 2002–03 and 2003–04 while declining by 1.3 per cent in Queensland. The percentage growth in prison costs for NSW between 2002–03 and 2008–09 was 53.6 per cent compared with 36.7 per cent for Queensland.

Figure 2: Percentage growth in real recurrent expenditure on prisoners from 2002–2003, NSW, Queensland and Australia



Source: Report on Government Services 2004 to 2010 (excludes capital expenditure)

Consultations with key stakeholders

As part of its initial information gathering for the Council's reference, representatives of the Council's Secretariat visited NSW in March 2011 to discuss the impact of SNPPs in that jurisdiction.

The main objectives of the visit were to seek to understand the outcomes of the SNPP scheme in NSW and explore some of the key challenges and any concerns of stakeholders with regard to the scheme. Stakeholder views were also sought about other approaches that might achieve the intended objectives of the scheme. Those consulted were primarily legal practitioners, although the Secretariat also met with Corrective Services NSW and victim support service providers.

Some of the comments made by stakeholders in relation to the NSW SNPP scheme were:

- SNPPs create an unfair inducement to plead guilty – that is, the 'carrots and sticks' in the system should not be so substantial or extreme as to impact on or override an offender's choices. For example, with murder carrying such a high SNPP in NSW, even with a good defence, where a defendant is offered manslaughter, it becomes too great a risk not to plead guilty.
- SNPPs increase the complexity of the sentencing task, leading to delays in sentencing. It was commented that many judges do not like the scheme, and do not apply SNPPs at all.

- The complexity of the SNPP scheme imposes an additional workload, and consequently additional financial burden, on a range of criminal justice agencies, including the courts, the Director of Public Prosecutions, the Public Defenders Office, Legal Aid and Corrective Services NSW.
- SNPPs have led to a continuing increase in appeals (with the decisions of the Court of Appeal creating further grounds of appeal, resulting in more appeals, rather than resolving the existing matters). This has also affected victims, in terms of their expectations that matters will finally be resolved so that they can get on with their lives.
- SNPPs raise the expectations of victims without delivering additional transparency. It was suggested by some that victims can find it even more difficult to understand sentencing as a result of the scheme.

The cost implications of SNPPs were also highlighted. This includes the additional expense of housing prisoners who might receive longer sentences, and of those prisoners spending longer periods in high security facilities, increasing the overall cost of the sentence.

It was reported that the difficulty in courts applying the SNPP scheme initially generated many appeals and that this continues as other offenders start looking at the various appeal decisions for possible new grounds of appeal. On the other hand, some pointed to the fact that an offender may receive a non-parole period or sentence below the SNPP for an offence as reducing the likelihood of severity appeals proceeding.

In terms of the scheme's objective of increasing transparency, SNPPs were believed by those consulted to have failed on a number of counts. The comment was made that SNPPs have aided transparency in sentencing only insofar as any individual can look up the table of offences and determine the SNPP for a particular offence. In many cases the SNPP is not applied.

Sentencing remarks made in relation to the use of the scheme were also reported as being 'obtuse' and 'full of legal concepts'. On the other hand, others consulted felt that the focus on the objective seriousness of the offence had encouraged greater transparency by encouraging judges to turn their mind to this before considering an offender's subjective case.

Stakeholders consulted could not say with any certainty what impacts the SNPP scheme had on Aboriginal and Torres Strait Islander people and other vulnerable offenders.

3.2 South Australia

SA introduced a minimum non-parole period scheme to be applied when sentencing adult offenders[136] for serious offences against the person[137] in November 2007.[138]

The SA Government's objectives in introducing this legislation were to provide a scheme aimed at:
- bringing victims to the forefront of criminal justice policy
- ensuring that sentencing courts give primary consideration to the need to protect the public from an offender's criminal act, and
- protecting the South Australian public, whether as individuals or as a whole from dangerous criminals.[139]

What offences does the scheme apply to and what levels apply?

The scheme imposes a duty on a sentencing judge to fix a non-parole period in relation to murder and serious offences against the person by reference to a prescribed mandatory minimum non-parole period. For murder, the mandatory minimum non-parole period is 20 years.[140] For a serious offence

against the person, in similar fashion to the NT scheme discussed below, the mandatory minimum non-parole period is expressed as a proportion of the head sentence (four-fifths, or 80%, of the head sentence).[141] The court determines the head sentence in the usual manner and it has been determined that the minimum non-parole period scheme should have no effect on fixing the head sentence.[142]

What does the mandatory minimum NPP represent?

The prescribed mandatory minimum non-parole period reflects the appropriate non-parole period for an offence at the '*lower end of the range of objective seriousness*'. When sentencing, the court should determine the head sentence and then compare the offence before the court with the non-parole prescribed period (of 80%) to determine whether a longer or shorter non-parole period should be imposed.[143] Doyle CJ in *R v Ironside* described the prescribed period in similar terms to the NSW Court of Criminal Appeal in the leading decision of *R v Way* as providing a 'yardstick or benchmark'.[144]

Grounds for departure

The legislation allows the court to increase or decrease the mandatory minimum non-parole period in certain circumstances.

The court may fix a longer non-parole period if it is satisfied that a longer non-parole period than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence.[145]

The court may also decline to fix a non-parole period if it is of the opinion that it would be inappropriate to fix such a period because of:

- the gravity of the offence or the circumstances surrounding the offence
- the criminal record of the person
- the behaviour of the person during any previous period of release on parole or conditional release or
- any other circumstances.[146]

A shorter non-parole period may be fixed if the court is satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period.[147] In deciding whether special reasons exist, the court is permitted to have regard only to the following matters:[148]

- the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct
- if the offender pleaded guilty to the offence – the fact and the circumstances surrounding the plea, and
- the degree to which the offender has cooperated with the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.

Concerns about the SA mandatory minimum NPP scheme

The introduction of mandatory minimum non-parole periods was opposed by the Supreme Court judges and the Law Society of SA, who disagreed with the SA Government's policy and raised concerns that the legislation may operate harshly on some offenders.[149]

Since its introduction, there has been continued concern and differing judicial views about many aspects of the scheme, particularly in relation to:

- what is meant by the 'lower end of the range of objective seriousness' and the assessment of how the question of placing an offence on the range of objective seriousness should be approached
- when handing down a sentence, whether the sentencing court is required to make a specific finding about whether the offence is at the lower range of objective seriousness
- how courts are to approach sentencing an offender for multiple offences that fall under the mandatory minimum non-parole period scheme, and
- the grounds on which the court can depart from the prescribed non-parole period.[150]

Assessing the 'lower end of the range of objective seriousness'

Similarly to the NSW scheme, the SA legislation does not provide a definition of what is meant by 'lower end of the range of objective seriousness'; nor does it specify what factors should be taken into account when determining where an offence may lie on the range of objective seriousness.

Multiple offences and pre-sentence custody

The SA legislation provides that, when sentencing an offender for multiple offences[151] that include an offence subject to a mandatory minimum non-parole period, the non-parole period fixed by the court must not be less than the mandatory period prescribed in respect of the relevant offence.[152] If there is more than one mandatory minimum non-parole period offence, the non-parole period fixed by the court must be the greater of any such mandatory period.[153]

The practical application of these provisions was considered in *R v Dundovic*.[154] In this case the court determined that to fix a mandatory minimum non-parole of four-fifths based on the total head sentence would cause hardship to the offender.[155] On this basis, the court took the position that the prescribed mandatory minimum non-parole period should apply to the sentence imposed for the mandatory minimum non-parole offence only.[156]

Although the legislation is silent on the matter, the court also credited the pre-sentence custody, the impact of which was to reduce the mandatory minimum non-parole period.[157]

The basis for departure

There is a lack of clarity in SA about the basis on which the sentencing court can depart from the mandatory minimum non-parole period.

The setting of a non-parole period that is shorter than the prescribed period has been the basis of many appeals. Issues raised have included:

- uncertainty about what process should be followed
- what the courts' power is to set a shorter non-parole period, and
- what impact a court's finding of special reasons has and, if the court makes a finding of special reasons, whether this allows the court to take other relevant factors into consideration (thereby creating an unfettered discretion).[158]

If the court seeks to impose a longer or shorter non-parole period in accordance with either section 32A(2)(a) or (b) of the *Criminal Law (Sentencing) Act 1988* (SA), the question has been raised as to whether this finding provides the court with an unfettered discretion in sentencing based on the words 'as it thinks fit'.[159]

If in the first instance the sentencing court has reduced a head sentence by taking into account any factors that could also be considered as special reasons, can these same factors again be raised and

applied as special reasons to shorten the non-parole period? In essence, this would allow an offender to receive a double discount in the sentence imposed based on the same reasons.

3.3 Northern Territory

The Northern Territory provides for SNPP schemes for murder, certain sexual offences and certain offences committed against persons under 16 years.

SNPP for murder

Structure of the scheme

The *Sentencing Act 1995* (NT) provides for a minimum non-parole period for the offence of murder.[160] The court must fix a SNPP of either 20 years or, in certain circumstances 25 years.[161] As with the NSW scheme, the NT SNPP of 20 years represents the non-parole period for an offence in the 'middle of the range of objective seriousness'.[162]

Grounds for departure from the SNPP for murder

As with the NSW and SA schemes, the court may reduce or increase the SNPP; different criteria apply when setting a longer, or shorter, non-parole period.

A court may set a longer non-parole period than the SNPP if satisfied that a longer non-parole period than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence.[163]

A shorter period may only be set where a court is satisfied that there are *exceptional circumstances* for fixing a shorter non-parole period than the prescribed period.[164] This only applies to the SNPP for murder without a circumstance of aggravation. In deciding whether exceptional circumstances exist, the legislation directs the court to have regard only to the following matters:[165]

- the offender is otherwise a person of good character and unlikely to re-offend (the court may consider whether the offender has a significant record of previous convictions or any remorse expressed), and
- whether the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

The court may also decline to fix a non-parole period if it is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if the offender is indefinitely imprisoned without the possibility of release on parole.[166]

The meaning of the 'factors affecting the relative seriousness of the offence' justifying the setting of a longer non-parole period was considered in *R v Crabbe*.[167] The court found that 'the starting point is the ordinary and natural meaning of the words of the provisions in the contexts in which they appear',[168] and 'ordinarily, only those circumstances which are causally connected or have a nexus with the commission of the offence would fit the description of factors which make a difference'.[169]

The court found, in deciding whether or not to refuse to fix a non-parole period, that it must consider:

- the level of responsibility of the offender for the crime, and
- whether the crime is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if the offender is indefinitely imprisoned.[170]

The community interest was seen as so important that it allowed the court to consider all of the factors that are normally relevant to the process of sentencing, such as the legislated sentencing principles and purposes, as well as the established principle of sentencing.[171]

However, when considering whether a longer non-parole period should apply, the court can only consider the 'objective or subjective factors affecting the relative seriousness of the offence'.[172]

Again in *R v Crabbe,* the court considered whether this meant that the sentencing court must not make reference to community interest matters. In contrast to the decision of the NSW Court of Criminal Appeal in *R v Way,* the court determined that the objective and subjective factors to which the court shall have regard are not limited to those that, literally speaking have a direct causal connection with the commission of the offence.

Factors such as immediate remorse, immediate cooperation with authorities and an early plea of guilty, while not directly linked in a causative way to the commission of the crime, were seen as so closely connected with the offender's culpability as to amount to factors affecting the relative seriousness of the offence for the purposes of section 53A of the *Sentencing Act* and section 19(4) of the Act.[173]

In considering what factors should not be taken into consideration when determining the relative seriousness of the offence, the court determined that prospects of rehabilitation or progress towards rehabilitation should be excluded.[174] The court also found that once the sentencing court determines that a longer non-parole period is warranted, the court has unfettered discretion.[175]

'Fixed non-parole periods' for certain sexual offences

Another form of SNPP in the *Sentencing Act* is fixed non-parole periods that apply to certain offences, if the court sentences the offender to a term of imprisonment and does not wholly or partially suspend the sentence.[176] A fixed non-parole period is expressed in terms of a set percentage of the head sentence, rather than as a minimum period of years. The court is required to set a non-parole period of not less than 70 per cent of the sentence unless it 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 non-parole period inappropriate.[177] The offences captured by this scheme are:

- sexual offences involving sexual intercourse without consent pursuant to section 192(3) of the Criminal Code (NT)[178] and
- certain offences committed by adult offenders against persons under the age of 16 years, including sexual offences and offences involving physical harm.[179]

'Minimum non-parole periods' for other offences

In other cases, where a court sentences an offender to a term of imprisonment of 12 months or longer that is not suspended, it is required to fix a non-parole period of not less than 50 per cent of the sentence, but not less than 8 months.[180] The court also has a power under the *Sentencing Act* not to fix a non-parole period if it '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'.[181]

This is more prescriptive than the approach in Queensland, where for sentences of more than 3 years, or 3 years or less (in the case of sexual offences) and where a serious violent offender declaration has not been made, an offender's parole eligibility date is the day after the offender has served 50 per cent of his or her sentence unless the court has set an earlier or later parole eligibility date.[182]

3.4 New Zealand

After the release of a Law Commission report on sentencing guidelines and parole reforms in August 2006, a series of reforms to sentencing and parole were introduced in New Zealand.[183]

These reforms included:

- comprehensive legislative narratives on the purposes and principles of sentencing including:
    - general principles to be applied by the courts
    - a non-exhaustive list of the aggravating and mitigating factors that are to be taken into account by the court
    - a ladder or hierarchy of sentences, and
    - a strong presumption in favour of reparation
- the introduction of a Sentencing Council, and
- the development of sentencing guidelines (similar to those in operation in the United Kingdom).

However, after a national election in November 2008 which resulted in a change of government, a number of these reforms were not implemented. The new conservative NZ Government has not moved on appointing members to the Sentencing Council and has indicated that it does not wish to proceed with proposed sentencing guidelines.[184]

The new NZ Government has introduced an alternative set of reforms, including the introduction of a three-stage sentencing escalation regime for major violent offences and sexual offences in June 2010.[185] Although this has been one of the most contentious reforms, it is not strictly a standard non-parole scheme - rather, it is a form of mandatory sentencing for major violent offences and sexual offences. The process mandates the sentencing procedure for an offender convicted of a serious violent offence.[186]

The application of the new sentencing regime is still in its infancy and to date no evaluation has been undertaken of its impact or effectiveness.

3.5 Canada

Canada differs in its approach in that it does not have a minimum non-parole period scheme but provides a range of mandatory minimum sentences (MMS) for certain *Criminal Code C-46* offences.

In addition to the offence of murder, which requires a mandatory sentence of life imprisonment, the other applicable MMS offences fall into four categories:

- sexual offences involving children
- offences involving firearms and weapons
- impaired driving, and
- miscellaneous offences (high treason and illegal betting).

There is no discretion for judges to reduce the sentence for any offence requiring a MMS unless a constitutional exemption is made.

The MMS scheme has been subject to various challenges including constitutional validity.[187] Some sentencing judges have chosen not to impose a MMS, and offenders have appealed a MMS, on the grounds that the MMS would be cruel or unusual punishment pursuant to section 12 of the *Canadian Charter of Rights and Freedoms*. Of note are the disparities that have occurred between sentences imposed in the first instance and those imposed on appeal.[188]

Starting point sentences and sentencing ranges

Some provincial Courts of Appeal in Canada have embraced a range of sentencing tools such as categorisation, starting point sentences and sentence ranges.[189] These measures have been introduced in an effort to achieve a uniformity of approach to sentencing, but do not have a legislative basis.

Canadian courts vary in their approach to sentencing. It has been described by some commentators as a two-step approach, with the judge first determining the range of sentences for a typical case and then, using that range adjusting the sentencing upwards or downwards based on the facts of the individual case.[190] The Alberta Court of Appeal has described the approach in that jurisdiction as involving a three-stage methodology: 'first, a categorisation of a crime into "typical cases", second, a starting sentence for each typical case, third, the refinement of the sentence to the very specific circumstances of the actual case'.[191]

Established sentencing ranges are typically viewed as guidelines to provide the sentencing judge with an idea of what final sentence is considered to be 'in the range'.[192] The application of sentencing ranges has been criticised, however, as being limited and rudimentary, leading sentencing judges to throw "a mental dart"[193] at the range in an attempt to find a starting point for the sentencing process.

In *R v Arcand,* the court found that the combination of categorisation, starting point sentencing and sentencing ranges should be adopted as an integral approach to sentencing and further that 'to function properly, both starting points and ranges require appropriately defined categories.'[194]

We discuss some of the challenges of setting a single SNPP for offences in Chapter 4 of this paper.

3.6 Summary

This chapter has presented information about the structure and operation of minimum sentencing schemes in NSW, the NT and SA, and explored approaches to sentencing adopted in NZ and Canada. Though each scheme operates with reference to different offences (although most schemes clearly apply to more serious personal offences), some such as the SA scheme apply a standard proportion to the levels at which the non-parole period is set, while others (NSW, for example) have elected to use specific periods of time for the minimum non-parole period to be applied. Most schemes articulate the grounds on which a sentencing judge may depart from the scheme, which are different for each scheme.

CHAPTER 4
STRUCTURING A SNPP SCHEME

In this chapter we present two possible models for structuring a SNPP scheme. We discuss:

- the operation and potential benefits and risks of each of these models
- the eligibility criteria and possible exemptions
- whether a SNPP should be representative of a certain type or level of offending, and if so what this might be
- how the levels in a SNPP scheme could be set, and
- grounds for departure from the SNPP, to allow courts to set a non-parole period that is either shorter or longer than the SNPP.

Elements of the SNPP schemes we present have been drawn from the NSW, SA and NT schemes discussed in Chapter 3.

In identifying what type of scheme Queensland might adopt and how it might apply, it is important to keep in mind the overarching interests of:

- providing a consistent and transparent sentencing process that promotes public confidence
- maintaining judicial discretion to impose a just and appropriate sentence in individual cases
- ensuring consistency with statutory and common law principles and purposes of sentencing, and
- introducing a SNPP scheme that is unambiguous, simple to understand and apply, and which does not overcomplicate what is an already complex sentencing process.

4.1 SNPP models

Overview

The Queensland Government's stated intention in introducing a SNPP scheme is to ensure that offenders who commit serious violent offences and sexual offences serve an appropriate period of actual incarceration.

There are two broad approaches considered in this chapter for achieving this:

- to specify a minimum or standard period of imprisonment an offender is to serve in prison for a given offence (a defined term scheme – Option 1)
- to require an offender sentenced to imprisonment to serve a particular proportion of their sentence in prison (a standard percentage scheme – Option 2).

What model is supported may depend on what are considered to be the most important objectives of the scheme. For example, if the intention is just to ensure that offenders sentenced to imprisonment

spend a minimum proportion of that sentence in prison, a standard percentage scheme might achieve this. However, if the objective is not only to ensure offenders serve a minimum proportion of their sentence in prison, but also to provide direct guidance to courts on the appropriate sentence length and length of non-parole period for a standard example of the offence where an offender is sentenced to imprisonment, then a defined term scheme might be the better option.

The Council also acknowledges that there might be other ways to deal with these matters rather than simply through the introduction of a SNPP scheme. We explore this aspect in Chapter 8.

One of the challenges for the Council in advising the Queensland Government on the structure of a SNPP scheme is to ensure that it operates consistently with existing sentencing principles set out in the *Penalties and Sentences Act 1992* (Qld) and in a complementary way with existing provisions relating to parole.

In approaching the question of how a SNPP scheme might operate and the levels (or level) at which SNPPs might be set, factors may also be identified that limit the Council's ability to structure a scheme which is consistent in its application and approach. For example, setting SNPPs by reference to maximum penalties may expose problems with the levels at which some of these penalties have been fixed.

The inclusion of some offences defined as 'serious violent offences' and 'sexual offences' under current sentencing legislation, and exclusion of others, may also mean that the provisions relating to parole in Queensland might operate quite differently depending on the type of offence committed. There may be a need, on this basis, for a broader review of these provisions to ensure that they operate as intended and do not lead to anomalous outcomes for offenders charged with serious violent offences and sexual offences.

How would these schemes work?

Under a defined term scheme, courts must sentence offenders convicted of certain offences by reference to a SNPP expressed as a defined period of years. Each offence included in a defined term scheme carries an individual SNPP.

For example in the NSW scheme, which is a form of defined term scheme, sexual assault has a SNPP of 7 years.

In contrast, under a standard percentage scheme, courts must set the non-parole period at a given percentage of the sentence for a SNPP offence once a sentence of imprisonment is imposed. Under this form of scheme, however, courts retain full discretion in sentencing an offender to imprisonment to set the length of that sentence in a given case.

For example, in SA the minimum non-parole period scheme provides for a SNPP of four-fifths (80%) of the head sentence for a range of offences, but does not specify a minimum standard period (in years) that a court, in imposing a prison sentence, must direct the offender to serve.

4.2 Impact on current sentencing processes

It is important in structuring a SNPP scheme to consider how any proposed SNPP scheme would operate in the context of the current approach to sentencing in Queensland and existing legislation.

Queensland has two schemes that require offenders sentenced to imprisonment to serve a standard percentage of their sentence in custody in some circumstances:

- Under section 184 of the *Corrective Services Act 2006* (Qld), the offender must serve 50 per cent of his or her sentence in custody before being eligible for parole if:
    - the offender is sentenced to imprisonment for more than 3 years, or
    - the offender is serving a period of imprisonment of not more than 3 years for a sexual offence and the court has not fixed a parole eligibility date, and
    - the offender is not subject to an indefinite sentence or has been declared convicted of a 'serious violent offence' (SVO).
- If a court makes an SVO declaration under Part 9A of the *Penalties and Sentences Act*, an offender must serve a minimum of 80 per cent (or 15 years, whichever is the lesser) of his or her sentence before being eligible for parole. We discuss in detail the interaction between a SNPP and the SVO provisions later in this chapter.

In structuring either a defined term or a standard percentage SNPP scheme, the Council needs to consider how the new scheme might operate in a complementary way with these existing approaches.

The structuring of a SNPP scheme also has implications for how judges approach the task of sentencing. In Queensland, the sentencing process involves a 'top-down' approach. Submissions are made to the court by the prosecution and defence that provide an indication of the appropriate sentencing range. After hearing submissions the judge determines the appropriate sentence to be imposed and, if the offender is sentenced to full-time imprisonment, may set the parole release or parole eligibility date.

In cases where there are multiple offences, or multiple counts of the same offence (for example, two counts of rape) the court must set individual sentences for each offence and count, but only has to set one non-parole period based on the total sentence. An example is given below.

The adoption of a defined term scheme is likely to result in judges having to adopt a 'bottom-up' approach to sentencing. Emphasis would be removed from the overall sentence to a focus on the custodial period required taking into account the SNPP for the offence.

If a defined term is mandated, this is likely to be at the forefront of the courts' deliberations when determining an appropriate penalty. The second of the following case examples illustrates how this approach applies in practice.

Setting of non-parole periods in Queensland – case example[195]

An offender is convicted of multiple offences and counts of sexual offences committed against children. The sentencing judge sets an individual term of imprisonment for each offence and count, no cumulative sentence order is made. The result is a total effective sentence of 9 years' imprisonment. The court then sets a single non-parole period of 3 years.

Excerpt from sentencing remarks:

In respect of this prisoner, for the rape offences, counts 5 and 8, in each case the sentence will be one of imprisonment for 9 years. For the aggravated indecent treatment of a child offences, counts 1 to 4, 6 and 9 to 15 inclusive, in each case the sentence will be one of imprisonment for 4 years. For the indecent treatment offences without the circumstance of aggravation, counts 7 and 16 to 19 inclusive, in each case the sentence will be one of imprisonment for 3 years. For count 20, the offence of permitting sodomy, the boy was about 15 years of age at the time of the commission of the offence, imprisonment for 4 years. With respect to the indecent assault offence, count 21, imprisonment for 12 months.

I considered whether I should make the sentence for the indecent assault offence cumulative. In the end I have decided I will not do that. In considering fixing a parole eligibility date, I have taken into account the pleas of guilty of the defendant. I fix a parole eligibility of the 15th of December 2013.

Setting of non-parole periods in NSW – case example[196]

An offender is convicted of two separate offences – one of which (a firearms offence) carries a SNPP. Because of the way the NSW provisions used to operate prior to introduction of the power of a court to impose aggregate sentences, the court had to set both individual sentences and non-parole periods for each offence. In this example the court sentences the offender to 3 years and 9 months for the first offence, with a non-parole period of 2 years and 3 months, and 6 years for the firearms offence, with a non-parole period of 3 years and 9 months. The court allows for a partial cumulative sentence (which means the non-parole period for the second offence commences 1 year after the non-parole period for the first offence starts running). This results in a total effective sentence of 7 years, with a non-parole period of 4 years and 9 months.

Excerpt from sentencing remarks:

In relation to Count 1, the *Crimes Act 1900* offence, you are convicted. You are sentenced to a term of imprisonment that consists of a non-parole period of 2 years 3 months, to commence on 28 February 2007 and expire on 27 May 2009. The balance of the sentence of 1 year and 6 months expires on 27 November 2010.

On Count 2, the *Firearms Act 1996* offence, you are convicted. You are sentenced to a term of imprisonment that consists of a non-parole period of 3 years and 9 months, to commence on 28 February 2008 and expire on 27 November 2011, on which date you will be eligible to be released to parole. The balance of the sentence of 2 years 3 months expires on 27 February 2014.

This gives a total effective sentence of 7 years with a non-parole period of 4 years 9 months. The sentences are to date from when the offender first came into custody. You will become eligible to be released to parole on 27 November 2011.

A standard percentage scheme could be structured in two ways:

- The SNPP might apply to a scheme offence only. For example, an offender is sentenced for two offences that relate to the same incident. Only one offence is a SNPP offence. The judge would be required to apply the SNPP percentage only to that offence.
- The SNPP could apply to the total head sentence for all offences if the court is sentencing the offender for an offence or offences included in the scheme. The non-parole period, in this case, would be determined after the overall sentence had been determined. For example, an offender is sentenced for two offences that relate to the same incident. Only one offence is a SNPP offence; this would invoke the application of the SNPP scheme. The judge would be required to apply the SNPP percentage to the overall sentence (which would include both offences).

A possible advantage of a standard percentage SNPP scheme is that it would be more consistent with existing approaches to sentencing in Queensland. If this type of scheme is adopted, the court would first determine the overall sentence before considering the standard non-parole percentage. The standard percentage scheme would then be applied to either the scheme offence or the overall sentence (depending on the legislative approach taken) to determine the minimum period an offender must spend in prison.

Applying this to the Queensland example above, the court would approach the setting of the head sentence in the same way but, at the point of determining what the parole eligibility date should be, it would be required to consider the SNPP.

A standard percentage scheme could either be presumptive (requiring a court to order the offender to serve the set proportion of the sentence, or a higher proportion, in prison unless specific criteria are met), or more broadly discretionary (giving the court full discretion to set a higher or lower non-parole period).

As illustrated by the NSW example, ensuring the complementary operation of a defined term scheme with the current approach to sentencing in Queensland would be more complex.

A defined term scheme would have the advantage over a standard percentage scheme of providing guidance to courts on the actual period of imprisonment (in years) that Parliament considers is appropriate for a given offence at a particular level of seriousness; however, based on the NSW experience and the current approach to sentencing, a defined term scheme is likely to have a substantial impact on sentencing in Queensland and increase the time and complexity of the sentencing process.

QUESTION:

2. What type of SNPP scheme should be introduced in Queensland:
- a defined term scheme (with the SNPP representing a set number of years), or
- a standard percentage scheme (with the SNPP representing a set proportion of the head sentence), or
- some other type of scheme?

4.3 Eligibility criteria and exclusions

In developing a SNPP scheme, its application and possible exclusions also need to be considered by the Council.

For example, the NSW SNPP scheme does not apply to:

- offences dealt with summarily
- offender sentenced to life imprisonment or for any other indeterminate period or to detention under the *Mental Health (Forensic Provisions) Act 1990* (NSW), or
- offenders aged less than 18 years of age at the time of the offence.

In SA and NT, the application of the SNPP or minimum non-parole period is based on:

- the offence of which an offender is convicted, and
- whether the court sentences an offender to full-time imprisonment of 12 months or more (in the case of NT if the term of imprisonment is not wholly or partially suspended).

The NT minimum non-parole period of 70 per cent applies to specified serious offences, while a default non-parole period of 50 per cent captures those offences that do not fall within the 70 per cent scheme.

In this part, we discuss these and other matters and their application to a proposed Queensland SNPP scheme. We also present the option of limiting the application of a SNPP scheme to repeat offenders.

Interaction with other sentencing and detention orders

Life imprisonment

Several offences being considered for inclusion in a Queensland SNPP scheme carry a maximum penalty of life imprisonment. In the case of offenders convicted of murder, the court must impose a mandatory life sentence or an indefinite sentence (under Part 10 of the *Penalties and Sentences Act*).[197]

A separate non-parole period regime already applies to offenders sentenced to life imprisonment in Queensland. Under section 181 of the *Corrective Services Act*, offenders sentenced for an offence under section 305(2) of the Criminal Code (which includes offenders sentenced for more than one conviction of murder) must serve a minimum period of 20 years in prison before being eligible for parole. For all other offenders sentenced to life imprisonment, the minimum non-parole period is 15 years. In both cases, the court has the power to set a later parole eligibility date.

Unlike the NSW SNPP scheme, neither the NT nor the SA scheme provides an exemption for matters involving a sentence of life imprisonment. The NT legislation specifically directs that where a court sentences an offender to life imprisonment, a non-parole period must be set. However, there is no legislative guidance on how this should be approached.

Separate mandatory minimum non-parole period provisions apply in SA and NT to the offence of murder in cases where a life sentence is imposed. The NT legislation also sets out aggravating circumstances that a court must taken into account in determining whether a longer non-parole period is warranted.

Indefinite sentences

Like NSW, SA and NT, Queensland has an indefinite sentencing scheme.[198]

The NSW, SA and NT SNPP schemes do not apply if an offender has been sentenced to an indefinite or an indeterminate sentence.

Because non-parole periods are not set for indefinite sentences, it is unlikely that a SNPP scheme would be relevant in cases where an indefinite sentence is imposed.

Detention under mental health legislation

The *Mental Health Act 2000* (Qld) governs the detention of persons in Queensland with a mental illness. A person who, while serving a sentence of imprisonment or detention, becomes a classified patient pursuant to the *Mental Health Act* may still be eligible for parole.[199] Parole boards accept applications for parole by classified mental health patients, and they can be granted parole while classified under the *Mental Health Act*.[200]

In the case of a person who is found to have been unsound of mind at the time of the alleged offence, or who is unfit for trial, there are provisions under the Criminal Code[201] and *Mental Health Act* that allow a court to order that the person be detained under a forensic order. Decisions to terminate a forensic order are made by the Mental Health Review Tribunal (or, on appeal, by the Mental Health Court or

the Court of Appeal). These people are not under sentence, and are therefore not subject to a non-parole period.

In contrast, in NSW a court can make a qualified finding of guilt as part of a special hearing in certain circumstances (such as where an offender is found to be unfit for trial for an extended period) and, on doing so, is required to indicate if it would have imposed a term of imprisonment had the offender been found guilty of the offence as part of a normal trial, and the term of imprisonment it would have considered appropriate.[202] Because of this requirement, there is a specific legislative exclusion in NSW for offenders sentenced to detention under mental health legislation, which is unlikely to be necessary for a Queensland scheme.

QUESTION:

3. What forms of detention (if any) should be exempt from the application of a Queensland SNPP scheme?

Suspended sentences

Queensland sentencing legislation allows a court that imposes a sentence of 5 years or less, to wholly or partially suspend that sentence for a period of up to 5 years.[203]

The NT similarly provides for the whole or partial suspension of a term of imprisonment where the offender is sentenced to a term of imprisonment of 5 years or less. If a court does not suspend the sentence, then it must fix a non-parole period (depending on the offence this will be either 50% or 70%).

In SA, the court can only wholly suspend a sentence on the condition that the offender enters a good behaviour bond and agrees to comply with the conditions of the bond. The suspension of a prison sentence can be imposed in addition to a non-parole period. For example, in the recent decision of *R v Narayan*,[204] the court sentenced the offender to 6 years imprisonment with a non-parole period of 3 years for the manslaughter of her husband. The judge suspended the whole sentence on the condition the offender enter a bond of $1000, be of good behaviour for 2 years, and be under the supervision of a community corrections officer.

As is the case in SA, in NSW the court can only wholly suspend a prison sentence. Because the requirement for a court to set the SNPP as the non-parole period for a SNPP scheme offence only applies to sentences of full-time imprisonment, suspended sentences fall outside the operation of the scheme; however, the court must record its reasons for doing so, including each mitigating factor that it took into account.[205]

Regardless of what type of SNPP scheme is adopted in Queensland, how the scheme will interact with the suspended sentence provisions will need to be determined.

Sentences of imprisonment of 3 years or less

Currently in Queensland, if an offender is sentenced to imprisonment for 3 years or less for an offence that is not a sexual offence or an offence for which he or she has been declared as convicted of a 'serious violent offence' (SVO) the court must fix a date for the offender to be released on parole. This type of parole is referred to as 'court-ordered parole'.

How a SNPP scheme should interact with this existing court-ordered parole requirement will need to be determined.

If a defined term scheme is adopted, this interaction may depend on what the SNPP represents, what the SNPP level for the offence is, and the grounds for departure from the SNPP.

If a standard term scheme is introduced, court-ordered parole might still be available provided the offence does not fall within one of the exclusions for court-ordered parole and the sentence of imprisonment is for a term of 3 years or less.

QUESTION:

4. How should a Qld SNPP scheme interact with court-ordered parole?

Offences dealt with by the Magistrates Court

Pursuant to the Terms of Reference, a number of the offences proposed to fall within a SNPP scheme are able to be dealt with summarily by the Magistrates Court (in certain situations). See Appendix 3 which identifies whether offences currently defined as serious violent offences and sexual offences can be dealt with summarily.

The jurisdiction of the Magistrates Court when dealing indictable offences summarily is limited to imposing a maximum penalty of 3 years imprisonment or 100 penalty units;[206] in the case of drug court matters the maximum penalty is 4 years imprisonment or 100 penalty units.[207] A magistrate retains discretion to abstain from dealing with a matter summarily.[208]

Whether the SNPP scheme should and could apply to matters dealt with summarily is an issue to be explored by the Council as part of this reference, and will depend on the form of SNPP adopted. For example, a standard percentage scheme could apply without too many difficulties, whereas it would not be logical for a defined term scheme to apply to these matters if the SNPP period is higher (or close to) the maximum penalty the Magistrates Court can impose.

QUESTION:

5. Should offences dealt with summarily (by the Magistrates Court) be excluded from the operation of a Queensland SNPP scheme?

Young offenders

The NSW SNPP scheme specifically excludes offenders under the age of 18 years at the time the offence was committed from the operation of the scheme.

The SA scheme does not apply to person under the age of 18 years unless the person is sentenced as an adult or is sentenced to detention to be served in a prison.[209]

In the NT, the *Youth Justices Act* (NT) provides that when sentencing a person under the age of 18 years to a term of detention for 12 months or longer that is not wholly or partially suspended, the court must fix a non-parole period. The *Youth Justice Act* does not include provision for SNPPs or other fixed non-parole periods.

The Council's Terms of Reference refer to current sentencing practices for offenders aged 17 years and over as a relevant consideration for the Attorney-General in referring the matter to the Council, which could suggest an intention for a Queensland scheme to apply only to offenders aged 17 years or over.

In Queensland, a 'child' is defined in the *Youth Justice Act 1992* (Qld) as a person who is under the age of 17 and, on this basis, 17-year-old offenders are in most cases treated as being adults for the purposes of sentencing.[210] However, this would not prevent a Queensland SNPP scheme being limited to offenders who are aged 18 years or over if it was considered appropriate to do so. Taking into account that a SNPP scheme is likely to apply to more serious offences involving longer periods of incarceration, it may be that the adoption of such an age limit is seen as appropriate (although the *Youth Justice Act* does allow juveniles to be sentenced as adults in relation to particularly serious offences such as murder).

QUESTIONS:

6. Should young offenders be excluded from the operation of a SNPP scheme?

7. If so, how should a young offender be defined?

4.4 Offenders with prior convictions

Another issue relevant to this reference is whether a SNPP scheme should be limited in its application to offenders who have prior convictions for serious violent offences or sexual offences.

Pursuant to section 9 of the *Penalties and Sentences Act*, in sentencing an offender who has one or more previous convictions, the court must treat each prior conviction as an aggravating factor if the court considers that it can reasonably be treated as such, taking into account the nature of the previous conviction and its relevance to the current offence, and the time that has elapsed since the conviction. However, the sentence imposed must not be disproportionate to the gravity of the current offence.[211]

For example, drawing on the recently introduced New Zealand mandatory minimum sentencing provisions[212] a SNPP might only be activated on a second conviction for a scheme offence, with a warning issued to first-time offenders that this will be the consequence if they re-offend. Alternatively, rather than the existence of prior convictions being an eligibility criterion for the scheme, an absence of relevant prior convictions might be a ground for courts departing from a SNPP in a given case.

QUESTIONS:

8. Should SNPPs in Queensland apply to all offenders convicted of specified offences, or to repeat offenders only?

9. If the scheme is limited to repeat offenders, how should this be defined (for example, further conviction for another scheme offence committed after the conviction for the first offence)?

4.5 Defining what a SNPP represents

In the adoption of a SNPP scheme, among the questions to be considered by the Council are how a SNPP should be defined and whether the SNPP should be representative of a certain type of offending.

What the SNPP represents is important to provide clarity and to:

- allow courts to act in accordance with the principles and purposes of sentencing, in particular the principle of proportionality, and to impose a sentence that is appropriate in circumstances of the individual case
- provide sufficient guidance to courts in determining whether the SNPP is intended by Parliament to apply in a given case, and grounds for setting a higher or lower non-parole period than the SNPP, and
- minimise the risk of appeals based on sentencing errors.

Sentencing judges are currently guided by the statutory maximum penalty set by Parliament, which reflects the seriousness of the offence, and by the submissions of the prosecution and defence, which are usually based on comparative sentences. The maximum penalty together with sentencing submissions provides the sentencing judge with a starting range in determining the penalty.

Additional sentencing guidance reflecting the seriousness of certain violent and sexual crimes, and how much time a person should spend in custody before being eligible for parole, is currently provided by:

- the SVO provisions; the operation of which depends on the offence, the length of the imprisonment sentence imposed or if serious harm was caused to another person,[213] and
- the indefinite sentence provisions; the operation of which depends on the offence committed, the characteristics of the offender and the need to protect the community from the risk of serious harm.[214]

Defined term scheme

One of the challenges of a defined term SNPP scheme is providing guidance to a sentencing court on determining how the offence before the court compares with an offence for which the defined term SNPP is intended to apply.

Because a SNPP would be expressed a number of years, some thought would need to be given to what this period of years is intended to represent and to what cases it is intended to apply.

Adopting a 'range of objective seriousness' criteria

The NSW SNPP scheme provides that the SNPP (for example, 7 years for sexual assault) represents a non-parole period for an offence in the 'middle of the range of objective seriousness'. The NSW scheme does not define what is meant by the 'middle of the range of objective seriousness', or what factors a court must take into account when determining where a particular offence lies in relation to this range; this has been left to judicial interpretation.

In Chapter 3 we discussed many of the criticisms and problems the NSW courts have faced in applying the SNPP scheme, in particular the differences in the interpretation of the range of objective of seriousness. From our analysis of the current NSW scheme and the criticism it has attracted, the development of a defined term scheme based on a similar definition to that used in NSW would be difficult and complex for courts to apply.

An alternative approach would be to adopt a definition that defines a SNPP as a non-parole period for offences at the lower end of the range of objective seriousness. The starting point for judges would then be to consider where the particular offence lies by reference to lower-level examples of offending. However, there is no guarantee that this would resolve the problems of what factors should be considered in assessing 'objective seriousness', and how an individual offence is to be measured against this standard.

SA has adopted this approach. In the SA scheme, four-fifths of the head sentence represents the mandatory minimum non-parole period for an offence 'at the lower end of the range of objective seriousness'. Like courts in NSW, SA courts have faced problems in the interpretation and application of this definition.

Any scheme that is reliant on a classification of the seriousness of the offence would require detailed clarification to avoid ambiguity and inconsistency. However, it is likely that by adopting this approach, the sentencing process will be increased, particularly if the SNPP must be determined in accordance with a list of factors.

Adopting a baseline or starting point SNPP

Another option is to define the SNPP as a reference point that is intended to represent a baseline sentence. As discussed in Chapter 1, this approach is currently being considered by the Victorian Sentencing Advisory Council after a reference by the Victorian Attorney-General.

In accordance with the Victorian Council's Terms of Reference:

> in determining the non-parole period to be served by the offender, the court will be required to start from the baseline minimum sentence before applying aggravating or mitigating factors that would alter the non-parole period up or down from the baseline.[215]

However, as for a defined term scheme, what the 'baseline' is intended to represent would still need to be defined and, in many respects, it could be considered as quite similar to the NSW model.

An alternative approach is provided by a proposal by the Israeli Parliament which is considering introducing what are referred to as 'starting point sentences'.[216] The objective of a starting point sentence is to provide a perspective on the seriousness of the offence before the consideration of any mitigating or aggravating factors particular to the offender. The starting point sentence is seen to 'express the degree of gravity with which society regards the offence…'.[217] The Bill proposes that a committee should be established to set the starting point sentences, which will be 'entitled in respect of such offences as it sees fit, to prescribe sentences that are commensurate with those offences, when committed in circumstances which are not exceptional in terms of aggravating or mitigating factors' (or 'the typical case').[218]

Again, as recognised in a recent study commissioned by the Israeli Ministry of Justice, the difficulty is in defining what a typical offence is, what criteria should be used to determine this, and whether a baseline or starting point SNPP (or sentence) for all offences should be determined on the same criteria. The approach taken could be, for example, to select the median sentence or the most common sentence, or to select the 'typical case' on a normative rather than empirical basis.[219]

We discuss the challenges of setting SNPP levels later in this chapter.

QUESTION:

10. If a defined term SNPP scheme is adopted, what should a SNPP represent? For example:
- a non-parole period for an offence in the mid-range of objective seriousness, or
- a non-parole period for an offence in the low range of objective seriousness, or
- a non-parole period for a typical example of the offence (based on factors relevant to the offence and the offender), or
- other?

Standard percentage scheme

The option of a standard percentage model could possibly overcome many of the definitional problems with a defined term scheme. The standard percentage would not need to be representative of a particular level or type of offending, and could be applied to sentences imposed for SNPP offences only, or to the overall head sentence.

A standard percentage scheme is also broadly consistent with existing Queensland percentage schemes (80% for serious violent offences under Part 9A of the *Penalties and Sentences Act* and 50% for other offences) which provide forms of minimum non-parole periods; these apply to the overall sentence (in instances where a person is being sentenced for more than one offence). The 50 per cent non-parole period is not offence-based and applies if a person has been sentenced to imprisonment for more than 3 years, or for a sexual offence (where a SVO declaration has not been made) and the court has not fixed a parole eligibility date. In these cases, the offender must serve 50 per cent of their sentence in custody before being eligible to apply for parole.

The 80 per cent non-parole period under the SVO provisions is offence-based; its activation is automatic in cases where a sentence of imprisonment of 10 years or more has been imposed, or in other cases where imprisonment has been imposed and the court makes an SVO declaration.

For example, a standard percentage scheme might be one under which the SNPP:

- is not representative of a type or standard of conduct, but is assumed to be the appropriate minimum non-parole period for all examples of offending where the court imposes a sentence of full-time imprisonment
- is activated by the sentencing of a scheme offence
- would apply equally to scheme offences so there is no need to determine individual offence terms
- would apply to the overall head sentence in order to avoid complexities associated with applying different sentencing requirements to different offences.

Alternatively if a standard percentage SNPP scheme is adopted that defines the set period in terms of offending of a particular type or level of seriousness, what that SNPP represents (for example, an offence in the middle of the range of objective seriousness) will need to be determined.

QUESTION:

11. If a standard percentage SNPP scheme is adopted, should the SNPP represent a particular level or type of offending? If so, what level or type of offending should the SNPP represent?

4.6 How should a court be required to take a SNPP into account?

Another issue which applies particularly to the adoption of a defined term scheme is how a court should take the SNPP into account in sentencing.

Currently the maximum penalty provides a reference point for courts as the penalty that is appropriate for the worst cases and as an upper limit for these offences. However, as is made clear by its inclusion with other factors in section 9(2) of the *Penalties and Sentences Act*, it is only one of a number of considerations a court must take into account in sentencing.

In NSW, under section 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW), when a court imposes a term of imprisonment (or an aggregate term of imprisonment) for a SNPP offence, it must set the SNPP as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter. The reasons for departing from the SNPP are discussed later in this chapter.

The NSW Court of Criminal Appeal has determined even in cases that fall outside the mid-range of objective seriousness, that the SNPP is still of relevance as a 'reference point, or benchmark, or sounding board, or guidepost'.[220] Whether courts are permitted to use the SNPP in this way, for offences falling outside the mid-range of objective seriousness, is the subject of a special leave application to the High Court.[221]

Under the Israeli proposal, a judge would not be required to sentence the offender to the starting point sentence, but would be required to commence the process of determining the appropriate sentence from the starting sentence, before considering any aggravating or mitigating factors. The judge would also have to explain the relationship between the sentence imposed and the starting sentence (s 40L(3) of the Bill). Because this is only a proposal at this stage, it is not clear how such a scheme would operate in practice and whether it would avoid any of the problems that have arisen in NSW – for example, the need to specify in some detail where the offence falls by reference to the level of offending the SNPP is intended to represent.

The NSW Court of Criminal Appeal has specifically rejected judges using the SNPP as a form of starting point, suggesting that to 'oscillate about it by reference to the aggravating and mitigating factors' means that 'the standard non-parole period will tend to dominate the remainder of the exercise, thereby fettering the important discretion which has been preserved by the Act'.[222]

As the Council's Terms of Reference refer to the need to maintain judicial discretion, whatever approach is taken, it will be important to preserve this discretion in the drafting of the SNPP legislation.

QUESTION:

12. How should courts be required to take the SNPP into account in sentencing?

4.7 How should SNPP levels be set?

Equally as challenging as determining what a SNPP should represent is deciding at what level (or levels) a SNPP should be set; this will depend on the type of scheme adopted, what SNPPs are designed to achieve and, importantly, what the SNPP is said to represent.

Currently the maximum penalty provides a statutory guide to courts in determining the sentencing level in an individual case; however this is reserved for the worst case examples. If the SNPP is reflective of a representative level of offending, to accord with the principle of proportionality, there must be a correlation between what the SNPP is said to represent and the SNPP level. Taking the NSW model as an example, the year figure assigned as the SNPP should be appropriate for an offence that falls into the middle of the range of objective seriousness.

Depending on what SNPPs are designed to achieve and what type of scheme is selected, in setting the levels guidance could be obtained from:

- the maximum penalty for the offence
- the seriousness of the offence based on the type of offence
- existing Court of Appeal decisions
- current sentencing levels
- current parole eligibility dates and the actual time offenders spend in prison
- the availability and length of rehabilitation programs run in prison, to allow offenders to complete programs to deal with the factors contributing to their offending behaviour and support aspects of rehabilitation, and/or
- community expectations of the minimum time offenders sentenced to imprisonment should spend in prison for a given offence.

Although each of these approaches carries its own challenges, for the reasons discussed in Chapter 2, setting SNPP levels by reference to community expectations (for example, obtained through a public perceptions survey) would be particularly challenging. The Victorian Government has recently announced it will be conducting an online survey on sentencing commencing in July 2011 that will seek the community's views about the levels at which the new 'baseline' minimum sentences should be set.[223]

Leaving aside the time required to properly conduct such a survey, it is unlikely that community consensus could be reached on the particular year value to be assigned for offences under a defined term scheme, or the percentage for a standard percentage scheme. The best that might be hoped for is that a majority of people would agree that the level set is 'appropriate' for the offence, or a majority would not consider the level 'inappropriate'.

Defined term scheme

If a defined term scheme is adopted, matching a SNPP to an offence is likely to be a particularly complex exercise. In addition, where an offence has circumstances of aggravation that result in a higher maximum penalty, each circumstance of aggravation would arguably require a separate SNPP.

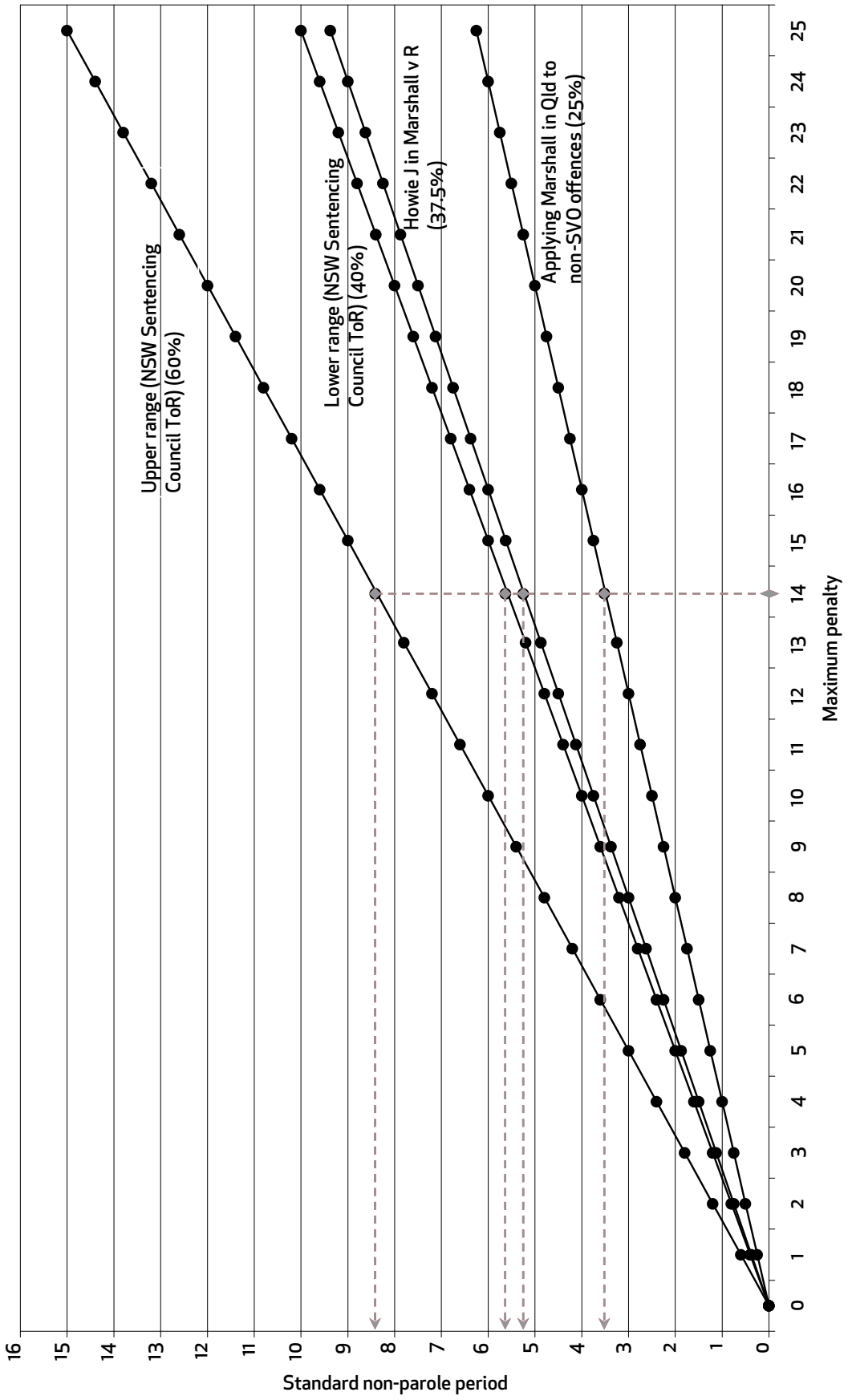
Limited guidance can be taken from how the NSW SNPP levels were determined, as it is not clear how these levels were arrived at and what weight was given to the considerations said to have influenced their development, namely:

- the seriousness of the offence
- statutory maximum penalties
- current sentencing trends for scheme offences as evidenced by sentencing statistics complied by the Judicial Commission of NSW, and
- community expectations.

As discussed in Chapter 3, there is no consistent relationship between SNPP levels in NSW and maximum penalties, with SNPPs ranging from 21.4 per cent (for possession and use of firearms or prohibited weapons) to 80 per cent of the maximum penalty (for aggravated indecent assault). The high levels at which SNPPs for some offences have been set has been subject of judicial comment,[224] and has also been criticised by some legal commentators.[225] The NSW Sentencing Council has a current reference from the Attorney-General asking it to provide advice on standardisation of SNPPs for sexual and other offences within a band of 40–60 per cent of the available maximum penalty.

In order to illustrate at what levels SNPPs might be set in Queensland if based on the maximum penalty, we apply the NSW SNPP 'middle of the range of objective seriousness' criterion to several Queensland maximum penalties adopting judicial reasoning from the NSW Court of Criminal Appeal case of *Marshall v The Queen*.[226] As discusse din Chapter 3, in that case, Justice Howie suggested that 'as a matter of logic and the application of ordinary sentence principles' the expectation should be that an offence in the mid-range of seriousness should carry a sentence of half the maximum penalty. Howie J concluded that, by then applying the NSW provisions around the setting of the head sentence by reference to the non-parole period, the non-parole period should be set at 75 per cent of that figure (representing 37.5% of the maximum penalty).[227]

Figure 3: Defined term standard non-parole periods set by reference to the reasoning of Howie J in *Marshall v The Queen* [2007] NSWCCA 24 and under current Terms of Reference to NSW Sentencing Council to standardise SNPPs within 40–60% of the maximum penalty



Applying this reasoning to the Queensland context (that is, that half the maximum penalty represents an appropriate sentence for an offence in the mid-range of objective seriousness), and taking into account the proposals in NSW to standardise SNPP levels, in Figure 3 we set out what the SNPP would be for offences carrying different maximum penalties based on:

- a non-parole period of 50 per cent (the non-parole period in Queensland for sentences of more than 3 years, as well as sentences for sexual offences and offences not declared as SVOs in circumstances where the court has not set a non-parole period) (which translates to a SNPP of 25% of the maximum penalty)
- a non-parole period of 75 per cent (adopting the NSW approach in *Marshall*), which would result in a SNPP of 37.5 per cent of the maximum penalty
- 40 per cent of the maximum penalty (the lower end of the range being considered in NSW, and the SNPP level applying the reasoning in *Marshall* to offences in Queensland falling under the SVO regime which carry a non-parole period of 80% of the sentence imposed or 15 years, whichever is the lesser), and
- 60 per cent of the maximum penalty (the upper limit of the range being considered in NSW).

Though applying the reasoning in *Marshall* has the advantage of ensuring a consistent approach to the setting of SNPP levels, this approach has limitations. For example, such an approach assumes that sentences should be evenly distributed based on their objective seriousness from no imprisonment, or very short terms of imprisonment, for the least serious examples of offending, through to the maximum penalty for the most serious or worst category of cases. Because this approach focuses solely on imprisonment as a sentencing outcome, it also discounts the possible role of non-custodial penalties.

Relying on maximum penalties alone as a basis to set SNPP levels is also likely to reveal anomalies and other problems with the levels at which current maximum penalties have been set. For example, a maximum penalty set by Parliament at a very high level with the worst case in mind may not reflect the typical seriousness of particular offences.

Setting a single SNPP based on the maximum penalty for offences that capture a broad range of conduct may also lead to unjust outcomes.

The challenge in setting defined terms based on the maximum penalty alone is demonstrated by applying the NSW SNPP scheme and the examples set out in Figure 3 to the offences of manslaughter, rape and carnal knowledge (referred to in the Council's Terms of Reference as offences to which a SNPP might apply).

As we discuss in Chapter 6, manslaughter is committed in a wide range of circumstances, which affects the seriousness of particular examples of the offence and, consequently, the penalty imposed. In the case of rape, the conduct captured by the offence ranges from digital penetration committed on a single occasion with no pre-thought or planning, to a pre-meditated vicious sexual attack involving sexual intercourse and extreme violence, perhaps involving a very young victim.

The offences of manslaughter and rape both carry a maximum penalty of life imprisonment. For the purposes of illustration, and because it is not possible to assign a year figure to a maximum penalty of 'life imprisonment', the consequences of applying the reasoning in *Marshall* or standardising SNPPs within 40–60 per cent of the maximum penalty, assuming a maximum penalty of 25 years, are considered.[228] As illustrated in Figure 3, depending on which methodology is applied, the defined term SNPP for these offences could range from 6 years and 3 months to 15 years. This compares with an actual average non-parole period, based on the Council's analysis, of 3 years, and an average sentence length of 8 years (for manslaughter) and 6 years and 6 months (for rape).

Arguably, there is no typical example of manslaughter or rape, and it similarly may be difficult, if not impossible, to identify examples of these offences falling in the 'middle of the range of objective seriousness'. Although grounds of departure may allow a shorter non-parole period to be set for less serious examples of offending, if the SNPP is also intended to provide a reference point or benchmark for cases to which the SNPP does not apply, the discretion courts have to set a non-parole period substantially below the SNPP might be limited.

In the case of unlawful carnal knowledge, depending on the circumstances of the case, the offence may attract a maximum penalty of either life or 14 years imprisonment. For those offences to which a 14-year maximum penalty applies, depending on which methodology is adopted, the defined term SNPP could range from 3 years and 6 months to 8 years and 5 months. This compares with an average sentence length of 12 months for offenders sentenced to imprisonment in the higher courts.

Current sentencing and parole practices in Queensland are another basis on which the SNPP levels could be set under a defined term scheme. The Council's research paper *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011) explores sentencing and parole outcomes in Queensland in some detail.

However, as discussed in Chapter 3, there would be problems in determining a 'middle of the range of objective seriousness' SNPP based on the average sentence length or average non-parole period alone. First, such sentences and non-parole periods represent *final sentences and non-parole periods* (taking into account aggravating and mitigating factors personal to the offender), rather than what courts have determined is an appropriate sentence and non-parole period on the basis of objective seriousness only. Assuming that the average sentence and non-parole period are an appropriate representation of cases falling into the mid-range of objective seriousness therefore fails to take into account the range of factors that influence sentencing outcomes; for example offenders who plead guilty and who are given a sentencing discount (sometimes in the order of a one-third reduction).[229]

Given the significance of a plea of guilty to the sentencing outcome, excluding offenders who plead not guilty from this analysis could resolve the previous problem to some extent. But this approach would still be problematic as it would not factor in the impact of other mitigating circumstances personal to the offender, and would be based on an assumption that all offenders convicted of the offence serve a term of full-time imprisonment.

Second, this approach assumes that there is an even distribution of offending conduct upon which the average is based. Average sentences and non-parole periods represent *average* lengths only. The average sentence and non-parole period will be affected not only by the presence or absence of mitigating or aggravating factors, but also by whether typical or common examples of the offending are at the high or low end of seriousness. For example, if the most common occurrences of an offence are less serious examples, then the average length of sentence and non-parole period for the offence will be skewed down. An average sentence or non-parole period is therefore unlikely to be representative of the period that is appropriate for an offence in the 'middle of the range of objective seriousness'.

Third, the Council's analysis is based on outcomes for the most serious offence only. This means that less serious examples of some offences, which typically co-occur with more serious offences (for example, indecent treatment of a child under 16 years, with maintaining a sexual relationship with a child or rape) may not be included in the pool of cases analysed, thereby suggesting that average sentences and non-parole periods are lower for the offence than they in fact are.

An alternative approach might be to try to identify individual cases that fall within the mid-range based on objective seriousness alone, and identify what sentence and non-parole period were imposed;

however, it would still be difficult, if not impossible, to determine what weight factors personal to the offender (both aggravating and mitigating) were given by the sentencing court in arriving at the final sentence. It is also likely that in doing so, there will be a very small sample of cases on which to base the setting of the SNPP.

Another challenge of setting a single defined period for each offence is the broad range of conduct captured by some offences. One approach might be to amend existing offence provisions to more narrowly define these offences, or subcategories of them, and to set the maximum penalties and SNPPs accordingly. However, for offences such as rape, having a single offence that captures a range of conduct could be viewed as necessary on the basis that the seriousness of a particular example of the offence can only be assessed in its broader context and the individual circumstances of the case.

As an alternative, subcategories of existing offences could be separately identified outside the offence provisions and SNPPs levels could be set accordingly. This approach has been adopted by the Sentencing Guidelines Council in the United Kingdom (UK), now the Sentencing Council for England and Wales, in setting starting points and sentencing ranges included in sentencing guidelines for use by the courts.[230] For example, the *Definitive Guideline on Robbery* identifies five different categories of robbery (street robbery or 'mugging', robberies of small businesses, less sophisticated commercial robberies, violent personal robberies in the home, and professionally planned commercial robberies).[231] Three of these categories are then further classified into subcategories based on the type or nature of activity involved. For example, while the maximum penalty for robbery is life imprisonment, under the category of 'street robberies' in the guideline, there are three starting points, ranging from 12 months imprisonment (where the offence includes the threat or use of minimal force and removal of property) to 8 years imprisonment (in cases where the victim is seriously injured by the use of significant force and/or use of a weapon).[232]

Structuring SNPPs in this way might overcome some of the possible difficulties of setting a single SNPP for offences capturing a broad range of conduct; however, arguably such an approach is more easily accommodated within the context of sentencing guidelines, rather than a legislative SNPP scheme.

QUESTION:

13. If a defined term SNPP scheme is adopted, how should the SNPP levels be set?

Standard percentage scheme

Setting SNPP levels under a standard percentage scheme would be more straightforward as a fixed percentage would apply irrespective of differences in maximum penalties; however, deciding what percentage should apply would have its own challenges.

The SA scheme provides a minimum non-parole period of four-fifths (80%) of the head sentence for an offence at the 'lower end of the range of objective seriousness'. There is no publicly available information for determining why this percentage was adopted and if it is based on any expressed theory or logical basis.

As discussed earlier in this chapter, Queensland has two standard percentage non-parole periods that apply in certain circumstances:

- a standard non-parole period of 50 per cent for offenders sentenced to imprisonment for more than 3 years, or found guilty of a sexual offence, and who are not declared convicted of a serious violent offence, in circumstances where the court has not set a parole eligibility date, and

- a standard minimum period of 80 per cent of their sentence or 15 years (whichever is less) for offenders declared convicted of a serious violent offence under Part 9A of the *Penalties and Sentences Act 1992* (Qld).

The 50 per cent default non-parole period only applies in instances where the court has either not suspended the sentence wholly or partially[233] (in the case of sentences of up to 5 years imprisonment[234]) or has not fixed a parole eligibility date (unless an offender has a current parole eligibility date, there is no requirement on the court to fix a date when the offender is eligible for parole).

The 80 per cent non-parole period is offence-based and its activation is automatic if a sentence of imprisonment of 10 years or more has been imposed or, in other cases where imprisonment has been imposed and the court makes a declaration that the offender is convicted of a SVO.

Possible options for developing a standard percentage SNPP scheme that applies to serious violent offences and sexual offences as a presumptive minimum period include:

- strengthening the existing 50 per cent default non-parole period provisions to create a statutory requirement that unless the court suspends the sentence in whole or in part, the court must fix a non-parole period of not less than 50 per cent of the period of imprisonment; the court would maintain discretion to impose a higher non-parole period
- creating a new SNPP by defining the SNPP as a fixed percentage of the head sentence, and imposing a statutory requirement that unless the court suspends the sentence in whole or in part, the court must apply the fixed non-parole period.

In both cases, grounds for departure could be identified to allow a court to set the non-parole period at a higher or lower level.

Based on the Council's analysis of sentencing and parole practices in Queensland,[235] average non-parole periods for serious violent offences range from about 33 per cent of the head sentence (for assaults occasioning bodily harm, producing dangerous drugs and trafficking in dangerous drugs) to 50 per cent (for attempted murder);[236] however, the actual proportion of prison sentences served in custody on average for some offences is up to 71 per cent. For some offences, such as sexual offences against children and adults, the actual time served on average is consistently above 62 per cent of average head sentences for these offences.

For the reasons discussed above, however, it may be dangerous to rely on averages as representative of actual sentencing practices and if the SNPP were to be set by reference to these some care would need to be taken. For example, although the non-parole period for armed robbery is on average around 62 per cent of the head sentence, many offenders might receive a longer or shorter sentence and/or non-parole period depending on the individual circumstances of the case. Applying a standard non-parole period is therefore likely to reduce the discretion of the court to respond to the individual circumstances of offenders.

As well, the benefits of parole as a form of supervised release in the community need to be considered. In Chapter 5, we discuss these benefits and the limitations of using actual time in custody as a measure of the 'appropriateness' of the period of actual incarceration.

QUESTIONS:

14. If a standard percentage SNPP scheme is adopted, how should the standard percentage (or percentages) be set?

15. If adopted, how should a standard percentage scheme interact with current parole provisions in Queensland? For example, should the scheme be confined to sentences of imprisonment over 3 years for serious violent offences (where no SVO declaration is made) thereby retaining the power for a court to set a court-ordered release date for sentences of 3 years or less?

4.8 Grounds for departure

The Attorney-General's Terms of Reference request the Council's advice on the grounds upon which a court should be permitted to depart from the SNPP and also refer to the need to maintain judicial discretion to impose a just and appropriate sentence and to have regard to the sentencing principles set out in the *Penalties and Sentences Act*. Taking these considerations into account, clear and concise grounds for a court to decline to apply a SNPP will need to be developed in order to:

- avoid the unintended creation of a mandatory sentencing regime by the creation of fixed penalties that are not sufficiently flexible to accommodate differences in the circumstances of the offence and the offender's personal circumstances
- accord with existing legislative requirements that prescribe that certain factors must be taken into account when sentencing
- support the application of judicial independence in the sentencing process and accord with existing sentencing practices which allow courts to exercise their discretion to increase or decrease a sentence and set an appropriate non-parole period
- provide for fairness and transparency in sentencing through the provision of clear guidance to the courts on when a court can depart; a failure to provide this form of guidance is likely to result in departures from the SNPP that are not adequately explained or justified, and an increase in appeals
- respond to, and act in accordance with, the purposes of sentencing and the principles and factors to be taken into account by a court in sentencing as set out in section 9 and related provisions of the *Penalties and Sentences Act*, and
- support the principle of proportionality – which is that the severity of the sentence should be in accordance with the seriousness of the offence. The sentencing process must be sensitive to and capable of responding to the seriousness of a given offence when compared with other examples of the same offence, and to accommodate the personal circumstances of the offender. This supports individualised justice, where each case must be treated on its merits.

Defined term scheme

If a defined term scheme is adopted and the SNPP is intended to be representative of a particular level of offending (for example, mid-range offences), identifying the grounds of departure will be complex because of the need to identify:

- what would bring a case outside that level of seriousness (for example, outside the mid-range)
- what additional grounds there should be for a court to decline to apply the SNPP, even when the case reaches the defined level of seriousness, and
- what factors should support setting a lower and/or higher non-parole period than the SNPP.

The grounds of departure may be broad and generic (for example, allowing courts to depart from the SNPP in individual cases if it is in the interests of justice to do so), or specify particular factors to be

taken into account, and some grounds may be based on those already taken into account as part of the sentencing process. For example, the *Penalties and Sentences Act* already requires courts to have regard to a range of factors and circumstances that influence the sentence imposed including:

- factors to be taken into account when sentencing an offender for an offence involving violence against another person or a sexual offence committed in relation to a child (see s 9)
- factors that must be taken into account when sentencing offenders generally – for example a guilty plea (s 13) or cooperation with law enforcement authorities (s 13A).

In NSW, section 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows a court to depart from the SNPP if the court determines that there are reasons for setting a non-parole period that is longer or shorter than the SNPP. A court must make a record of its reasons for increasing or reducing the SNPP, and identify in its reasons each factor that it took into account.

The reasons a court may set a non-parole period that is longer or shorter are those set out in section 21A of the Act. Section 21A includes a broad non-exhaustive list of aggravating and mitigating factors to be taken into account by a court in sentencing. Some of these factors are similar to those set out in section 9 of the Queensland *Penalties and Sentences Act*. The NSW factors are categorised into aggravating and mitigating factors, as well as other general factors, and are more specific in nature than the factors set out in the Queensland legislation. Under section 21A, the court is also permitted to take into account 'any other objective or subjective factor that affects the relative seriousness of the offence', as well as 'any other matters that are required or permitted to be taken into account by the court under any Act or rule of law'.

Importantly, a plea of guilty is identified under a number of schemes that are based on a representative level of offending (for example, the mid-range of objective seriousness) as a ground for departing from the SNPP. This is because:

- a plea of guilty is recognised, at law, as a basis on which a court may reduce the sentence that would have been imposed had the offender been convicted after trial (see, for example, section 13 of the *Penalties and Sentences Act*), and
- a decision by an offender to plead guilty is unrelated to the objective seriousness of the offence, and is relevant only to the determination of the penalty to be imposed.

Even if a SNPP is defined in terms of a 'typical offence', it would still make sense to set the SNPP by reference to offenders convicted after trial, and for a plea of guilty to constitute one of the grounds of departure. This is because, although a plea of guilty may be taken into account by courts in sentencing as a mitigating factor, a decision by a defendant to plead not guilty is not in itself an aggravating factor.

If an approach similar to the NSW approach is adopted, the section 9 principles and factors could be adopted as the factors that a court is permitted to take into account when determining whether to set a higher or lower non-parole period than the SNPP. However, one of the possible consequences of adopting this approach is that it is likely to lead to increases in court time and add to the complexity of the sentencing process, particularly if the court is required to provide detailed reasons for each ground of departure from the SNPP (as is required in NSW).

QUESTION:

16. If a defined term SNPP scheme is adopted, on what grounds should courts be permitted to set a longer or shorter non-parole period than the SNPP?

Standard percentage scheme

Under a standard percentage scheme, although a set percentage of the head sentence (for example, 60%) might be set as the presumptive non-parole period for all offences captured by the scheme, a court might have broad discretion to depart to set either a higher or a lower non-parole period – for example, in any circumstance in which it considers it is 'in the interests of justice' to do so.

Alternatively the court may be permitted to depart from the scheme only in defined circumstances – for example, if the offender has pleaded guilty, or there are specific factors that reduce the offender's culpability, such as the offender's youth, mental condition and/or intellectual capacity and, in the case of offences such as carnal knowledge with or of children under 16 years, the closeness in age between the offender and the victim.

Both the NT and SA provide standard percentage schemes that are based on a representation of a range of objective seriousness. These schemes also provide a range of different grounds for departure from the SNPP which include:

- specified grounds to increase the SNPP in murder cases (NT only)
- in imposing a longer SNPP period – any objective or subjective factors affecting the relative seriousness of the offence (both NT and SA)
- in imposing a shorter SNPP period – the identification and particularisation of exceptional or special reasons to depart (both NT and SA); these reasons include:
    - that the victim's conduct or condition substantially mitigated the offender's conduct
    - a guilty plea and the circumstances of the plea
    - the cooperation of the offender with law enforcement authorities
    - any previous criminal history, and
- in declining to impose a SNPP the reasons – including the level of culpability for the offence, community interests (retribution, punishment, deterrence, protection), the criminal history of the offender, the behaviour of the person during any previous period of release on parole or conditional release.

As discussed in Chapter 3, despite there being legislated grounds for departure, there have been a number of appeals initiated in SA and NT questioning the basis on which sentencing courts have departed from the standard or fixed non-parole periods, in particular in relation to fixing shorter non-parole periods. It is possible that this is to some extent a consequence of these schemes being based on a representative level of offending, rather than on scheme offences regardless of their level of objective seriousness.

QUESTION:

17. If a standard percentage SNPP scheme is adopted, on what grounds should courts be permitted to set a longer or shorter non-parole period than the SNPP?

4.9 How would a SNPP scheme operate with the SVO provisions?

Different parole eligibility criteria apply to offenders declared by a court as convicted of a 'serious violent offence' (SVO), and therefore under the Terms of Reference the Council has been tasked with considering how a SNPP might operate with the existing SVO provisions.

Offenders declared convicted of a SVO are generally eligible for parole after serving at least 80 per cent of their sentence, or 15 years (whichever is less);[237] the court may also set a later parole date.[238]

Whether an offender is declared convicted of a 'serious violent offence' depends on a range of factors. If an offender is convicted of a listed offence and sentenced to 10 or more years imprisonment, this declaration is mandatory.[239] In other cases, making such a declaration is discretionary.[240]

Where a declaration is not mandatory, the basic premise is that the offence must be at the higher or more serious end of offences of its type to attract SVO status.[241]

How the existing SVO scheme might operate alongside a new SNPP scheme in Queensland will depend on whether a defined term scheme or a standard percentage scheme is adopted.

To fulfil the requirements of a SVO declaration under a defined term scheme, the court could be required, for example, to:

- have regard to the SNPP for the serious violent offence
- consider whether the offence warrants a longer (or shorter) non-parole period than the SNPP because of its relative seriousness
- set the non-parole period accordingly
- make a declaration that the offender is being convicted of a serious violent offence, and
- calculate the head sentence based on the non-parole period – that is, non-parole period + (non-parole period × 0.25) = head sentence.

This creates a 'bottom-up' sentencing approach that has been criticised in NSW as being overly cumbersome (see Chapter 3).

Alternatively, a defined term SNPP scheme could exclude offences that attract an SVO declaration, for example on the basis that these offences are likely to result in significant terms of imprisonment regardless of the existence of a SNPP.

A standard percentage scheme could operate more effectively with the existing SVO provisions; this is because this option would allow a SNPP to come into play only in relation to serious violent offences that do not automatically attract a declaration or, in other cases, where a court determines that the nature of the offending does not warrant the court declaring the offender as convicted of a SVO. Sentencing courts could either make a SVO declaration resulting in a non-parole period of 80 per cent, or refrain from making such a declaration, resulting in the non-parole period being arrived at by virtue of the SNPP percentage.

QUESTION:

18. What changes are required to the existing SVO provisions to ensure their complementary operation with a SNPP scheme if:
- a defined term SNPP scheme is adopted, or
- a standard percentage SNPP scheme is adopted?

4.10 Conclusion

In this chapter, we have explored two different models for structuring a SNPP scheme, and how a SNPP scheme might operate in a complementary way with current provisions relating to parole.

As we discuss later in this paper, the type of scheme adopted might not only affect the operation of the scheme, but also the type of offences recommended for inclusion in it. For example, under a defined term scheme, certain offences could be excluded on the basis of the broad range of conduct captured and levels of offence seriousness, whereas a standard proportion SNPP scheme might more readily accommodate these differences. We discuss these matters, and the possible grounds for selecting offences, in the following chapters of this paper (Chapter 5 and 6).

CHAPTER 5
SELECTING OFFENCES FOR A SNPP SCHEME

In the Terms of Reference, the Government has expressed the intention that a SNPP scheme is to apply to serious violent offences and sexual offences and, at a minimum, the offences of:

- murder
- manslaughter
- rape, and
- child sex offences.

With the exception of murder, many of these offences already fall within Queensland's existing 'serious violent offence' (SVO) provisions under Part 9A of the *Penalties and Sentences Act 1992* (Qld). In responding to the Terms of Reference, the Council has been asked to consider how the SNPP regime is to operate in the context of the SVO provisions, which was discussed in Chapter 4.

5.1 What offences are currently defined as 'serious violent offences' and 'sexual offences'?

The *Penalties and Sentences Act* defines what are considered to be 'serious violent offences' and 'sexual offences' for the purposes of provisions relating to parole. However, these definitions do not necessarily need to be adopted for the purposes of a SNPP scheme. The question the Council has been asked to consider is which of these offences are appropriate for inclusion in a Queensland SNPP scheme.

A list of serious violent offences and sexual offences under the Act, along with their maximum penalties and the ability for them to be dealt with summarily (that is, by the Magistrates Court) is set out in Appendix 3.

Serious violent offences

The offences currently defined as being 'serious violent offences' are those included in Schedule 1 to the *Penalties and Sentences Act*. They range from offences carrying a life sentence (such as manslaughter, rape, maintaining a sexual relationship with a child, and armed robbery), down to offences with a maximum penalty of 2 years imprisonment (the offences of preparing to escape from lawful custody and threatening violence). This list also includes some drug offences (trafficking in dangerous drugs, supplying dangerous drugs if the offence is one of aggravated supply, and producing dangerous drugs if certain circumstances apply).

Sexual offences

The definition of 'sexual offences' in section 160 of the *Penalties and Sentences Act* determines how a court must approach the task of setting a non-parole period. In the case of an offender convicted of a 'sexual offence', the court cannot set a parole release date even when the sentence is a prison sentence of 3 years or less, although a parole eligibility date may (or, if the offender had a current parole eligibility date or release date, must) be set.

The definition of 'sexual offences' is found in the *Corrective Services Act 2006* (Qld)[242] and governs the management of prisoners convicted of these offences, including the grounds on which they can be granted leave and prohibiting them from being transferred to a work camp.

The offences classified as 'sexual offences' include a wider range of sexual offences than those defined as 'serious violent offences'. For example, child pornography offences are not included in the list of serious violent offences, but fall within the definition of a 'sexual offence'.[243] (See further in Appendix 3). However, there is a high degree of overlap between the offences captured within these definitions.

In addition to sexual offences under the Criminal Code (Qld), the definition of a 'sexual offence' includes offences under the *Classification of Computer Games and Images Act 1995* (Qld), the *Classification of Films Act 1991* (Qld) and the *Classification of Publications Act 1991* (Qld), as well as some Commonwealth offences.[244]

5.2 What offences do other similar schemes apply to?

New South Wales

The offences initially included in the NSW SNPP scheme were:

- murder, conspiracy to murder and attempted murder
- wounding or grievous bodily harm with intent to do bodily harm or resist arrest
- certain assault offences involving injury to police officers
- certain sexual offences, including sexual intercourse with a child under 10 years
- certain robbery and break and enter offences
- car-jacking
- certain offences involving commercial quantities of prohibited drugs, including manufacture and production
- unauthorised possession or use of firearms, and
- intentionally causing a bushfire.[245]

Over time, the offences to which the NSW SNPP scheme applies have been expanded to include new offences and subcategories of:

- murder, where the victim was a child under 18 years
- reckless causing of grievous bodily harm in company
- reckless causing of grievous bodily harm
- reckless wounding in company
- reckless wounding
- knowingly facilitating a car or boat rebirthing activity
- cultivation, supply or possession of prohibited plants involving not less than the large commercial quantity (if any) specified
- unauthorised sale of prohibited firearm or pistol

- unauthorised sale of firearms on an ongoing basis
- unauthorised possession of more than three firearms any one of which is a prohibited firearm or pistol, and
- unauthorised possession or use of a prohibited weapon – where the offence is prosecuted on indictment.[246]

Further amendments introduced a new aggravated offence of sexual intercourse with a child under the age of 10 years.[247]

How were the offences selected?

There is limited information about the grounds on which the original offences included in the NSW scheme were selected.

At the time of the introduction of the NSW SNPP, a number of references to 'community expectations' were made in the Second Reading Speech for the Bill.[248]

Later changes to the SNPP scheme to include other serious offences involving personal violence and drug and firearm offences were intended to 'send a clear message to the community that the Government will not tolerate crimes of personal violence' and to 'strike at organised crime and crimes committed for profit', and 'where there is a strong need for general deterrence and consistency in sentencing'.[249]

South Australia and the Northern Territory

The SA scheme does not identify specific offences that fall within the scope of the scheme, but rather provides that the scheme is to apply to 'serious offences against the person'. A 'serious offence against the person' is defined as a major indictable offence (other than murder) that results in the death of the victim or the victim suffering total incapacity.[250] The definition includes conspiracy to commit such an offence, or aiding, abetting, counselling or procuring the commission of such an offence.

In the NT, the scheme applies to the offence of murder and certain sexual offences. The offence of murder carries a SNPP of 20 years, which must be increased to 25 years in certain cases.[251] Fixed non-parole periods of 70 per cent of the head sentence apply to sexual offences involving sexual intercourse without consent where a prison sentence is imposed.[252] Similar provisions apply to sexual offences committed against children under 16 years.[253] The court also has the residual power to decline to fix a non-parole period in such cases;[254] if no non-parole period is set, the offender must serve the whole of his or her sentence.

It is unclear how the offences in the SA and NT schemes were selected.

Canada and New Zealand

In Canada, a number of offences carry a mandatory minimum sentence including murder, sexual offences involving children, offences involving firearms and weapons, impaired driving, and other miscellaneous offences (high treason and illegal betting).

The NZ sentencing escalation regime applies to a broad range of offences including sexual offences and child sexual offences, murder, manslaughter, offences involving personal violence, firearm offences and robbery.[255] The objective of these reforms is 'to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences'.[256] Those offences that are defined as 'serious violent offences' carry a maximum penalty of at least 7 years imprisonment.

5.3 How might offences be selected?

One option is that the Queensland SNPP scheme be limited to offences involving harm to the person, based on criteria such as:

- the maximum penalty for the offence (for example, offences carrying a maximum penalty of 10 years imprisonment or more)
- current sentencing practices (for example, offences for which a high proportion of offenders are sentenced to significant terms of imprisonment), and
- community views on relative offence seriousness.

Once these offences are identified, further filters could be applied. For example:

- to meet the objective of consistency the scheme could be focused on offences where there is a high degree of variability in the length and type of sentences imposed, and/or parole eligibility dates; and
- if meeting community expectations is the primary concern, an assessment might be made about offences based on community views on the appropriateness of current sentencing levels.

Another option might be to target specific types of high-risk offenders, rather than simply particular types of offences. Along these lines, the scheme could either specify the offenders to which it applies, or provide grounds of departure that screen out lower-risk offenders.

Consideration might also be given to how possible impacts on Indigenous offenders, and other vulnerable offenders, might be minimised, particularly given the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system and commitments by the Queensland Government to address this.[257]

Research by the Council confirms that although Aboriginal and Torres Strait Islander offenders represent a smaller proportion of offenders sentenced to full-time imprisonment in the Queensland higher courts than non-Indigenous offenders, among offenders who are sentenced to imprisonment, they are much more likely than non-Indigenous offenders to have been convicted of a serious violent offence or sexual offence (71% compared with 53% of non-Indigenous offenders).[258] Reducing the possible differential impacts of a SNPP scheme on these offenders could be achieved, for example, by excluding less serious forms of violent offending for which Indigenous people are significantly overrepresented in prison (such as wounding and assault occasioning bodily harm),[259] and by allowing for the subjective circumstances of these offenders[260] to be properly taken into account in determining if a SNPP should apply.

Factors supporting the inclusion and exclusion of scheme offences

A range of factors might support the inclusion or exclusion of a particular offence in a SNPP scheme. What factors are ultimately considered as relevant to this selection depends on what the scheme is aiming to achieve. They include:

- the objective seriousness of the offence and indicators of whether current time spent in prison by offenders is considered appropriate (to ensure that serious violent offenders and sexual offenders serve an appropriate period of actual incarceration, for purposes such as just punishment, deterrence and the protection of the community)
- evidence of variability in sentencing outcomes (to meet the objective of consistency in sentencing), and

- inadequacy of current guidance to the courts on appropriate sentencing ranges and non-parole periods, for example, as evidenced by the number of successful appeals against sentence and by the nature of appellate guidance (to ensure that sentencing courts are provided with the necessary guidance in sentencing offenders convicted of serious violent offences and sexual offences).

We explore some of these factors below, together with factors that might affect the application of the scheme, such as:

- whether offenders charged with the offence can only be dealt with by the higher courts (where a SNPP is likely to apply), or also by the Magistrates Court (which might limit the usefulness of a SNPP scheme)
- guilty plea rates, and the potential for SNPPs to affect these rates (for example, to encourage a guilty plea in appropriate cases), and
- whether the offence covers a narrow or relatively broad range of conduct (which would suggest a NSW-style defined term scheme, which sets a specific year value for offences falling into the mid-range of objective seriousness may not be appropriate).

In Chapter 6, we consider how this approach might be applied to specific offences.

1. Selecting offences on the basis of 'objective seriousness'

What is 'objective seriousness' and how can it be measured?

Offence seriousness, also referred to as the gravity of the offence, involves two distinct elements:

- the harm or potential harm done, or risked, by the criminal act (for example, in the case of violent offences, death or serious injury), and
- the culpability or blameworthiness of the offender – including the offender's intentions and motives, and what he or she realised or should have realised about the consequences of his or her actions.[261]

The 'objective seriousness' of an offence refers to factors directly relevant to the commission of the offence, as distinct from matters in mitigation (such as a guilty plea, steps by the offender to rehabilitate or his or her personal circumstances). Objective seriousness is tied to the common law principle of proportionality. In accordance with this principle, affirmed by the High Court in *Veen v The Queen (No2)*, a sentence should not exceed that which is appropriate to the gravity of the offence in light of its objective circumstances.[262]

The process of considering the objective seriousness of an offence can be approached in a number of ways. For example, a SNPP scheme targeted at offences of high objective seriousness might look at indicators of seriousness such as:

- the maximum penalty for the offence
- the proportion of offenders sentenced to imprisonment and average sentence lengths, and
- community views on the relative seriousness of the offence.

Maximum penalty as an indicator of offence seriousness

The maximum penalty provides an important guide as to how serious Parliament considers an individual offence to be relative to other offences.[263]

The current maximum penalties that apply to serious violent offences and sexual offences are set out in Appendix 3. A sample of these offences is included in Table 2. As Table 2 illustrates, although there is

some level of variation between the maximum penalties that apply to individual offences, a number of these offences carry the same maximum penalty.

Selecting offences to be included in a SNPP on the basis of maximum penalties alone would have the benefit of capturing those offences that Parliament considers are the most serious. However, as a SNPP is also intended to improve consistency in sentencing, this approach might exclude some offences that have high rates of sentence variability although, based on the Council's analysis of sentencing outcomes reported in its research paper *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011), there is no evidence indicating that high sentence length variability is a problem in terms of the sentencing practices of the Queensland higher courts.

One of the limitations of the maximum penalty is that it is set and reserved for cases falling within the worst category of offending.[264] Therefore it may not be a good indicator of how serious the most common examples of the offence are in comparison with typical examples of other offences. For example, the maximum penalty might be set quite high to allow for the possibility of a particularly heinous example of the offence, while most offences fall towards the lower end of offence seriousness.

Sentencing practices as an indicator of offence seriousness

Relying on current sentencing practices as a guide to offence seriousness might avoid some of the problems identified with applying the maximum penalty; however relying on sentencing practices as a basis for selecting offences still has a number of limitations.

Table 3 below represents offence seriousness on the basis of median imprisonment sentence lengths for serious violent offences and sexual offences. This table does not take into account offences that attracted a sentence other than full-time imprisonment. The Council explores sentencing practices for serious violent offences and sexual offences in more detail in its research paper *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).

Although a number of offences carry the same maximum penalty, there is considerable variation in the average sentences imposed by the courts for these offences. The reasons for this might include, as discussed above, that the seriousness of the most common or typical example of these offences will vary, as will the range of conduct captured (for example, with some offences being quite narrowly defined, and others encompassing a broad range of conduct from relatively minor forms of offending to quite serious conduct). In other words, the variation in average sentences may indicate the typical seriousness of offences committed and the range of conduct captured, rather than how serious the worst example of the offence might be.

The basis on which the average or median sentence is calculated also means this measure must be approached with some caution. This is because the analysis is based on the most serious offence charged only, rather than all examples of the offence. Some offences (such as incest) are likely to also involve the commission of more serious offences (for example, maintaining a sexual relationship with a child under 16 years). Using the most serious offence to summarise data will mean that information on the less serious offence is not captured in the analysis process. This means that calculated average sentences for less serious offences may misrepresent true sentencing levels. Many might argue that it is only by looking at the whole case context that it is possible to get a true sense of the seriousness of the offending. Again, this may suggest that current sentencing practices may provide only one possible indicator of true offence seriousness.

Community views on offence seriousness

Another way of approaching the task of offence selection for a SNPP scheme might be to determine which offences the community considers to be the most serious.

There have been a number of studies examining which offences the community considers to be the most serious which have found that violent offences are usually rated as the most serious.[265] However, these previous studies have a number of limitations including that:

- they are usually based on brief descriptions of different types of offences with little analysis of the underlying assumptions and beliefs of participants influencing these rankings
- they do not consider factors that may affect culpability, such as whether an offence is premeditated or planned, or committed impulsively, and
- the attitudes expressed may be based on false assumptions or beliefs – for example, concerning the prevalence of crime, and current sentencing practices.[266]

There is little available Australian data on public opinion about offence seriousness.[267] Because of the scope of the work required to undertake this task – particularly if this research was to include views on the seriousness of a large number of offences – approaching the selection of offences on this basis would take substantial time and effort, and community members surveyed might hold quite different views on this matter.

2. Selecting offences on the basis of ensuring that sentences and non-parole periods are 'appropriate'

Although the concept of 'appropriateness' is difficult to define, there are a number of general indicators that might provide some evidence that current sentencing levels and non-parole periods need to be reviewed, for example:

- a high rate of Attorney-General appeals with a high success rate – which may suggest that sentences imposed at first instance are inadequate given the seriousness of the offence
- a high proportion of offenders spending substantial time in prison beyond their parole eligibility date (for example, for continued access to treatment programs, or as a result of decisions made by the parole boards), and
- evidence of community dissatisfaction with sentences imposed.

Each of these approaches has limitations, which we discuss below.

Table 2: Comparative maximum penalties for serious violent offences and sexual offences as defined in the Penalties and Sentences Act 1992 (Qld) (as at 31 March 2011)[1]

Type of Offence	Term of imprisonment				
	7	10	14	20	Life
Murder (mandatory sentence of life imprisonment)					
Attempt to murder					
Manslaughter					
Rape					
Maintaining a sexual relationship with a child					
Carnal knowledge with or of children under 16 years – child under 12 or under the offender's guardianship or care					
Sexual assaults – offender is or pretends to be armed or is in company; or the indecent assault includes penetrating the complainant's vagina, vulva or anus with something other than a penis					
Acts intended to cause grievous bodily harm and other malicious acts					
Unlawful sodomy – child under 12, or a child or person with impairment of the mind who is the offender's lineal descendant or under the offender's guardianship or care)					
Incest					
Burglary – if the offender uses or threatens to use actual violence, or is or pretends to be armed					
Robbery – if the offender is armed, or is in company, or wounds or uses any other personal violence to any person					
Attempted robbery – if the offender is armed and wounds, or uses other personal violence to, any person					
Indecent treatment of children under 16 years – child under 12 or offender's lineal descendant, or under the offender's guardianship or care					
Unlawful sodomy – child 12–17 yrs or person with an impairment of the mind (not offender's lineal descendant, or under the offender's guardianship or care)					
Attempt to commit rape					
Carnal knowledge with or of child 12–15 years (not under offender's guardianship or care)					
Indecent treatment of children under 16 years – without circumstance of aggravation					
Sexual assaults – if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person					
Torture					
Robbery – no circumstance of aggravation					
Grievous bodily harm					
Attempted robbery – if the offender is or pretends to be armed or is in company with one or more other person or persons					
Assaults occasioning bodily harm — offender is, or pretends to be, armed or is in company with one or more other person or persons					
Sexual assaults – no circumstance of aggravation					
Obscene publications and exhibitions depicting, or where person appearing in the indecent show or performance, is a person who is or is represented to be, a child under the age of 12 years					
Involving a child in making child exploitation material					
Making child exploitation material					
Attempted robbery – no circumstance of aggravation					
Wounding					
Assaults occasioning bodily harm – no circumstance of aggravation					

Note: 1. This table contains select offences only and does not include offences carrying a maximum penalty of less than 7 years.

Table 3: Comparative median sentence length for serious violent offences and sexual offences – higher courts Queensland, 2005–06 to 2009–10

	Average sentence provided by courts (years)																						
Type of offence	0.5	1	1.5	2	2.5	3	3.5	4	4.5	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10	11	11.5	Life
Murder																							■
Attempt to murder																						■	
Manslaughter																■							
Rape													■										
Maintaining a sexual relationship with a child												■											
Acts intended to cause grievous bodily harm and other malicious acts												■											
Unlawful sodomy												■											
Incest										■													
Attempt to commit rape										■													
Torture										■													
Robbery						■																	
Grievous bodily harm						■																	
Attempted robbery					■																		
Wounding				■																			
Indecent treatment of children under 16 years			■																				
Assaults occasioning bodily harm			■																				
Carnal knowledge with or of children under 16 years		■																					
Sexual assaults		■																					
Possessing child exploitation material		■																					
Threatening violence		■																					
Serious assaults	■																						

Appeal rates

Over the period 2007–08 to 2009–10, 1032 appeals were lodged in the Queensland Court of Appeal (including appeals against sentence, appeals against conviction, and applications for an extension of time within which to appeal or apply for leave to appeal).[268] Only 46 of these were appeals against a sentence initiated by the Attorney-General,[269] of which 25 (or 54%) were successful.[270]

The appeal figures confirm that Attorney-General appeals against sentence in Queensland are initiated, as the High Court has said they should be,[271] only in exceptional cases.

Given the small number of cases that are successfully appealed, relying on appeal rates will not provide an adequate basis on which to identify offences for which a SNPP should apply.

Time offenders spend in custody past parole eligibility and breach rates

Identifying offences for which offenders, on average, spend significant periods in prison past their parole eligibility date could provide a measure of how 'appropriate' current non-parole periods are in terms of community safety and rehabilitation. An advantage of selecting offences for a SNPP scheme based on actual time spent in custody is that it reflects current practices of the parole boards which consider issues of community safety paramount,[272] and take offender rehabilitation into account. It might also minimise the impact of a SNPP scheme in terms of any possible increase in prisoner numbers.

This approach, however, has a number of limitations. First, relying on actual release practices would not provide a guide to how appropriate sentences are in terms of punishing offenders 'to an extent or in a way that is just in all the circumstances' (*Penalties and Sentences Act* s 9(1)(a)) or meeting the purposes of general or specific deterrence (*Penalties and Sentences Act* s 9(1)(c)) – assuming these purposes are valid.[273]

Second, the assumption that the delayed release of these offenders indicates a need for longer periods of incarceration fails to adequately acknowledge the many reasons for an offender not being granted parole. Some of these reasons relate to the offenders themselves and their social supports (for example, whether they have participated in programs, their risk of re-offending and the degree of risk, whether they have complied with conditions of previous parole orders, and whether they have somewhere to live on their release), and others to the way the prison and parole system currently operates, including administrative processes for applying for parole, and the availability of programs both in prison and in the community.

From a practical perspective, requiring courts to set longer non-parole periods for these offences under a SNPP scheme might also have other consequences, such as reducing the incentive a shorter non-parole period might provide to some offenders to address their offending behaviour while in prison. It also would treat all offenders the same, when some offenders might not pose an ongoing risk to the community.

In addition to providing prisoners with an incentive for rehabilitation, parole (and the possibility of early release) is said to have a number of important benefits including:

- supporting better prisoner management by encouraging good behaviour by prisoners while in prison
- allowing for a graduated release into the community through supervision, reducing the risks of re-offending, and
- reducing the financial cost and burden on the criminal justice system, taking into account the lower costs of community supervision compared with incarceration and lower risks of re-offending.[274]

Ensuring that parole boards retain discretion in the timing of a prisoner's release from prison enables those boards to determine when it is appropriate to release particular prisoners into the community, taking into account these offenders' very different circumstances and backgrounds.[275]

Leaving aside the limitations of using parole eligibility and release data as a basis for selecting offences, there are two approaches that could be considered for selecting offences on the basis of time spent in custody:

1. to focus on offences where prisoners, on average, are serving a much higher proportion of their sentence in prison than the parole eligibility date set by the court, and
2. to include offences for which prisoners are spending substantially more time (for example, more than 1 year) in prison past their parole eligibility dates.

The first approach would apply the same criteria to offences, regardless of the sentence length. The second is likely to capture offences only at the more serious end of the spectrum for which offenders are being sentenced to significant prison time.

The Council explores the offences that meet these criteria in its paper on current sentencing and parole practices for serious violent offences and sexual offences – *Sentencing for Serious Violent Offences and Sexual Offences in Queensland* (2011).[276] On the basis of this research, it seems that offenders convicted of sexual offences are the most likely to serve substantial periods of time in prison past their parole eligibility dates.

Parole breach rates are another possible measure of whether the current time offenders are spending in prison for particular offences is 'appropriate'. However, this approach would have similar limitations to using actual time in custody to select offences.

Community views on whether current sentencing practices and non-parole periods are appropriate

It is important to know how members of the community view the seriousness of certain offences and the appropriateness of sentencing practices and non-parole periods. For example, particular conduct such as assaults on police officers, emergency workers, taxi drivers and community workers raises considerable community concern. There is no available Queensland data at present to measure community views in this regard.

One of the criticisms of community views as measured by public opinion surveys is that they measure 'top of the head' responses and do not take into account the real-life circumstances under which offences are committed and the complex range of matters that typically affect on sentencing. We explore some of the limitations of this research in Chapter 2 of this paper.

As with research on community views on relative offence seriousness, it is likely that any Queensland-specific research on community views about these matters, particularly on an offence-by-offence basis, would take substantial time and effort, and might not result in consistent findings across those surveyed.

For these reasons, while community views on these issues are important, it may be difficult to rely on community views alone as a basis for selecting offences for inclusion in a Queensland SNPP scheme.

3. Selecting offences based on levels of sentence variability

As one of the objectives of the SNPP scheme is sentencing consistency, another approach to selecting offences might be to focus on those offences for which there is a high degree of sentence variability.

In the Council Secretariat's meetings with NSW legal practitioners, a number of those consulted suggested high levels of sentence length variability could be used in Queensland as a basis for selecting offences for a Queensland SNPP scheme.[277]

The Council's analysis of sentencing outcomes in the higher courts for offences currently defined as serious violent offences and sexual offences, does not show high levels of sentence length variability across most offence categories for offenders sentenced to full-time imprisonment. However, some offences show higher levels of sentence length variability than others. This is discussed in detail in the Council's research paper *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).

In assessing the 'acceptability' of sentence outcome variability, it is important to consider the range of conduct the offence captures (for example, with high sentence length variability possibly simply reflecting the nature of the offence itself).

Another consideration in assessing sentencing outcome variability is the broader sentencing practices of the courts for the offence, including the proportion of offenders receiving sentences other than full-time imprisonment.

An approach that focuses on this as one of the principal criteria for selecting offences for inclusion would therefore need to take factors such as the scope of behaviour captured by particular offences, and broader sentencing practices into account.

4. Using SNPPs to provide additional guidance to the courts in sentencing

In Chapter 2 we discussed a number of different forms of guidance which judges currently have in arriving at an appropriate sentence. The question of whether current guidance for judges is adequate, or requires some enhancement, is explored further in Chapter 8.

On an individual offence basis, arguments in favour of including a specific offence in a SNPP scheme might include that the level of guidance provided (for example, by the maximum penalty, sentencing guidelines set out in legislation, similar cases and appellate court decisions) could be enhanced.

Conversely, reasons for excluding an offence from the scope of a SNPP scheme might include that there is appropriate guidance for courts at first instance in sentencing offenders convicted of the offence and that there are good levels of consistency in sentencing, or that any significant variation in sentencing outcomes can be explained by the nature of the offence itself.

5. Selecting offences based on capacity for deterrence

General and specific deterrence are two of the purposes for which a sentence can be imposed in Queensland under the *Penalties and Sentences Act*.[278]

General deterrence, although problematic from a theoretical and practical perspective, has been suggested by the courts to be most beneficial in relation to offences:

- that are prevalent[279]
- where public safety is at risk[280]
- that are hard to detect[281]
- that involve a breach of trust, or[282]
- where people in a vulnerable position need protection.[283]

Deterrence, including the prevalence of an offence, has been one of the grounds on which some jurisdictions have targeted offences for inclusion in SNPP and minimum sentencing schemes. For example, under the current proposals in Israel to introduce starting sentences, the Ministerial Committee on Legislation has determined that starting sentences should be assigned to severe and frequent offences and should be tabled for debate before being incorporated into the Bill introducing the scheme.[284]

One of the main criticisms of general deterrence is that it assumes a degree of rational thought on the part of a potential offender to make a decision not to offend. This is particularly problematic in relation to an offender who is not in a state to make such a choice – for example, because of intoxication or drugs, a high emotional state such as in cases of provocation or self-defence, and in most cases where premeditation was not an aspect of the offending.

Unlike general deterrence, which aims to broadly influence future offending behaviour, specific deterrence aims to prevent future offending by an individual on the basis that it is a person's propensity to re-offend that is the main determinant of the sentence imposed, although it has been suggested that 'logically an offender's history of repeat offending also points to the conclusion of individual deterrence as having little effect'.[285]

One of the challenges in selecting offences to be included in a SNPP scheme on this basis is the limited evidence that either general or specific deterrence in a sentencing context is effective in reducing offending.[286] Strong criticism has been made of deterrence as a basis for sentencing policy. In the absence of evidence about the deterrent effect of SNPPs on offending, the inclusion of offences in a Queensland SNPP scheme on this basis could be viewed as unjustified.

6. Procedural aspects of offence selection

Current sentencing practices

Because SNPPs in NSW and other jurisdictions apply only in circumstances where the court imposes a sentence of full-time imprisonment, a Queensland SNPP scheme is likely to be of most relevance to offences that already attract a high rate of imprisonment and for which a non-parole period must be set.

However, it cannot be assumed that sentencing practices will remain the same after the introduction of SNPPs – particularly if a NSW-style scheme is adopted. Based on the NSW experience, it is probable that there will be an increase in full-time imprisonment rates for some offences following their inclusion in the scheme.[287] Selecting offences on the basis of current imprisonment rates alone, therefore, may result in the exclusion of some offences unnecessarily.

Offences which can be dealt with by the Magistrates Court

The NSW SNPP scheme includes some indictable offences which can be tried summarily, but only applies to an offender if he or she is sentenced in the NSW District Court or Supreme Court.

There are three broad categories of indictable offences in Queensland that can be dealt with in the Magistrates Court:

- offences that must be heard summarily unless the defendant elects for a trial by jury (presumption in favour of summary disposal)[288]
- offences that must be heard and decided summarily on the election of the prosecution,[289] and
- offences that must be heard and decided summarily (with neither the defendant or prosecution having the power to elect otherwise).[290]

In all three cases, a magistrate must abstain from exercising this jurisdiction 'if satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction' (that is, by a term of imprisonment of up to 3 years).[291]

The currently defined serious violent offences and sexual offences that can be dealt with summarily are set out in Appendix 3.

Based on the NSW experience, if a Queensland SNPP scheme applies to indictable offences that can be dealt with summarily, it may have implications for how cases are currently dealt with, and increase the workload of the Magistrates Court and the prosecution, for example, as a result of:

- more offenders choosing to have their matters dealt with by the Magistrates Court (by not making an election to have their cases heard in the higher courts) to bring themselves outside the scope of the scheme, and
- for those matters where the prosecution has the power of election, the need for the prosecution to more closely examine whether an election to have a matter heard and decided in the Magistrates Court is appropriate as a result of the offence carrying a SNPP.[292]

If a Queensland SNPP scheme similarly applies to some indictable offences that can be dealt with summarily, it may limit its usefulness and may affect decisions made by prosecutors and defendants concerning which court should deal with these offences. For example, in cases where a defendant can elect to have their case determined in the higher courts, he or she may be less likely to elect to do so knowing that the offence carries a SNPP. Prosecutors may also be more reluctant for offences where they have the power of election to have the offence dealt with in the Magistrates Court, to exercise this power.

Confining the scheme to offences that are strictly indictable (that is, that can only be dealt with in the higher courts) might overcome these issues, but could potentially rule out serious offences to which the scheme should arguably apply.

Impact on guilty pleas

Guilty pleas are recognised as having a number of potential benefits including saving the community the expense of a contested hearing, reducing court delays, and sparing witnesses (including victims) the stress of having to give evidence.[293] There are a number of factors that may contribute to a person deciding to plead guilty, including the strength of the evidence against that person.

The benefits of a guilty plea are recognised in section 13(1) of the *Penalties and Sentences Act* which provides that a court in sentencing 'must take the guilty plea into account', and 'may reduce the sentence that it would have imposed had the offender not pleaded guilty'.

In Queensland, based on current plea data, there seems to be very limited capacity for a SNPP scheme to encourage guilty pleas. Of serious violent offenders and sexual offenders sentenced by the Queensland higher courts, 92 per cent currently plead guilty.[294]

In some cases, such as murder, an extremely low proportion of offenders pleading guilty might be expected given this offence in Queensland attracts a mandatory life sentence, and there are a number of possible defences, as well as partial excuses, reducing murder to manslaughter.

Importantly, unless pleading guilty continues to attract a significant discount[295] and/or would bring the offender outside the direct application of the SNPP scheme, offenders may choose to take their chances at trial to avoid being subject to the SNPP.

Factual basis of the offence

The Council's Terms of Reference specifically acknowledge some of the offences for which the setting of a single SNPP might prove difficult, including the offences of manslaughter, rape and unlawful carnal knowledge, and ask the Council to consider how a SNPP might apply given the range of circumstances in which these offences can be committed. We consider this issue in more detail in Chapter 6.

QUESTION:

19. What criteria should be used to determine the offences to which a Qld scheme should apply?

5.4 Focusing on specific criminal conduct

In determining what offences should be included in the SNPP scheme, the Council has been asked to consider whether it would be appropriate to single out specific types of criminal conduct, such as 'glassing' in and around licensed premises, to be subject to a SNPP or whether the preferable approach would be for the SNPP to apply to the offence or offences that would ordinarily capture that conduct. 'Glassing' is defined in section 96 of the *Liquor Act 1992* (Qld) as 'an act of violence that involves the use of regular glass and causes injury to any person'.

Crime data collected by the Queensland Police Service indicate that the number of reported assault offences[296] where glass was used as a weapon increased from 2005 to 2009, before decreasing in 2010.[297] There were 297 assaults involving glass in 2005, compared with 422 in 2009. In 2010, this decreased to 294. The rate per 100 000 persons of reported assaults involving glass was seven in 2005 and 10 in 2009.[298] The rate decreased to six in 2010.[299] Increased attention to 'glassing' incidents in licensed areas led to the 2009 Government Inquiry into Alcohol-Related Violence.[300]

This approach becomes complex, however, when specific criminal conduct falls within a range of different offences with different maximum penalties. For example, an incident involving a glassing may result in the offender being charged with unlawful wounding (carrying a maximum penalty of 7 years), assault occasioning bodily harm while armed (carrying a maximum penalty of 10 years) or grievous bodily harm (carrying a maximum penalty of 14 years).

Another example of specific criminal conduct that could be targeted under a SNPP scheme is sexual offending against children. There is a wide range of child sexual offences that carry different maximum penalties ranging from 5 years to life imprisonment.

QUESTION:

20. Should consideration be given to setting a separate SNPP for specific types of conduct or should SNPPs apply on an offence by offence basis?

CHAPTER 6
CONSIDERING SPECIFIC OFFENCES FOR A SNPP SCHEME

In this chapter, we examine some specific offences to which a SNPP might apply, with a focus on those identified in the Council's Terms of Reference. The considerations outlined in Chapter 5 are applied to each offence and some analysis and comment are included.

As discussed in Chapter 2, section 9 of the *Penalties and Sentences Act 1992* (Qld) sets out specific factors that are relevant to sentencing an offender for any offence that involves the use of violence against another person, or that results in physical harm to another person, or that is a sexual offence committed against a child under 16 years. In these cases, the principle that a sentence of imprisonment should only be imposed as a last resort does not apply. The court is directed to have regard primarily to matters such as the risk of physical harm to any community members if a prison sentence is not imposed, the need to protect the community from that risk, the personal circumstances of the victim of the offence, any death or injury or other loss or damage caused by the offence, the nature or extent of the violence used, or intended to be used, in the commission of the offence, and the past criminal history of the offender.[301]

6.1 Murder

Murder, which is objectively one of the most serious offences against the person in Queensland, carries a mandatory life sentence.[302]

Murder is the unlawful killing of another person in circumstances where:

- the offender intended to cause the death of the person killed or that of some other person, or to do to the person killed or some other person grievous bodily harm or
- the death was caused by an act done in the prosecution of an unlawful purpose and the act is of such a nature as to be likely to endanger human life (for example, in the course of an armed robbery) or
- the offender intended to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime or
- the death was caused by administering any stupefying or overpowering thing for either of the purposes mentioned previously above or
- death is caused by wilfully stopping the breath of any person for either of such purposes.[303]

Because of the small numbers involved, the murder rate can fluctuate significantly over time. However, overall in Queensland, the murder rate has remained relatively stable.[304] After a peak in 1996–97, the murder rate has been steadily declining, although there was a slight increase (16%) in 2009–10.[305] In 2009–10, there were 56 reported murders in Queensland, which translates to a rate of 1 per 100 000 people.[306] Of these homicides, 10 involved women killed by their partner or ex-partner, 1 a man killed by his partner, 1 the killing of the offender's child, and 6 homicides of other relatives of the offender (4 men and 2 women).[307] A further 13 involved victims known to the offender (11 men and 2 women), while 21 were killings by a stranger (14 men and 7 women).[308]

There are separate statutory provisions that govern the release of prisoners sentenced for murder on parole. An offender convicted on or after 1 July 1997 of more than one murder, or who has previously been convicted of murder, must serve a minimum of 20 years imprisonment or longer (as ordered by the court) before being eligible for parole.[309] In other cases, the offender is eligible for parole after serving 15 years of their prison sentence, or on a later date fixed by the court under Part 9, Division 3 of the *Penalties and Sentences Act*. In effect, murder already has a 'standard' or rather a 'minimum' non-parole period that applies automatically.

The NSW scheme excludes offenders sentenced to life imprisonment or for any other indeterminate period;[310] consistent with this approach, it may be logical to exclude murder from any Queensland SNPP scheme on this basis.

6.2 Manslaughter

Manslaughter is committed in circumstances where a person unlawfully kills another person under such circumstances as not to constitute murder.[311] 'Unlawful' means that the killing was not authorised, justified or excused by law and, in the case of manslaughter, it does not matter that the person did not intend to kill the person or do the person any harm.

Manslaughter carries a maximum penalty of life imprisonment, but unlike the penalty for murder, this is not a mandatory penalty.[312]

In 2009–10, there were 9 reported manslaughters in Queensland, down from 7 in the previous financial year.[313] Of these victims, 3 were female and 6 were male. Five victims knew the offender, including one man who was killed by his partner and one child who was killed by a parent.[314] Some offenders convicted of manslaughter are initially charged with murder and therefore are included in the reported crime statistics under 'murder', rather than 'manslaughter'.

Over the five year period 2005–06 to 2009–10, 100 offenders were sentenced for the offence of manslaughter in the higher courts where manslaughter was the most serious offence for which they were sentenced (Table 4 below).

Factual basis of the offence

Manslaughter has been singled out in the Council's Terms of Reference as an offence that may not be amenable to a single SNPP. This is because of the broad range of circumstances in which manslaughter can be committed in Queensland.

As indicated below in a random sample of manslaughter cases dealt with by the courts between 2008 and 2010, manslaughter represents a broad range of conduct and levels of culpability:

- The offender, JM, who pleaded not guilty, taped her husband to a veranda pole as part of a 'game' they had engaged in previously from which, the intention was, he would escape. She left his nose

uncovered, but he died of asphyxiation some time later. JM was sentenced to 3 years imprisonment to be suspended after 12 months.[315]

- The offender, AC, and another man attacked and killed a 59-year-old man who was out taking an evening walk. The attack was unprovoked and with sustained violence. The defendant pleaded guilty to this and a number of related offences. The sentence was 12 years imprisonment, with a SVO declaration (meaning that the non-parole period was 80% of the sentence, or 9.6 years).[316]
- The offender, KC, was a former drug addict with four young daughters (aged 8, 7, 5 and 3) who had recently been returned to her care after a lengthy period in foster care because of the offender's drug addiction. KC failed to call an ambulance when the youngest child slipped in the shower and hit her head. This resulted in an injury that lead to her death from a sub-dural haemorrhage a significant time after the accident. KC was sentenced to 5 years imprisonment, suspended after 18 months.[317]
- The offender, ZJ, who pleaded guilty to manslaughter, had an altercation with his de facto after spending the day drinking with his father, which resulted in her death. ZJ could not remember the exact circumstances surrounding the fight, and had gone to bed after it, but woke some time later to find the deceased in the hall. He attempted CPR and called 000, but to no avail. ZJ was sentenced to 9 years imprisonment, with parole eligibility after 3 years.[318]

Manslaughter also includes homicides perpetrated by victims of domestic violence, such as the following case:

- The offender, DS, a 35-year-old mother of two, was a victim of domestic violence perpetrated on her by the deceased on her for over 10 years. On the night the death occurred, the deceased had been drinking heavily (his blood alcohol concentration was 0.29) and he grabbed hold of one of her young children and threatened the child with a knife. In a struggle that followed, DS stabbed the deceased twice in the back, one of these blows caused his death. DS was sentenced to 5 years imprisonment wholly suspended, with an operational period of 5 years.[319]

The approach in other jurisdictions

Manslaughter is not included in the NSW SNPP scheme, nor has it been the subject of a guideline judgment in Australia. The decision to exclude manslaughter from the NSW scheme was revisited as part of a 2003 review of the law of manslaughter. This review concluded that the broad range of cases falling into the offence category of 'manslaughter' did not lend itself to a structured scheme of manslaughter and penalties (including SNPPs).[320]

A 2004 review of aspects of the NT Criminal Code reached a similar conclusion, recommending against the extension of SNPPs to manslaughter.[321]

Challenges of setting a SNPP

Because the circumstances in which manslaughter is committed are so varied, there is no 'typical' mid-range or low-range case. For this reason, the setting of a SNPP for manslaughter expressed as a period of years may not be possible.

Applying a SNPP that is a standard percentage of the head sentence may be less problematic. This is because courts would still have full flexibility to set an appropriate head sentence, and the SNPP would then apply to determine the minimum period the offender must spend in prison. However, because the offence is committed in such a wide range of circumstances, it could be argued that it is desirable to retain a high level of flexibility in the way parole eligibility dates for manslaughter are set.

The setting of multiple SNPPs based on legislatively defined subcategories of manslaughter is likely to be equally problematic for the reasons identified in the NSW review.

Sentencing and parole practices

Guilty plea rates and sentencing and parole practices are explored in the Council's research paper — *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011). They are summarised in Table 4 (below).

Based on data for sentences imposed by the Queensland courts between 2005-06 and 2009-10, manslaughter has an average sentence of 8 years imprisonment. All but one offender sentenced over the period 2005–06 to 2009–10 for manslaughter received an immediate term of imprisonment. Excluding the lowest sentence imposed of 1.5 years (a case involving a mother with a mental illness who left her infant daughter in the bathtub while making some phone calls, and the child subsequently died),[322] the bottom of the range of sentences was 4 years while the highest sentence imposed was 14 years.[323]

Table 4: Summary of number of offenders sentenced, guilty plea rates and sentencing outcomes in the Queensland higher courts (2005–06 to 2009–10) and parole outcomes (2000–10) for Queensland offenders convicted of manslaughter

Courts data	
Total number of offenders sentenced (manslaughter being the most serious offence)	100
Offenders pleading guilty	78.8%
Offenders sentenced to immediate imprisonment	99.0%
Offenders sentenced to full-time imprisonment	94.0%
Average sentence length[1]	8.0 years
- Range of sentence length	1.5 years - 14 years (4 years - 14 years)
- Median absolute deviation	1.0 years
- Interquartile range	2.1 years
Corrections data	
Average time served[1]	4.1 years
- Time served as percentage of head sentence	55.2%
Average non-parole period[1]	3 years
- Non-parole period as a proportion of head sentence	44.9%

Source: *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).
Notes:
1. 'Average' indicates the median.
2. Data presented in this table is a summary of data derived from two different sources: Queensland courts data maintained by the Office of Economic and Statistical Research (OESR) and QCS unit record data.
3. This data represents the most serious offence for the case.

The guilty plea rate for manslaughter is 78.8 per cent, which is substantially below the overall plea rate in the higher courts of 92 per cent. The reason for this could be the availability of defences that might reduce the number of offenders choosing to plead guilty. The extent to which a SNPP might encourage a guilty plea for an offence such as manslaughter, and the true capacity for it to do so, is therefore unknown.

On average, offenders convicted of manslaughter serve around 1 year beyond the average parole eligibility date - or just over 4 years in prison. The parole eligibility date is set, on average, at around 45 per cent of the head sentence.

The Council's research paper also examines the issue of sentence length variability. The Council uses two measures of variability: the median absolute deviation (MAD) and the interquartile range (IQR). A

smaller MAD or IQR value demonstrates low variation in sentence lengths. However, it is important to note that these measures do not provide a complete or perfect measure of sentencing consistency as they do not account for case variability.

A degree of sentence length variation within offence categories is to be expected given case variability. A higher degree of sentence variation for offences with high maximum penalties is also to be expected.

The Council's analysis shows that, despite the broad range of circumstances in which manslaughter can be committed, there is relatively low variation in sentence lengths for this offence in Queensland. Based on sentencing practices for the higher courts from 2005–06 to 2009–10, manslaughter had a MAD of 1 year. The IQR for this offence based on sentencing practice is, however, slightly wider, at 2.1 years, although this is still substantially below the offence with the highest IQR - attempted murder at 6.3 years. An IQR of 2.1 years means that within the middle 50 per cent of sentences for manslaughter, there was a difference of about 2 years between sentences at the top and bottom of this range.

Therefore, if offences to be included in a Queensland SNPP scheme are selected purely on the basis of unjustified sentence length variability, there could be a strong case for excluding the offence of manslaughter.

Appellate and statutory guidance

Queensland courts have recognised the broad range of offending captured by the offence of manslaughter, and that an appropriate sentence for a case of manslaughter will very much depend on the facts of the particular case.[324] The Court of Appeal has provided guidance for the courts in deciding an appropriate sentence for manslaughter.

For example, the courts have held:

- for a homicide resulting from a deliberate act (such as stabbing) the appropriate head sentence 'falls properly within the range of 10 to 12 years imprisonment'[325]
- for prolonged abuse of a young baby, a head sentence 'at least in the range of eight years to 10 years' would be called for,[326] and
- for killings that are not murder by reason of provocation, a range of 9–12 years is indicated.[327]

Similar statutory considerations to manslaughter also apply under section 9 of the *Penalties and Sentences Act*, including the need to take the circumstances of the victim into account, and to prioritise the interests of community protection.

Summary of arguments for and against inclusion

Arguments for the exclusion of manslaughter from a SNPP might include that:

- manslaughter is committed in such a broad range of circumstances, that it is not possible to identify a 'standard' example of the offence for the purposes of setting a SNPP (which is particularly a problem for a defined term scheme)
- taking a 'banding approach', and assigning different categories of manslaughter individual SNPPs would also be difficult because the circumstances in which the offence is committed are so varied
- there is already appellate court guidance on appropriate sentencing ranges for different categories of offending
- almost all offenders convicted of manslaughter are sentenced to an immediate term of imprisonment (either full-time custody or a partially suspended sentence), and many for a substantial period, and
- despite the broad variation in terms of offender culpability, based on the Council's analysis of the data, there appear to be low levels of sentence variability.

Equally, a number of arguments could be made supporting the inclusion of manslaughter in a SNPP scheme, such as:

- the harm caused (the death of a person) qualifies it as a serious offence, despite the range of circumstances in which the offence can be committed
- the offence is a 'serious violent offence' as defined in Schedule 1 to the *Penalties and Sentences Act* and therefore is already subject to Part 9A (a declaration that the offender is convicted of a 'serious violent offence' and liable to serve a minimum of 80 per cent of his or her sentence, or 15 years imprisonment, whichever is less)
- the majority of offenders are sentenced to substantial terms of imprisonment (an average of 8 years) and the offence can only be dealt with on indictment, maximising the potential application of the scheme, and
- a SNPP could provide courts with additional guidance on an appropriate non-parole period.

6.3 Other offences of violence against the person

The range of offences of violence against a person differs depending on the type of conduct, the nature of the injury caused and in the case of serious assault, the persons involved in the incident.

Offences of violence against the person in the Criminal Code (Qld) include acts intended to cause grievous bodily harm and other malicious acts (s 317), assault occasioning bodily harm (s 339), serious assault (s 340), grievous bodily harm (s 320) and wounding (s 323).

Serious forms of assault (as classified by the Queensland Police Service (QPS) as 'grievous assaults', 'serious assaults' and 'serious assaults (other)') comprise about 39 per cent of the offences categorised as offences against the person in Queensland.[328] The number of assaults in Queensland increased by 3 per cent from 2008–09 to 2009–10.[329] This equates to a rate of 452 offences per 100 000 persons in 2009–10. Since the mid 1990s, the rate of assault in Queensland has remained stable, although there was a small increase in the rate of reported assaults in 2009–10 (3%) from the previous year.[330]

As illustrated in Table 5 (page 112 below), over the five year period 2005–06 to 2009–10, the number of offenders sentenced in the Queensland higher courts for offences of violence against the person ranged from 115 offenders for the offence of acts intended to cause grievous bodily harm and other malicious acts, to 3084 offenders for assault occasioning bodily harm. Some caution should be exercised when interpreting these data as these counts are based on the most serious offence for which the offender was sentenced rather than the total number of offenders sentenced for those offences.

Assault occasioning bodily harm simpliciter carries a maximum penalty of 7 years. Where an offender assaults another person, and is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, the offence is seen as more serious and the offender is liable to imprisonment for 10 years.

A 'serious assault' is an assault on specific types of people such as police officers, corrective service officers, people carrying out a duty imposed by law (for example a child protection officer), people aged 60 years or more or a person who is blind. The offence has a maximum penalty of 7 years imprisonment.

Higher rates of serious assault (as classified by the QPS) were seen between 2005–06 and 2006–07.[331] The QPS has identified a possible explanation for this is a broadening of the definition of serious assault to include, for example, assault of a person aged 60 years or more, assault on physically impaired people, and assaulting a police officer in the execution of duty. [332]

Wounding carries the same maximum penalty of 7 years as assault occasioning bodily harm and serious assault. A wounding charge is dependent on the conduct involved in the incident and how the injury was inflicted on the victim - for example by using a knife or glass. Offenders are often charged with wounding for a 'glassing' incident,[333] but if the injury caused is of a serious nature the offence of grievous bodily harm may be charged, depending on the facts. An offender cannot rely on the defence of provocation as a defence to wounding.

The offence of grievous bodily harm, as reflected by its maximum penalty of 14 years imprisonment, is a more serious offence because of the level of injury caused. It involves:

- the loss of a distinct part or an organ of the body or
- serious disfigurement or
- any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health whether or not treatment is or could have been available.

As with wounding, an offender cannot rely on provocation as a defence.

The offence of acts intended to cause grievous bodily harm and other malicious acts carries a maximum penalty of life imprisonment, reflecting the intentional nature of the harm caused.

The approach in other jurisdictions

NSW has included a number of equivalent offences against the person in its SNPP scheme. The SNPPs range from 3 years, for reckless wounding to 7 years for wounding with intent to do bodily harm.

Because the SA scheme is limited to serious offences against the person, which are defined as major indictable offences resulting in the death of the person or the victim suffering total incapacity (that is, they are incapable of independent function)[334] it would exclude many less serious forms of violence against the person that do not cause this level of incapacity.

The NT scheme does not apply to serious offences of violence against the person other than murder (which carries a SNPP of 20 years or, in some cases, 25 years).

Challenges of setting a SNPP

A challenge for setting a SNPP for these types of offences is the wide range of conduct these offences involve.

Serious assault sentences range from a probation and community service order with no conviction recorded[335] to gaol terms with convictions recorded.[336]

Wounding sentences range from fines[337] to 4 years imprisonment[338] although fines are in the minority and sentences of imprisonment the majority.

The same is the case with the offences of assault occasioning bodily harm and grievous bodily harm.

The sentencing range for assault occasioning bodily harm is wide, as shown in these examples:

- An offender, GD, pleaded guilty to assaulting a fellow player during an AFL game. The offender was fined $500 and no conviction was recorded: *R v GCD*.[339]

- An offender, JS, an 18-year-old male, pleaded guilty to assaulting an 18-year-old female by twisting her wrist causing pain and discomfort. JS had a history of drug offences but no violent offences and was sentenced to 12 months probation with no conviction recorded: *R v JJS*.[340]
- An offender, BS, pleaded guilty to assaulting a female sex worker by repeatedly striking her to the back of the head and neck. She suffered lacerations to her head. The offender was not arrested until 8 years after the incident. The offender had a criminal history but no offences of violence. He was sentenced to 15 months imprisonment with a parole release date after serving 4 months: *R v BLS*.[341]

With regard to the offence of grievous bodily harm, in unusual circumstances offenders have been sentenced to a fine with no conviction recorded, for example:

- An offender, KB, punched the victim after the victim threatened the offender's brother. The victim fell and hit his head causing a fractured skull. KB pleaded guilty and had no criminal history. He was fined $500 and no conviction was recorded.[342]

However, in most cases, convictions are recorded and sentences include a term of imprisonment. There is a wide variance in sentencing where imprisonment is involved:

- An offender, BS, pleaded guilty to grievous bodily harm after an altercation during a garage sale. The altercation related to an ownership dispute over property. The offender punched the complainant twice in the face resulting in permanent loss of some degree of peripheral vision in one eye. The offender was sentenced to 15 months imprisonment which was wholly suspended: *R v BRS*.[343]
- An offender, KC, a security guard was found guilty of grievous bodily harm. KC was involved in an altercation with the complainant which resulted in the complainant falling and suffering a broken jaw. The offender was sentenced to 3 years imprisonment with a parole release date after serving 1 year imprisonment. The offender appealed against the conviction and sentence: *R v Coomer*.[344]
- An offender, CC pleaded guilty to stabbing the complainant causing life threatening injuries. The offender was 17 years old at the time of the offence and was sentenced to seven years imprisonment with a recommendation for parole eligibility after serving 2 years and 6 months imprisonment: *R v CJC*.[345]

Current sentencing and parole practices

Research by the Council indicates that the inclusion of some of these offences in a SNPP scheme might have a differential impact on Aboriginal and Torres Strait Islander offenders. Many of the violent offences disproportionately relate to Aboriginal and Torres Strait Islander offenders. For example, 20 per cent of Indigenous offenders who received a prison sentence in the higher courts had assault occasioning bodily harm as their most serious offence, compared with 10 per cent of non-Indigenous offenders. The offences of grievous bodily harm and wounding had similar patterns.

Assault occasioning bodily harm has a guilty plea rate of 95 per cent, which again suggests that the reduction in sentence associated with an early plea is playing a part. The imprisonment rate overall is 47.4 per cent with an average release to parole after 0.3 years.

Wounding has a guilty plea rate of 97.2 per cent and an imprisonment rate of 72 per cent, with an average release to parole after 12 months.

In relation to grievous bodily harm, the guilty plea rate is 94 per cent and the imprisonment rate is 81.4 per cent. The accepted practice of allowing a discount on sentence length for a timely plea of guilty is no doubt an influencing factor, but there is still an average of 1.3 years served in prison before release on parole, which reflects the seriousness of the offences in this category.

As indicated in the Council's research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011), the MADs for the offences of 'grievous bodily harm', 'wounding' and 'assault occasioning bodily harm' all suggest that the current sentencing practices show good consistency in the courts' approach in Queensland.

Appellate and statutory guidance

There is consistent guidance from the Queensland Court of Appeal in relation to the appropriate sentencing levels for these matters, and appropriate guidance for sentencing courts to follow.

For the offence of assault occasioning bodily harm, guidance has been given in relation to sentencing - for example, in the case of *R v Maddox;*[346] where an appeal against the original sentence was denied. The Court of Appeal agreed that the original sentence of 12 months was well within range, and agreed with the submissions of the respondents in relation to possible sentence range, saying: 'Counsel for the respondents submitted that a head sentence of up to three years imprisonment could have been imposed for the offence of assault occasioning bodily harm. That submission is supported by *R v Hills*,[347] *R v West*,[348] and *R v Hadland.'* [349]

For the offence of wounding involving a 'pub glassing' incident by a person of otherwise good character, the Court of Appeal has said that 'the comparable sentences of *R v Hays*, *R v Toohey*, *R v Jasser* and *R v Kimmins* demonstrate that the present offence warranted a head sentence of between 18 months and two years imprisonment.'[350]

Table 5: Summary of number of offenders sentenced, guilty plea rates and sentencing outcomes in the Queensland higher courts (2005–06 to 2009–10) and parole outcomes (2000–10) for Queensland offenders convicted of serious violent offences against the person in Queensland

	Acts intended to cause GBH and other malicious acts	Assault occasioning bodily harm	Serious assault	Grievous bodily harm	Wounding
Courts data					
Total number of offenders sentenced (the offence listed being the most serious offence)	115	3084	816	933	655
Offenders pleading guilty	80.9%	95.0%	95.8%	94.0%	97.2%
Offenders sentenced to immediate term of imprisonment	98.2%	47.4%	57.7%	81.4%	72.0%
Offenders sentenced to full-time imprisonment	81.7%	37.8%	47.8%	53.7%	51.1%
Average sentence length[1]	6.0 years	1.3 years	0.6 years	2.9 years	2.0 years
Range of sentence lengths	6 months – 15 years	8 days – 6.3 years	3 days – 6 years	3 months – 13 years	55 days – 6 years
Median absolute deviation	1.5 years	0.5 years	0.3 years	0.9 years	0.5 years
Interquartile range	3.0 years	1.3 years	0.5 years	1.5 years	1.0 years
Corrections data					
Average time served[1]	1.2 years	0.3 years	-^	1.3 years	1.0 year
- Time served as percentage of head sentence	34.7%	33.1%	-^	58.1%	56.6%
Average non-parole period[1]	1.1 years	0.3 years	-^	1.0 years	0.8 years
- Non-parole period as a percentage of head sentence	33.6%	33.0%	-^	41.4%	41.7%

Source: *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).
Notes:
1. 'Average' indicates the median.
2. Data presented in this table is a summary of data derived from two different sources: Queensland courts data maintained by the Office of Economic and Statistical Research (OESR) and QCS unit record data.
3. This data represents the most serious offence for the case.
4. ^ Not available in corrections data.

In relation to grievous bodily harm, numerous matters provide guidance to the courts when sentencing. In *R v Paisa*[351] the offender was sentenced for an unprovoked attack on two people, one of them blind; Judge Tutt stated:

> Our Courts of Appeal have repeatedly said in recent years, when dealing with matters involving unprovoked, gratuitous street violence as this was, that deterrence must be the major factor influencing sentencing in these cases, and therefore the imposition of a custodial sentence with actual time to be served in custody is well within the range of penalties to be imposed.

Section 9 of the *Penalties and Sentences Act* also sets out clear guidance on the primary considerations of sentencing offenders convicted of these offences, including the need to take into account the harm caused, the circumstances of the victim, and the interests of community safety and protection.

Summary of arguments for and against inclusion

Arguments for the exclusion of the offences of wounding, assault occasioning bodily harm, serious assaults, grievous bodily harm and acts intended to cause grievous bodily harm and other malicious acts from a SNPP might include that:

- these offences are committed in such a broad range of circumstances that it is not possible to identify a 'standard' example of the offence for the purposes of setting a SNPP (which is particularly a problem for a defined term scheme)
- the inclusion of these offences is likely to have a more pronounced impact on Aboriginal and Torres Strait Islander offenders, who are overrepresented among offenders who receive a prison sentence for these offences, and
- despite the broad variation in terms of offender culpability, based on the Council's analysis of the data, there appear to be low levels of sentence variability.

Equally, a number of arguments could be made supporting their inclusion, such as:

- the harm caused (an act of violence against another person) may mean that the offender will be convicted of a serious violent offence, depending on the circumstances of the offending, despite the range of circumstances in which the offence can be committed
- the offences are all classified as a 'serious violent offence' as defined in Schedule 1 to the *Penalties and Sentences Act*, and
- a SNPP could provide courts with additional guidance on an appropriate non-parole period for the offences listed.

6.4 Rape

The current definition of rape involves the following sexual conduct without a person's consent:

- sexual or anal intercourse with a person (penile rape)
- penetrating a female's vulva or vagina or a person's anus to any extent with a thing or part of the person's body that is not a penis (digital rape), or
- penetrating the mouth of the other person to any extent with the person's penis.

If the victim is a child under the age of 12, an offender will generally be charged with rape rather than indecent treatment or carnal knowledge, as a child under the age of 12 years is legally incapable of giving consent.

Rape, like murder and manslaughter, is regarded as one of the most serious criminal offences and carries a maximum life sentence.

Based on published reported crime statistics, there were 1402 reported rapes and attempted rapes in Queensland in 2009–10 which equates to a rate of 31 per 100 000 people.[352] The rate of reported rapes and attempted rapes in Queensland is declining (down 8% from 2008–09), although there may be a number of reasons for this unrelated to actual victimisation rates.[353] Reported rapes are overwhelmingly committed against women and girls by a family member or someone known to them.[354]

As illustrated in Table 6 (below), over the five year period 2005–06 to 2009–10, 444 offenders were sentenced in the Queensland higher courts for the offence of rape where this was the most serious offence for which the offender was sentenced.

As discussed in Chapter 5, offence seriousness has two dimensions: the harm caused or risked, and the offender's culpability, including intended or foreseeable harm. From a harm perspective, rape is an offence that can cause considerable physical and psychological harm to a victim, often compounded by a threat to physical integrity, violating a victim's fundamental rights to autonomy, choice in sexual matters and respect for private life.[355] The sexual aspect of the offence also 'brings in other values and disvalues – self-expression, intimacy, shared relationships, shame, humiliation, exploitation and objectification'.[356] The culpability of the offender in these cases is also generally high because although the offence may not involve substantial pre-planning, in most cases offenders will be aware of what they are doing.[357]

Factual basis of the offence

In terms of the conduct captured by the offence, from October 2000 the offence of rape in Queensland (s 349 of the Criminal Code) was extended to include penetration by the offender of the vagina, vulva and anus of the victim by any body part or object, and penetration of the mouth of the victim by the offender's penis. This conduct was previously captured within the scope of the offence of sexual assault.[358] Rape in its current form, therefore, covers quite a broad range of conduct, rather than just non-consensual sexual intercourse, and courts have suggested that some of the sub-categories, without aggravating features, are less serious - for example, in the Court of Appeal decision of *R v Colless*[359] (a case of serial digital rape).

Two examples included in the Council's research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011), illustrate the wide variation in offence seriousness this offence can involve:

- JL was charged with the digital rape of an acquaintance after a night of drinking, when both the defendant and the complainant had consumed excessive alcohol. The complainant was asleep in the taxi at the time the offence took place. The court held that the offender breached the trust between them by committing the offence while the complainant was defenceless. The offence was seen as out of character for the offender, and at the lower end of seriousness for the offence of rape. He was sentenced to 2 years imprisonment with parole eligibility after 8 months.[360]
- In the second example, the offender appealed against a sentence of life imprisonment after a conviction for seven counts of rape, three counts of sodomy or attempted sodomy, nine counts of indecent assault and one count of assault occasioning bodily harm against seven female victims. The offences were perpetrated against women aged 16–24 years at various locations at night over a nine-month period on the Gold Coast, and during which the offender menaced the complainants with a weapon. The appeal was dismissed, as the court did not see that there were any mitigating circumstances to reduce the sentence imposed. The original sentence was seen as the correct one in that the sentencing judge had regard to the total criminality of the offences committed, and to the deliberation and planning by the offender over the period of the offences, including what the court described as the 'callous disregard of the dignity and welfare of a number of decent young women'.[361]

The approach in other jurisdictions

Rape, or its equivalent, is included in two of the three Australian SNPP schemes.

In NSW, the SNPP scheme includes sexual assault (sexual intercourse without consent),[362] which is that State's equivalent to the Queensland offence of rape. For the offence of sexual assault the SNPP is 7 years, with 10 years for the aggravated form of the offence and 15 years for aggravated sexual assault in company.[363] The maximum penalties for these offences are 14 years, 20 years and life imprisonment respectively.[364] Sexual intercourse involving a child under 10 years, which carries a maximum penalty of up to life imprisonment, also carries a SNPP of 15 years.[365]

In the NT, under a standard percentage form of SNPP scheme, courts in sentencing an offender to imprisonment for the offence of sexual intercourse without consent must set a non-parole period of not less than 70 per cent of the head sentence.[366] This offence carries a maximum penalty of life imprisonment.[367]

Current sentencing and parole practices

The seriousness of rape is reflected in current sentencing practices in Queensland. As illustrated in Table 6, over the period 2005-06 to 2009-10, the overwhelming majority of offenders sentenced for rape (where this was the most serious offence committed) were sentenced to an immediate term of imprisonment (96.7%), and the vast majority of these were a full-time sentence of imprisonment (76.4% of sentences). The average sentence length for sentences of full-time imprisonment was 6.5 years, with sentences ranging from 8 months to 25 years.

Table 6: Summary of number of offenders sentenced, guilty plea rates and sentencing outcomes in the Queensland higher courts (2005–06 to 2009–10) and parole outcomes (2000–10) for Queensland offenders convicted of rape

Courts data	
Total number of offenders sentenced (rape being the most serious offence)	444
Offenders pleading guilty	71.7%
Offenders sentenced to immediate imprisonment	96.7%
Offenders sentenced to full-time imprisonment	76.4%
Average sentence length[1]	6.5 years
- Range of sentence length	8 months – 25 years
- Median absolute deviation	2.0 years
- Interquartile range	4.0 years
Corrections data	
Average time served[1]	4.3 years
- Time served as percentage of head sentence	67.6%
Average non-parole period[1]	3.0 years
- Non-parole period as a proportion of head sentence	49.2%

Source: *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).
Notes:
1. 'Average' indicates the median.
2. Data presented in this table is a summary of data derived from two different sources: Queensland courts data maintained by OESR and QCS unit record data.
3. This data represents the most serious offence for the case.

In terms of time served, offenders convicted of rape spend on average 4.3 years in prison, 1 year longer than the average non-parole period of 3.0 years. Information from the courts administrative databased suggests that the average sentence for rape is 6.5 years imprisonment. Queensland Corrective Services data show that offenders on average are eligible for parole after serving close to half their sentence (49.2%), but are not released on parole until serving two-thirds (67.6%) of their sentence.

The guilty plea rate for rape is comparatively low, at around 72 per cent. However, this is still above the guilty plea rates in NSW after the introduction of its SNPP scheme (57.9% for sexual assault and 71.1% for aggravated sexual assault).[368] The extent to which a SNPP might encourage a guilty plea, and the true capacity for it to do so in the case of an offence such as rape, are unknown.

Sentence length variability

Consistent with the range of conduct constituting the offence, rape is one of the offences for which there appears to be greater sentence length variability than is the case with other offences (with a MAD of 2 years and an IQR of 4 years). This level of variability could be expected as appropriate relative to the range of offending captured; however, it could also be suggested as a basis for including rape in a SNPP scheme.

Appellate and statutory guidance

The Attorney-General has, on occasion, appealed against sentence for this offence, although given the number of sentences imposed for this offence (444 over the period 2005-06 to 2009-10 where rape was charged as the most serious offence), the number of Attorney-General appeals for this offence is relatively low.

An example of a successful and relatively recent appeal in 2008 is the case of *R v KU, AAC, WY, PAG, KY, KZ, BBL, WZ & YC; ex parte A–G (Qld)*[369] in which the Court of Appeal allowed an appeal in relation to three young adult offenders (aged 25, 18 and 17 years at the time of the offending), convicted with juvenile offenders of raping a 10-year-old girl in a remote Aboriginal community. The original sentence was 6 months imprisonment on each count suspended for an operational period of 12 months. The court re-sentenced the offenders to 6 years imprisonment, with eligibility for parole after 2 years (taking into account matters, including their guilty pleas).

There are a number of such Court of Appeal decisions to assist judges at first instance in sentencing an offender for rape. Some examples are:

- *R v Newman*, where the offender pleaded guilty to a rape committed in the victim's own home at night, and where burglary and other offences were also involved, the court determined that 'the range would be imprisonment for between 10 and 14 years'.[370]
- *R v Atwell*, where the degree of planning and premeditation involved and the number of elderly vulnerable victims attacked in their homes at night in a comparatively short period of time, led the court, after examining other cases, to conclude that 'sentences of life imprisonment are sometimes imposed for a series of offences like these'.[371]
- *R v KU & Ors: ex parte A-G (Qld),* where the victim is young, and it was been held that the offence was 'so serious that a sentencing range of between five to eight years imprisonment, after allowing for an early plea of guilty, is the appropriate range of head sentence for an adult whose offence [does] not involve actual or threatened violence or breach of trust'. [372]

As with the UK sentencing guidelines discussed in Chapter 4, some jurisdictions have developed quite detailed guidelines for rape and developed sentencing ranges for subcategories of the offence to guide courts in sentencing. For example in NZ the Court of Appeal issued a guideline judgment for rape in the case of *R v AM.*[373] One of the reasons for the NZ Court of Appeal choosing to issue this rape guideline was a lack of clarity by NZ courts in applying a single starting point of 8 years imprisonment for a contested rape case.[374] The guideline judgment identifies four bands of rape, with case examples to assist with the placement of individual cases at the lower, or higher, end of the relevant band.[375] Unlike the Queensland offence, the NZ offence is more narrowly defined as a person having a 'sexual

connection' with another person, 'effected by the penetration of [the other person's] genitalia by [that person's] penis.'[376]

This experience suggests that, as with the offence of manslaughter, it may be difficult to adopt a defined term SNPP scheme that would assign a single year figure as a guiding point, as there is no 'typical' case of rape. When the broader definition of rape in Queensland is taken into account, this difficulty may be magnified.

Summary of arguments for and against inclusion

On the basis of the discussion above, arguments for excluding rape from a SNPP scheme might be that:

- the broad factual basis of the offence, meaning that it is not possible to identify a 'standard' example of the offence for the purposes of setting a SNPP
- the current levels of sentence length variability for the offence of rape might simply reflect the different forms of conduct that constitute the offence and differences in offender culpability and is not evidence of a need for a SNPP
- taking a 'banding approach', and assigning a different SNPPs to rapes of different levels of objective seriousness would be challenging, and would possibly require these forms of sub-categories to be legislatively defined (which would be difficult, if not impossible) – this approach would be better suited to guideline judgments or sentencing guidelines
- almost all offenders convicted of rape are already sentenced to an actual term of imprisonment (either full-time custody or a partially suspended sentence)
- although offenders convicted of rape, on average, are not released on parole until they have served two-thirds of their sentence, this may reflect the availability of treatment programs in prison and in the community, and problems with the management of parole, rather than suggesting that courts are setting the non-parole periods too low, and
- there is existing appellate guidance on appropriate sentencing ranges for sentencing for the offence.

Arguments in favour of the inclusion of rape in a SNPP scheme might be that:

- the harm caused to a victim of rape is significant, and qualifies it as a serious offence, despite differences in the factual circumstances of the offence and in offender culpability
- the majority of offenders are sentenced to substantial terms of imprisonment (an average of 6.5 years), maximising the possible application of the scheme
- offenders serve, on average, 1.3 years past their parole eligibility date in prison, representing around two-thirds of their sentence, suggesting that court practices in setting parole eligibility dates do not match the practices of the parole boards
- based on the Council's analysis of the data, there appears to be some level of sentence variability that might benefit from a SNPP, and
- a SNPP could provide courts with additional guidance on an appropriate non-parole period for this offence.

6.5 Sexual offences against children

The Queensland Government has identified sexual offences against children, such as maintaining a sexual relationship with a child (s 229B Criminal Code), indecent treatment of children (s 210), sodomy (s 208) and unlawful carnal knowledge (s 215) as offences that the Council should consider for inclusion in a SNPP scheme. The offence of rape (discussed above) can also be committed against a child.

Maintaining a sexual relationship with a child

The offence of maintaining a sexual relationship with a child is a serious child sexual offence. The Attorney-General or the Director of Public Prosecutions must provide consent to prosecute a person for this offence.

The offence involves maintaining a sexual relationship with a child under the prescribed age over a period of time, where the sexual conduct in the relationship involves more than one act of any of the following: sodomy, indecent treatment, carnal knowledge, incest, rape, attempted rape or sexual assault. The prescribed age of a child refers to the age associated with the sexual act; for an act of sodomy, this is under the age of 18 years, and for all other acts the age is under 16 years.

Indecent treatment of children

Indecent treatment of children involves a range of conduct that may be committed against a child:

- unlawfully and indecently dealing with a child under 16 years
- unlawful procuring a child under 16 years to commit an indecent act
- an accused person unlawfully permitting themselves to be indecently dealt with by a child under 16 years
- wilfully and unlawfully exposing a child under 16 years to an indecent act
- without legitimate reason wilfully exposing a child under 16 to any indecent object or indecent film, videotape, audiotape, picture, photograph, or printed or written matter, and
- without legitimate reason taking any indecent visual image of a child under 16 years.

What is 'indecent' is judged in light of time, place and circumstance; consideration is given to conduct that offends against current acceptable standards of decency.

The offence provides for aggravating factors which increase the maximum penalty based on the age of the child and the relationship between the child and the offender. Children who are subject to this offence have often been 'groomed' by the offender and there is no element of the offence specific to this premeditation element.

Sodomy

Sodomy is an unlawful act against any person under 18 years of age or a person with an impairment of the mind. The offence involves a range of conduct associated with anal intercourse:

- if a person sodomises a person under 18 years
- if a person permits a person under 18 years to sodomise him or her
- if a person sodomises a person with an impairment of the mind, and
- if a person permits a person with an impairment of the mind to sodomise him or her.

A person can be charged even if participation in the conduct is consensual. If the conduct is not consensual, a charge of rape would be preferred. The offence provides for a higher maximum penalty if the accused is a lineal descendant of the victim or has the victim under his or her guardianship or care.

Unlawful carnal knowledge

Unlawful carnal knowledge involves carnal knowledge or attempted carnal knowledge with a girl under the age of 16 years. Carnal knowledge is complete upon penetration of the vagina by a penis to any extent. Consent by the girl is not a defence to this offence.

The offence provides for a higher maximum penalty depending on the age of the child and the relationship between the offender and the child.

Other sexual offences against children

In addition to the offences listed above, there are a large number of offences involving sexual conduct in relation to children. The range of behaviour captured is broad, including contact as well as non-contact offences, and child pornography offences, such as exposing a child to or involving a child in pornography.

Incidence of sexual offences against children and seriousness

Although Queensland crime statistics do not report on sexual offences against children as a separate category of offending, sexual offence statistics indicate that a substantial number of victims of these offences are children. For example, in 2009–10, 435 of the recorded rapes and attempted rapes involved children under the age of 16, as did 2304 of the other sexual offences.[377] However, as these statistics measure reported crime only, and there is evidence that a large number of these offences are never reported to police,[378] the numbers of sexual offences committed against children may well be much higher.

There have been significant fluctuations in the rate of sexual offences over time which may be due to offences being reported to police many years after these offences have taken place, and offenders being charged with a number of offences.[379] For this reason, rates of sexual offences should be approached with some caution. In 2009–10, Queensland recorded a slight decrease of 4 per cent compared with the previous year.[380]

As illustrated in Table 8 (page 123 below), over the five year period 2005–06 to 2009–10, the number of offenders sentenced for sexual offences against children in the Queensland higher courts ranged from 36 offenders for the offence of incest, to 1061 offenders for the offence of indecent treatment of children. Some caution should be exercised when considering these data as they are based on the most serious offence for which the offender was sentenced, rather than the total number of offenders convicted of this offence.

Sexual offences against children increasingly are recognised as some of the most serious offences in our community, and are particularly serious in terms of their targeting of young, vulnerable victims with often significant long-term physical, social and psychological effects. Often these offences are committed by a person in a position of trust in relation to the child. This is reflected in the maximum penalties for these offences (Table 7 below), with a number of offences carrying a maximum penalty of life imprisonment.

Table 7: Maximum penalties for sexual offences against children in the Criminal Code 1899 (Qld)

Section	Offence	Maximum penalty of imprisonment
208	Unlawful sodomy	14 years
	– child under 12 years, the offender's lineal descendant or under his or her guardianship or care	Life
210	Indecent treatment of children under 16 years	14 years
	– child under 12 years, the offender's lineal descendant, or under his or her guardianship or care	20 years
213	Owner etc permitting abuse of children on premises	10 years
	– child is under 12 years	14 years
	– child < 12 years and the proscribed act is defined as unlawful sodomy or carnal knowledge with or of children < 16 years	Life
215	Carnal knowledge with or of children under 16 years	14 years
	– child is < 12 years	Life
	– child is < 12 years (attempts)	14 years
	– child is not the lineal descendant of the offender but is under the offender's guardianship or care	14 years
217	Procuring young person etc. for carnal knowledge	14 years
218	Procuring sexual acts by coercion etc	14 years
218A	Using internet etc to procure children under 16	5 years
	– if child is < 12 years, or the offender believes is < 12 years	10 years
219	Taking child for immoral purposes	10 years
	If the child is under the age of 12 years and:	
	– the proscribed act is defined as unlawful sodomy or carnal knowledge with or of children < 16 years	Life
	– any other case	14 years
221	Conspiracy to defile	10 years
222	Incest	Life
	– Attempts	10 years
228	Obscene publications and exhibitions	
	– depicts a person who is or is represented to be a child < 16 years	5 years
	– depicts a person who is or is represented to be a child under the age of 12 years	10 years
228A	Involving a child in making child exploitation material	10 years
228B	Making child exploitation material	10 years
228C	Distributing child exploitation material	10 years
228D	Possessing child exploitation material	5 years
229B	Maintaining sexual relationship with a child	Life
229L	Permitting young person etc to be at place used for prostitution	14 years

Where the offender is in a position of authority in relation to the child, this indicates a higher level of culpability, and also impacts on the level of harm caused.

An Australian Bureau of Statistics Personal Safety Survey published in 2005 found that for those participants who experienced sexual abuse before the age of 15, 13.5 per cent were abused by a father or stepfather, 30.2 per cent by another male relative, 16.9 per cent by a family friend, 15.6 per cent by an acquaintance or neighbour, and 15.3 per cent by another known person.[381]

In the case of child pornography offences, the offence seriousness is closely related to the offender's culpability, the type of image involved, and the number of images – for example, whether the offender was involved in producing and distributing the material, or viewing it. Those offenders whose offending is limited to downloading this material can be viewed as being complicit in the original child sexual abuse involved in the production of the material. There is also ongoing harm to victims which results from the copying and further distribution of these images. Section 9 of the *Penalties and Sentences Act* specifically provides sentencing guidelines for child abuse or child exploitation material offences. The principles also provide that imprisonment as a last resort does not apply to a person convicted of these offences.

A number of sexual offences against children must be dealt with in the Magistrates Court unless the defendant elects to have them dealt with in the higher courts, provided certain criteria are met and, importantly, that there is no circumstance of aggravation, that the complainant was 14 years or over at the time of the offence, and that the defendant pleads guilty.[382] The Magistrates Court retains discretion to abstain from exercising this jurisdiction if satisfied because of the nature or seriousness of the offence or any other relevant consideration, that the defendant, if convicted, may not be adequately punished on summary conviction (that is, by a maximum sentence of 3 years imprisonment).[383] Depending on the scope of any SNPP scheme, the ability of some of these offences to be dealt with in the Magistrates Court brings offenders convicted of those offences and sentenced in the Magistrates Court outside the operation of any SNPP scheme.

The inclusion of these offences in any SNPP scheme may increase the workload of magistrates because of the need to assess whether it is appropriate to abstain from exercising their jurisdiction given the existence of a SNPP.

The approach in other jurisdictions

The NSW SNPP scheme applies to a number of sexual offences, including sexual assault without consent, aggravated sexual assault, sexual intercourse with a child under the age of 10 years, aggravated indecent assault with a person under the age of 10 years and aggravated indecent assault, although generally it excludes a number of sexual offences with maximum penalties at the same or a higher level. For example, persistent sexual abuse of children, for which the maximum penalty is 25 years imprisonment, is not included in the scheme.

The most serious sexual offence against children included in the scheme, sexual intercourse with a child under 10, carries a maximum penalty of 25 years imprisonment, or life imprisonment in circumstances of aggravation,[384] and a SNPP of 15 years.[385]

The NSW Sentencing Council has recommended that the scheme, if retained, be extended to the offence of persistent sexual abuse of a child and that the remaining sexual offences not included in the scheme be monitored with a view to their possible inclusion at a later point in time.[386]

The extension of the NSW scheme to these sexual offences is the subject of a current Attorney-General's reference to the NSW Sentencing Council.

In the NT, a number of sexual offences against children carry a fixed non-parole period of at least 70 per cent of the sentence of imprisonment imposed by a court. These offences include sexual intercourse and gross indecency with a child under 16, maintaining a sexual relationship with a child, indecent dealing with a child under 16 and incest.[387]

Current sentencing and parole practices

Sentencing outcomes in Queensland confirm that courts consider these serious offences. As illustrated in Table 8 (below), the average sentence for the offence of 'maintaining a sexual relationship with a child' and 'unlawful sodomy' over the period 2005–06 to 2009–10 was just under the average for rape. A significant proportion of unlawful sodomy offenders receive an immediate prison sentence (77.5%). Almost all offenders convicted of maintaining a sexual relationship with a child are sentenced to actual prison time (97.6%).

The offence of 'indecent treatment of children under 16 years' attracts an average sentence of 1.3 years imprisonment (with prison sentences ranging from 2 months to 10 years), while the average sentence for 'carnal knowledge with or of children under 16' and 'possessing child exploitation material' is 1 year (with sentence ranging from under 1 month to 4 years). The proportion of offenders receiving an immediate prison sentence for indecent treatment, carnal knowledge, and possessing child exploitation material is 59 per cent, 40.5 per cent and 31.6 per cent respectively.

Although the average sentences for carnal knowledge and indecent treatment might seem quite low in comparison with the maximum penalty (14 years if there is no circumstance of aggravation), it is important to recognise that these cases are likely to represent offences at the lower end of the spectrum of offence seriousness.[388]

The guilty plea rates for sexual offences against children range from 96.5 per cent for possessing child exploitation material to 76.6 per cent for maintaining a sexual relationship with a child. On this basis, the capacity of SNPPs for these offences to increase guilty plea rates (as is the case for many other Queensland offences) would appear to be somewhat limited.

The practices of Queensland parole boards suggest that offenders convicted of sexual offences against children serve, on average, substantial periods past their parole eligibility dates. For example, offenders sentenced to a term of imprisonment for incest, maintaining a sexual relationship with a child, unlawful sodomy, carnal knowledge with or of children under 16, and indecent treatment of children under 16 years were eligible for parole on average after serving between 37.5 and 49.2 per cent of their sentence. However, in practice these offenders served between 63.4 and 71.7 per cent of their sentence in prison before being released on parole. With the exception of indecent treatment of children, this represents an additional period 1 year or more (ranging from 1 year in the case of maintaining a sexual relationship with a child to 2.3 years for unlawful sodomy).

A delayed release may not necessarily provide evidence that a longer period of incarceration is required for the purposes of punishment, rehabilitation or community safety. It may be that such delays are the result of an offender's inability to access appropriate treatment programs while incarcerated, or the unavailability of such programs to offenders on parole.

Table 8: Summary of number of offenders sentenced, guilty plea rates and sentencing outcomes in the Queensland higher courts (2005–06 to 2009–10) and parole outcomes (2000–10) for Queensland offenders convicted of sexual offences against children

	Maintaining sexual relationship	Incest	Indecent treatment	Sodomy	Carnal knowledge	Possess child exploitation material
Courts data						
Total number of offenders sentenced (the offence listed being the most serious offence)	214	36	1061	49	321	231
Offenders pleading guilty	76.6%	83.3%	87.7%	89.8%	93.7%	96.5%
Offenders sentenced to immediate imprisonment	97.6%	80.6%	59.0%	77.5%	40.5%	31.6%
Offenders sentenced to full-time imprisonment	72.4%	52.8%	25.0%	46.9%	11.8%	11.7%
Average sentence length[1]	6.0 years	5.0 years	1.3 years	6.0 years	1.0 year	1.0 year
Range of sentence length	3 months – 13 years	3.0 years – 9.0 years	2 months – 10 years	35 days – 20 years	23 days – 4 years	11 days – 4 years (3 months – 4 years)
Median absolute deviation	1.5 years	1.0 year	0.8 years	2.0 years	0.8 years	0.5 years
Interquartile range	3.0 years	2.5 years	1.5 years	6.0 years	2.4 years	1.2 years
Corrections data						
Average time served[1]	3.3 years	3.9 years	1.5 years	5.3 years	2.5 years	N/A[2]
Time served as percentage of head sentence	63.4%	65.3%	71.7%	71.7%	71.0%	N/A[2]
Average non-parole period[1]	2.3 years	2.0 years	1.0 year	3.0 years	1.4 years	N/A[2]
Non-parole period as proportion of head sentence	38.1%	37.5%	49.2%	46.9%	47.0%	N/A[2]

Source: *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).
Notes:
1. 'Average' indicates the median.
2. 'N/A', or 'not available', indicates that averages within the corrections data were not calculated because of an insufficient number of offenders for that offence.
3. Data presented in this table is a summary of data derived from two different sources: Queensland courts data maintained by OESR and QCS unit record data.
4. This data represents the most serious offence for the case.

Consistent with the range of different offences that capture child sexual offending, some child sexual offences have higher levels of sentence length variability. Based on the Council's analysis of sentencing outcomes for child sexual offences,[389] the offences with higher than average values for sentence length variability are unlawful sodomy (MAD of 2 years, IQR of 6 years) and maintaining a sexual relationship with a child (MAD of 1.5 years, IQR of 3 years). The IQR for 'incest' is 2.5 years and for 'carnal knowledge with or of children under 16' it is 2.4 years. This suggests relatively good levels of consistency in sentence lengths for these offences, although this varies by offence. The use of non-custodial orders also needs to be taken into consideration in some cases.

Appellate and statutory guidance

The Attorney-General has successfully appealed sentences imposed at first instance in some cases involving sexual offences against children leading to higher sentences being imposed.[390]

The Queensland Court of Appeal, in the course of determining the outcome of sentencing appeals, has provided guidance to sentencing judges on the current sentencing range for particular sexual offences against children. For example, in *R v TS*, the Court, referring to previous cases where outcomes had been considered for cases involving maintaining a sexual relationship with a child (some of which involved pleas of guilty, or a late guilty plea or which were determined at trial), found that sentences for these offences were 'generally between 10 to 15 years'.[391] Factors that mitigate the penalty were noted by the court as including: conduct showing remorse, such as the offender voluntarily approaching the authorities, or seeking help for all the family, cooperation with investigating bodies, admissions of offending, co-operating with the administration of justice, and sparing the victims any contested hearing.[392]

As with offences of violence, section 9 of the *Penalties and Sentences Act* (s 9(6)) also sets out specific considerations that apply to sexual offences committed against children. Recent amendments to section 9 of the Act direct that a court in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, must ensure that the offender serves an actual term of imprisonment (unless there are exceptional circumstances).[393] Under the legislation, the safety of children is a paramount consideration in sentencing.

Summary of arguments for and against inclusion

The arguments advanced for and against the inclusion of child sex offences are similar to those that apply to rape, but the relevance of these factors may differ depending on the type of sexual offence involved. Arguments in favour of including some, or all, of these offences might be that:

- the significant harm caused to a child victim of sexual abuse qualifies these offences as serious offences, despite any differences for some offences in the factual circumstances of the offence and in offender culpability
- based on the Council's analysis of the data, there appears to be some level of sentence variability that could benefit from a SNPP
- a SNPP could provide courts with additional guidance on an appropriate non-parole period for these offences, and
- offenders convicted of sexual offences against children typically serve a substantial period in prison past their parole eligibility dates, suggesting that court practices in setting parole eligibility dates do not match the practices of the parole boards.

Arguments for excluding some, or all of these offences might be that:

- there are differences in offender culpability (for example, for carnal knowledge with a child under 16 years that can occur in the context of a consensual dating relationship between two young

people, or involve predatory conduct by an older offender), which means that it is not possible to identify a 'standard' example of the offence for the purposes of setting a SNPP
- the current level of sentence length variability for some of these offences simply reflects the different forms of conduct that constitute these offences and differences in offender culpability, which would make the setting of a SNPP inappropriate and does not provide evidence of a need for a SNPP
- there is sufficient statutory and appellate guidance to courts in sentencing for these offences, which gives high priority to considerations of community safety and deterrence
- the delayed release of offenders convicted of sexual offences against children on parole may reflect problems with the availability of treatment programs in prison and in the community, as well as other factors related to the management of parole, rather than indicating any problem with the way courts are currently setting non-parole periods for these offences, and
- some of these offences can be dealt with in the Magistrates Court which suggests that some examples of the offence are less serious. This might result in added complexity and a possible additional workload for the Magistrates Court in dealing with these matters if they were included in a SNPP scheme.

6.6 Conclusion

In this chapter, we have examined a number of specific offences for possible inclusion in a SNPP scheme. In doing this, the focus has been on the offences listed in the Terms of Reference as those to which a SNPP might apply, rather than all offences currently defined under the *Penalties and Sentences Act* as 'serious violent offences' and 'sexual offences'. However, a similar analysis could be applied to these other serious offences including:
- torture (s 320A Criminal Code)
- dangerous driving (s 328A)
- attempt to commit rape (s 350) and assault with intent to commit rape (s 351)
- sexual assaults (s 352)
- robbery (s 411) and attempted robbery (s 412)
- aggravated burglary (s 419(3)), and
- involving a child in the making of child exploitation material or the making, distribution or possession of child exploitation material (ss 228A–228D).

The offences recommended for inclusion in a SNPP scheme may depend on what form of SNPP scheme is introduced (for example, a defined term scheme or a standard percentage scheme). This is because some of the problems identified in this chapter, particularly for offences such as manslaughter and rape, for which the seriousness varies substantially from case to case based on the particular circumstances involved, would not be so pronounced if a standard percentage scheme was adopted. For example, if the SNPP was set as 60 per cent of the head sentence, sentencing judges would still have broad discretion to set an appropriate head sentence based on the individual circumstances of the case; the SNPP would only apply once the sentence was imposed. It would not be necessary, as would be the case with a defined term scheme, for courts to sentence by reference to a single year figure representing an appropriate sentence for the hypothetical offence falling into the 'mid-range of objective seriousness'.

QUESTION:

21. To what offences should the scheme apply, and should there be any exclusions or specific grounds of departure for these offences? For example, in the case of carnal knowledge, should closeness in age between the offender and the victim be a basis for departing from the SNPP?

CHAPTER 7
IMPLEMENTATION OF A SNPP SCHEME

In this chapter we explore some issues that may affect the successful implementation of a Queensland SNPP scheme:

- how a SNPP scheme might affect the operation of the Queensland criminal justice system and associated cost implications
- when the scheme should commence operation, including whether a staged implementation should be considered, and
- arrangements for the scheme to be evaluated and monitored to measure its effects, to ensure that it is meeting its objectives, and to assess the ongoing need for such a scheme.

7.1 Possible impacts on the Queensland criminal justice system

The NSW experience currently provides the best guide to the possible impacts of a SNPP scheme on the Queensland criminal justice system.

An evaluation of the NSW scheme by the Judicial Commission of NSW has credited the scheme with resulting in greater uniformity of, and consistency in, sentencing outcomes and resulting in an increase in the severity of sentences imposed and the duration of sentences.[394]

It is important to recognise that, regardless of what type of SNPP scheme is adopted, a Queensland SNPP scheme is likely to have impacts across the criminal justice system, many of which may not be intended. Based on the NSW experience, these could range from changes to police charging practices, bail decisions, how offences are prosecuted, and decisions by offenders about whether to plead guilty; through to the sentencing of offenders by courts, imprisonment sentence lengths, the number of appeals, and the management of prisoners by correctional authorities.

In the Council's discussions with NSW representatives,[395] risks and impacts of the NSW scheme identified included:

- concerns about overcharging practices by police of both SNPP and non-SNPP offences to support successful plea negotiations later in the process
- greater difficulty in defendants charged with SNPP offences being granted bail
- an increase in offenders pleading guilty to avoid the strict application of the scheme, with concerns that the pressure on offenders to plead guilty, particularly in the case of vulnerable offenders, may be overwhelming
- additional work for the ODPP in the preparation and prosecution of matters, for example, assessing prosecution briefs to determine whether SNPP offences should be dealt with on indictment or summarily and preparing sentencing submissions

- concerns regarding an increase in matters being dealt with on indictment and consequently increasing the associated costs of dealing with matters in the higher courts
- greater complexity and additional time associated with the hearing of sentences, including increased prosecution and defence submissions and time required for judges to draft their sentencing remarks; it was suggested this has contributed to court backlogs as well as an increase in appeals because of errors made in applying the scheme, and
- to the extent that SNPPs contribute to longer sentences (and particularly sentences of 3 years or more), increased costs to the NSW State Parole Authority for prisoner management.

Though the introduction of SNPPs in NSW has not resulted in any real change in the overall incarceration rate for offenders subject to the scheme, the imprisonment rate has grown significantly for some offences.[396] There is also evidence to suggest that the NSW scheme has increased the length of sentences and non-parole periods for SNPP offences, although this varies by offence and the plea status of offenders (with significant increases recorded for offenders pleading not guilty).[397]

In terms of appeals, evidence suggests that sentences in NSW for SNPP offences are slightly less likely to be appealed by offenders and slightly more likely to be appealed by the state as a result of the introduction of the scheme.[398] The Judicial Commission of NSW found that the rate of appeals by defendants (referred to as 'severity appeals') declined from 15.0 per cent in the pre-period to 12.6 per cent in the post-period, while the rate of Crown appeals rose from 2.8 per cent in the pre-period to 3.9 per cent in the post-period. The success rate of Crown appeals pre and post introduction was relatively stable (67.9% in the pre-period compared with 66.7% in the post-period), while severity appeals were more likely to be successful after the scheme's introduction (from 37.6% in the pre-period to 47.4% in the post-period).[399]

Queensland legal practitioners and offenders' advocates consulted by the Council in the early stages of this reference were concerned that the NSW experience would be replicated in Queensland if a SNPP scheme were to be introduced.[400] These stakeholders questioned both the need for reform of the current approach to sentencing in Queensland, and the value of SNPPs in terms of reducing crime and making the community safer. Another concern of these stakeholders was that while a SNPP scheme initially might be intended to apply only to serious violent offences and sexual offences, over time it would be expanded to capture other less serious offences which might not justify a SNPP (in what was described as 'bracket creep'). For example, if a high profile case appeared in the media, the government might be under pressure to respond by including the offence in the SNPP scheme without the matter being given proper consideration. This risk of the scheme being expanded in this way has to some extent been borne out by the NSW experience (see Chapter 4).

The Council hopes to conduct high-level modeling of the impacts of a SNPP scheme, and to document other aspects that will need to be considered in implementation of the scheme, for presentation in its final report. We welcome input on the range of matters we will need to explore in developing this impact assessment.

QUESTIONS:

22. What are the probable impacts on the Queensland criminal justice system of introducing a SNPP scheme?

23. What are the most important issues for the Council to consider in modeling the possible impacts of a SNPP scheme?

7.2 Retrospective or prospective operation

Another issue related to implementation is whether the scheme should apply prospectively (that is, to offenders who commit an offence after the scheme's introduction), or to all offenders regardless of when the offence for which they are being sentenced was committed. The SNPP scheme in NSW as introduced did not act retrospectively and only applied to those listed offences after the commencement date of the scheme, while later amendments to the legislation applied the new SNPPs to offences 'whenever committed'.[401]

The Council will need to consider whether to recommend the scheme should operate prospectively only, or retrospectively, and to consider whether a retrospective application would cause difficulties in Queensland, including in light of the fundamental legislative principles set out in the *Legislative Standards Act 1992* (Qld).[402]

QUESTION:

24. Should a SNPP scheme apply only to offences committed on, or after, the date the scheme commences (prospectively), or to all offences sentenced on, or after, the commencement date whenever committed (retrospectively)?

7.3 Monitoring and evaluation

Ensuring that a Queensland SNPP scheme is adequately monitored and evaluated from the date of commencement is one way of identifying any unintended problems or consequences that may arise, and possible solutions. It would also allow an assessment to be made of whether the scheme is meeting its stated objectives and whether it should be retained, as well as assist in responding to any criticisms of the scheme.

This raises the question of what timeframe would be appropriate to formally evaluate a Queensland SNPP scheme if introduced. Assuming that the scheme applied only to offences committed after the scheme's commencement, an evaluation might not be possible until the scheme had been in operation for a substantial period of time to ensure that there were sufficient numbers with which to compare outcomes pre- and post- introduction of the scheme. Assessment of the impact on actual release dates might not be possible for years, given the likelihood of offenders receiving substantial prison sentence for these offences.

QUESTION:

25. Should a Queensland SNPP scheme be monitored and evaluated? If so:
- What matters should be included as part of this monitoring and evaluation?
- How long should the scheme be permitted to operate before it is formally evaluated?

CHAPTER 8
THE ROLE FOR A SNPP SCHEME IN QUEENSLAND

In Chapters 4 to 6 we considered how a SNPP scheme might be structured in Queensland under either a standard percentage of defined term scheme, what the SNPP might represent, how a SNPP should be taken into account by courts in sentencing, in what circumstances courts should be allowed in sentencing an offender for a SNPP offence to depart from a SNPP (by setting a higher or lower non-parole period), and the offences to which a SNPP scheme might apply. In Chapter 3, we reviewed some of the questions raised during our preliminary consultations about the probable impacts of the introduction of a SNPP scheme. We discuss some of the outcomes of these consultations further below.

In this chapter we explore the possible role of a SNPP scheme in Queensland. In particular, we consider whether there are other legislative and non-legislative approaches that might enhance current practices to sentencing, and operate in conjunction with, or as an alternative to, a new SNPP scheme.

8.1 The Queensland Government's objectives

The question posed in this chapter is whether the system as it stands, including the legislative basis for sentencing and parole, along with the overarching approach taken by the courts, is already adequately meeting the Queensland Government's objectives in relation to the serious violent offences and sexual offences as set out in the Terms of Reference; that is whether:

- current penalties imposed for these offences are 'commensurate with community expectations'
- offenders who commit serious violent offences and sexual offences are serving 'an appropriate period' in prison, and
- the current system is serving to promote public confidence in the criminal justice system.

These questions involve complex matters, but they are necessary in assessing what contribution a SNPP scheme might make to sentencing in Queensland, and the possible value of such a scheme.

8.2 Outcomes of preliminary consultations

In the four Roundtables the Council conducted to inform the development of this paper, legal practitioners and offenders' advocates were strongly opposed to the introduction of a SNPP scheme in Queensland. Some of the concerns expressed by these stakeholders included that:

- a SNPP scheme is a form of mandatory sentencing that will fetter judicial discretion and reduce the ability of the courts to deliver individualised justice
- based on the NSW experience, SNPPs will add to the complexity of sentencing in Queensland, resulting in substantial additional preparation and court time and associated costs and delays, as well as a possible increase in appeals, at least in the period directly after the scheme's introduction

- SNPPs will most likely increase the severity of sentences imposed, leading to increases in prisoner numbers and correctional and parole board costs, for little or no benefit to the community in terms of reducing crime or improving community safety
- the SVO provisions perform substantially the same function as a SNPP for the majority of the offences to which a SNPP would apply, and
- SNPPs are likely to increase Indigenous disadvantage and incarceration rates, contrary to the objectives of the Queensland Aboriginal and Torres Strait Islander Justice Agreement.

Many stakeholders in the initial consultations felt that the risks and costs associated with the introduction of such a scheme substantially outweigh any potential benefits, and that the money necessary to support its introduction could be better spent elsewhere, including on programs to reduce crime and the numbers of offenders coming into prison.

Although a number of suggestions were made about how to improve the current system, including to increase transparency and promote community confidence, the concept of a SNPP scheme was not supported by these stakeholders.

Many of the concerns of Queensland legal stakeholders reflect the experiences and concerns of NSW legal practitioners and other NSW representatives with whom members of the Council Secretariat recently met. Overwhelmingly, those consulted felt that the NSW SNPP scheme had failed to achieve its objectives, while making sentencing far more complex, and should be abolished or significantly reformed. The impacts of the NSW scheme have been summarised in Chapter 3 of this paper.

In any cost-benefit analysis of such a scheme, the substantial costs of crime to the community and, in particular, victims of crime must also be considered. It is undeniable that being a victim of a serious violent offence or sexual offence can have a devastating effect on that person's life, and result in great financial, emotional, health and social costs in the immediate term and into the future. For example, one Australian study of child sexual abuse estimated the tangible and intangible costs of abuse (translated into 2008 dollars) as being in the range of $234 401 to $471 862 per victim, per offence.[403]

Victims have a legitimate expectation that the harm they, or their family members, have experienced will be properly acknowledged by the courts, and reflected in the sentence imposed. The community also expects that the state will take appropriate action to protect community members from the offenders assessed as posing an ongoing danger or risk to the community. This is reflected in one of the purposes of the *Penalties and Sentences Act 1992* (Qld) set out in section 3, which is to provide 'for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders' and, in appropriate cases, to ensure 'the protection of the Queensland community is a paramount consideration'.

Queensland victim support service providers and representatives consulted by the Council supported in principle the idea of SNPPs, but were concerned to ensure a Queensland scheme that was well drafted, achieved what it said it would, operated transparently, and had the support of the courts. They suggested that the Council, in setting the levels for SNPPs, should explore matters such as the time required for offenders to participate in programs while in prison. The application of the scheme to offenders with prior convictions was also identified as an aspect that should be considered.

8.3 Other approaches

Although introducing a SNPP scheme is one way of overcoming any perceived problems with the current approach to the sentencing of serious violent offences and sexual offences, there are other,

non-legislative means that might achieve similar objectives and could be considered in place of, or in addition to, a Queensland SNPP scheme.

In Chapter 2, we discussed a number of the existing approaches to achieving consistency and ensuring that sentencing practices are appropriate, including guideline judgments or sentencing guidelines, comparative sentencing, sentencing bench books and the appeal process. There might be opportunities to deal with any issues by enhancing or making better use of these approaches. We invite comments on this matter.

For example, to improve transparency of the sentencing process and public confidence in the criminal justice system, greater emphasis could be placed on providing information to inform the community about current sentencing practices, including through the work of the Council, improving access to sentencing statistics, and ensuring that sentencing comments are publicly available (where appropriate).

Other options that could be explored are the development of additional resources for courts to support consistency of approach (such as sentencing bench books and other forms of sentencing guidelines) and specialist continuing professional development activities.

In considering the need for a new form of SNPP scheme for Queensland, there is also room to consider whether better use can be made of existing parole provisions. Although they are not referred to as 'standard non-parole periods', as discussed in Chapter 4, Queensland already has forms of 'standard' or 'fixed' non-parole periods.

For example, in the case of offenders sentenced to imprisonment in relation to whom a court has not set a parole eligibility or release date (other than those sentenced to life imprisonment or declared convicted of a serious violent offence), they are eligible for parole after serving 50 per cent of their sentence.[404] This regime could be strengthened, for example, by creating a positive presumption for serious violent offences and sexual offences in favour of courts applying this as the minimum non-parole period, and requiring courts to provide reasons for setting either a longer or a shorter non-parole period.

The SVO regime under Part 9A of the *Penalties and Sentences Act* could also be strengthened to ensure that, where a court has discretion to make a declaration, this power is being used in appropriate cases, and that the use of this power is actively monitored. The scope of these provisions could also be reviewed. The Council has received two letters from Queensland prisoners convicted of drug offences who are subject to the scheme by virtue of receiving a prison sentence of 10 years or more (in which case a declaration is automatic). These offenders have questioned the rationale for the scheme applying to them automatically when other drug offenders convicted of Commonwealth offences may be eligible for parole much earlier, and ostensibly higher-risk offenders, such as repeat sex offenders sentenced to shorter periods of imprisonment, may not be subject to the scheme at all.

Because of data quality considerations, it has not been possible for the Council to report on what proportion of offenders convicted of serious violent offences are declared convicted of a SVO and subject to this regime. The Council would welcome submissions on how often these declarations are made, and whether there are any problems with the operation of the current scheme.

QUESTIONS:

26. Is the current system already adequately meeting the objectives of a Queensland SNPP scheme (transparency, consistency in sentence, ensuring that serious violent offenders and sexual offenders serve an appropriate period in prison, and providing courts with guidance in sentencing)?

27. Should any changes to existing sentencing and parole provisions as they apply to offenders convicted of serious violent offences and sexual offences be considered? For example, are there any ways to improve the operation of the current SVO provisions, or the setting by the courts of parole eligibility dates more generally?

28. Are there any other options that should be explored to support the objectives of a SNPP scheme, including to ensure that serious violent offenders and sexual offenders serve an appropriate period of imprisonment and to promote public confidence in sentencing?

APPENDIXES

Appendix 1 – Terms of Reference

Terms of Reference – Sentencing Advisory Council

Minimum standard non-parole periods

I, Cameron Dick, Attorney-General and Minister for Industrial Relations, having regard to:

- the concern of the Queensland Government that the penalties being imposed for serious violent offences and sexual offending are not always commensurate with community expectations;
- the expectation of the Queensland Government that offenders who commit serious violent offences and sexual offences serve an appropriate period of actual incarceration;
- the need to promote public confidence in the criminal justice system;
- the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases;
- the impact of the introduction of the standard non-parole regime in New South Wales on its criminal justice system;
- current Queensland sentencing practices for offenders aged 17 years and over; and
- the sentencing principles set out in the *Penalties and Sentences Act 1992*

refer to the Sentencing Advisory Council, pursuant to section 200(1) of the *Penalties and Sentences Act 1992*, an examination of:

1. the appropriate offences to which a minimum standard non-parole period should apply; and
2. the appropriate length of the minimum standard non-parole period for each of the offences identified.

In undertaking this reference, the Sentencing Advisory Council will:

- consider applying the approach to standard non-parole periods as prescribed in the *Crime (Sentencing Procedure) Act 1999* (NSW);
- recommend specific offences to which a minimum standard non-parole period should apply;
- note the Queensland Government's intention that the new regime of minimum standard non-parole periods will apply to serious violent offences and sexual offences, and its expectation that it will, as a minimum, apply to the Criminal Code offences of murder (sections 300, 305); manslaughter (sections 303, 310); rape (section 349); and child sexual offending such as, maintaining a sexual relationship with a child (section 229B); indecent treatment of children (section 210); sodomy (section 208); and unlawful carnal knowledge (section 215);
- consider whether the offence of manslaughter sufficiently lends itself to a minimum standard non-parole period, given that the circumstances

surrounding the offence and the moral culpability of an offender may vary greatly from case to case. If considered appropriate, recommend how best to accommodate the wide sentencing range for this particular offence;

- with regard to the offence of rape, consider the appropriate length of the minimum standard non-parole period, given those matters set out in section 349 of the *Criminal Code*;
- with regard to the offence of unlawful carnal knowledge, consider how to accommodate the scenario of a young offender engaged in a consensual but unlawful sexual relationship with an underage partner;
- discuss the appropriateness of singling out specific criminal conduct to be subject to a standard non-parole period (for example, 'glassing' incidents that occur in and around licensed premises) or whether the preferable approach is for the standard non-parole period to apply to the offence/s that would ordinarily capture that specific conduct (for example, wounding (section 323), assault occasioning bodily harm while armed (section 339) or grievous bodily harm (section 320), but with the knowledge that it would necessarily have general application;
- consider how the minimum standard non-parole regime is to operate in Queensland in the context of the existing provisions, pursuant to Part 9A of the *Penalties and Sentences Act 1992*, relating to serious violent offences; including what reforms, if any, are recommended to ensure continuity of the Serious Violent Offence provisions and their complementary operation with the new standard non-parole regime;
- consider and recommend to government the minimum standard non-parole periods appropriate for each of the offences to which the regime is to apply;
- consider and make recommendations on the grounds upon which sentencing judges should be permitted to depart from the prescribed standard non-parole periods, to either increase or decrease those periods; and
- advise on any other matter to give effect to this reference.

The Sentencing Advisory Council is to report to the Attorney-General and Minister for Industrial Relations by 30 June 2011.

Dated the 20th day of December 2010.

Hon Cameron Dick MP
Attorney-General and Minister for Industrial Relations

Appendix 2 – Consultations

Preliminary Roundtables – February 2011

Date & time	Roundtable	Venue
Thursday, 17 February 2011 (5.30–7.30 pm)	Legal Issues Roundtable I	L25, State Law Building, 50 Ann Street, Brisbane
Friday, 18 February 2011 (2.00–4.00 pm)	Community Issues Roundtable I	L25, State Law Building, 50 Ann Street, Brisbane
Monday, 21 February 2011 (2.00–4.00 pm)	Community Issues Roundtable II	Brisbane Square Library, 266 George Street, Brisbane
Tuesday, 22 February 2011 (5.30–7.30 pm)	Legal Issues Roundtable II	L25, State Law Building, 50 Ann Street, Brisbane

Meetings with NSW representatives – March 2011

Date & time	Roundtable	Venue
Thursday, 10 March 2011		
9.30-11.30 am	Corrective Services NSW and the State Parole Authority	Henry Deane Building, 20 Lee Street, Sydney
12.30-1.30 pm	Judge Mark Marien SC, President of the Children's Court	2 George Street, Parramatta
2.00–3.00 pm	Public Defenders Office, Department of Justice and Attorney-General	Carl Shannon Chambers, Level 13, 175 Liverpool Street, Sydney
3.30–4.30 pm	Victims Services, NSW Department of Justice and Attorney-General and Victims of Crime Assistance League	Level 13, 10 Spring Street, Sydney
5.00–6.00 pm	Criminal Law Committee, Law Society of NSW	170 Phillip Street, Sydney

Date & time	Roundtable	Venue
Friday, 11 March 2011		
9.30–10.30 am	Office of the Director of Public Prosecutions	Level 15, 175 Liverpool Street, Sydney
12.00–1.30 pm	Community Legal Centres NSW [representatives from the Intellectual Disability Rights Service and Wirringa Baiya Aboriginal Women's Legal Service	Suite 2C, 199 Regent Street, Redfern
2.30–3.30 pm	The Honourable Justice R O Blanch AM, Chief Judge of the NSW District Court	Downing Centre, 143–147 Liverpool Street, Sydney
3.45–4.30 pm	Director, Criminal Law Review Division, Department of Justice and Attorney-General	Level 13, 10 Spring Street, Sydney
5.00–6.00 pm	Criminal Law Committee, Bar Association of NSW	Selbourne Chambers, 174 Phillip Street, Sydney

Appendix 3 — Serious violent offences and sexual offences in Queensland

Table 9: 'Serious violent offences'[1] and 'sexual offences'[2] as defined in the *Penalties and Sentences Act 1992* (Qld), applicable maximum penalties, the availability of an indefinite sentence[3] and ability to be dealt with summarily

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
Criminal Code 1899 (Qld)							
61	**Riot** The offence of riot is committed if 12 or more persons who are present together (assembled persons) use or threaten to use unlawful violence to a person or property for a common purpose; and the conduct of them taken together would cause a person in the vicinity to reasonably fear for the person's personal safety. Each of the assembled persons commits the crime of taking part in a riot.	- Offence simpliciter[4] - If the offender causes grievous bodily harm, an explosive substance to explode or destroys a building etc - If property was damaged	3 years Life 7 years	✓	N/A	X	Yes – s 61(1)(c) only
75	**Threatening violence** If a person with intent to intimidate or annoy any person, by words or by conduct, threatens to enter or damage a dwelling or other premises or with intent to alarm any person, discharges loaded firearms or does any act that is likely to cause any person in the vicinity to fear bodily harm to any person or damage to any property, the person commits an offence of threatening violence.	- Offence simpliciter - If the offence was committed at night (between 9pm to 6am)	2 years 5 years	✓	N/A	X	Yes
142	**Escape by persons in lawful custody** Escape by persons in lawful custody involves a person who – (a) aids a person in lawful custody to escape, or to attempt to escape, from lawful custody; or (b) conveys anything to a person in lawful custody, or to a place where a person is or will be in lawful custody, with the intention of aiding a person to escape from lawful custody; or (c) frees a person from lawful custody without authority.	N/A	7 years	✓	N/A	X	Yes – on prosecution election (*Criminal Code 1899* (Qld) s 552A)
208	**Unlawful sodomy** Sodomy is an unlawful act for any person < 18. The offence involves a range of conduct (that may in some cases be consensual) associated with anal intercourse. The offence is committed: (a) if a person sodomises a person < 18 years; (b) if a person permits person < 18 to sodomise him or her; (c) if a person sodomises a person with an impairment; or (d) if a person permits a person with an impairment to sodomise him or her. If the conduct is non-consensual, a charge of rape would be preferred.	- Sodomy of a person 12 < 18 years - Sodomy of a child < 12 - Sodomy of a child or a person with an intellectual impairment who is to the knowledge of the offender: - his or her lineal descendant; or - under his or her guardianship or care	14 years Life Life	✓	✓	✓	Yes – unless defendant elects otherwise, provided: - no circumstance of aggravation - the complainant was 14 years or over - the defendant pleads guilty (*Criminal Code 1899* (Qld) s 552B)
210	**Indecent treatment of children under 16** This offence involves a range of	- Offence simpliciter - If the child is < 12 years or is the	14 years 20 years	✓	✓	✓	Yes – in certain circumstances

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	conduct that may be committed against a male or female child: (a) unlawfully and indecently dealing with a child < 16; (b) unlawfully procuring a child < 16 to commit an indecent act; (c) unlawfully permitting himself or herself to be indecent dealt with by a child < 16; (d) wilfully and unlawfully exposing a child < 16 to an indecent act; (e) without legitimate reason wilfully exposing a child < 16 to any indecent object or indecent film, videotape, audiotape, picture, photograph, printed or written matter; and (f) without legitimate reason taking any indecent photograph or record by means of any device, any indecent visual image of a child < 16 years. What 'indecent' is, is judged in light of time, place, and circumstance and consideration is given to conduct that offends against current acceptable standards of decency. Sentencing factors include: - touching of the genitals on the outside or inside of clothing - if the offender is in a position of trust - the nature of the conduct – genitals versus other body parts (hand or mouth) or objects used.	offender's lineal descendant or the offender is the guardian of the child or, for the time being, has the child under his or her care					(as for s 208)
211	**Bestiality** It is an offence for a person to have sexual relations with an animal. The offence is constituted by either vaginal or anal intercourse between a man or a woman and an animal.	N/A	7 years	X	✓	X	Yes – unless defendant elects otherwise provided defendant pleads guilty (*Criminal Code 1899* (Qld) s 552B)
213	**Owner etc permitting abuse of children on premises** This offence involves a range of conduct. The offence is committed if a person is: - the owner or occupier of premises; or - has or had (or acted or assisted in) the management or control of premises; and that person - induces, or - knowingly permits, a child under the prescribed age to be in or upon the premises for the purposes of any person doing a proscribed act in relation to the child. A proscribed act is defined to constitute an offence in s 208 sodomy; s 210 indecent treatment child under 16; or s 215 carnal knowledge with or of children under 16.	- Offence simpliciter - If the child is < 12 years - If the child is < 12 years and the proscribed act is defined as unlawful sodomy or carnal knowledge with or of child < 16 years	10 years 14 years Life	✓	✓	✓	Yes – in certain circumstances (as for s 208)
215	**Carnal knowledge with or of children under 16**	- If the child is < 12 years	Life	✓	✓	✓	Yes – in certain

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	Involves carnal knowledge or attempting to have carnal knowledge with a girl < 16 years. Carnal knowledge is complete upon penetration to any extent of the vagina. This offence does not include an act of sodomy.	- If the child is > 12 years - If the offender is the guardian of the child and has the child under their care - attempt to have carnal knowledge if child < 12 or the offender is the guardian of the child and has the child under their care	14 years Life 14 years				circumstances (as for s 208)
216	**Abuse of persons with an impairment of the mind** This offence involves a range of conduct: - carnal knowledge: if a person has or attempts to have carnal knowledge with a person with an intellectual impairment; - indecent dealing: if a person unlawfully and indecently deals with an intellectually impaired person; - procuring: if a person unlawfully procures an intellectually impaired person to commit an indecent act; - permitting indecent dealing: if a person permits himself or herself to be indecently dealt with by an intellectually impaired person; - exposing to indecent act: if a person wilfully and unlawfully exposes an intellectually impaired person to an indecent act by the accused (or another); - exposing to indecent thing: if a person wilfully exposes an intellectually impaired person to an indecent object (or other specified indecent thing) and the accused did so without legitimate reason; and - recording indecent visual image: if a person takes an indecent photograph (or recorded an indecent visual image) of an intellectually impaired person and the accused does so without legitimate reason.	- Offence simpliciter - If the offence involves an attempt to have carnal knowledge - If the offender is the guardian of that person or, for the time being, has that person under the offender's care where: -offence is having unlawful carnal knowledge or an attempt to have unlawful carnal knowledge - other conduct - If the person is to the knowledge of the offender, his or her lineal descendant	10 years 14 years Life 14 years 14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
217	**Procuring young person etc for carnal knowledge** This offence involves person knowingly enticing or recruiting for sexual exploitation either a person < 18 years or a person who is intellectually impaired, for the purposes of carnal knowledge (either in Queensland or elsewhere).	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
218	**Procuring sexual acts by coercion etc** Involves a range of conduct of a sexual nature: (1) A person by threats or intimidation of any kind procured another person to engage in a sexual act (either in Queensland or elsewhere). (2) A person by a false pretence procured another person to engage in a sexual act (either in Queensland or elsewhere). (3) A person administered to another	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	person (or caused a person to take) a drug or other thing; and did so intending to stupefy or overpower the person so as to enable a sexual act to be engaged in with that person.						
218A	**Using internet etc to procure children under 16** It is an offence for person >18 years to use electronic communication to procure a person < 16 years to engage in a sexual act or to expose a person < 16 years to indecent matter. The section further extends criminal liability to activity where the accused believes the relevant person to be <16 years. The offence does not need to involve physical contact.	- Offence simpliciter - If the child < 12 years, or the offender believes the child is < 12 years	5 years 10 years	X	✓	X	Yes – in certain circumstances (as for s 208)
219	**Taking child for immoral purposes** A person takes (or entices) away or detains a child, for the purpose of any person doing a proscribed act in relation to the child and the child is not the spouse of the accused. A proscribed act involves conduct that would be an offence pursuant to: s 208 sodomy; s 210 indecent treatment of child under 16; s 215 carnal knowledge with or of child under 16.	- Offence simpliciter - If the child < 12 and: - the proscribed act is defined as unlawful sodomy or carnal knowledge with or of children < 16 yrs - any other case	10 years Life 14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
221	**Conspiracy to defile** A person conspired with another to induce a person by false pretence or other fraudulent means to permit another to have unlawful carnal knowledge with (or of) him or her.	N/A	10 years	X	✓	✓	Yes – in certain circumstances (as for s 208)
222	**Incest** A person commits incest if they have carnal knowledge with or of their offspring or other lineal descendant or sibling, parent, grandparent, uncle, aunt, nephew or niece and they know that the other person bears that relationship to him or her, or some relationship of that type to him or her. Consent to participate in the conduct is irrelevant.	N/A	Life (attempt – 10 yrs)	✓	✓	✓	Yes – in certain circumstances (as for s 208)
228	**Obscene publications and exhibitions** A person commits an offence who knowingly, and without lawful justification or excuse – (a) publicly sells, distributes or exposes for sale any obscene book or other obscene printed or written matter, any obscene computer generated image or any obscene picture, photograph, drawing, or model, or any other object tending to corrupt morals; or (b) exposes to view in any place to	- Offence simpliciter - If the matter involves: - a depiction of a person who is or is represented to be a child < 16 years or public exhibit of any indecent show or performance if the person appearing is, or is reported to be, a child < 16 years - a depiction of a person who is or is represented	2 years 5 years 10 years	X	✓	X	Yes – s 228(1) offence only

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	which the public are permitted to have access, whether on payment of a charge for admission or not, any obscene picture, photograph, drawing, or model, or any other object tending to corrupt morals; or (c) publicly exhibits any indecent show or performance, whether on payment of a charge for admission to see the show or performance or not.	to be a child < 12 years or public exhibit of any indecent show or performance if the person appearing is, or is represented to be, a child < 12 years.					
228A	**Involving a child in making child exploitation material** A person who involves a child in the making of child exploitation material commits an offence. In relation to this offence, 'involves' includes involving a child in any way in the making of child exploitation material; and attempting to involve a child in the making of child exploitation material. In relation to the offences found in ss 228A to 228D – child exploitation material means any material that contains data from which text, images or sound can be generated, that in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child <16 years in: (a) a sexual context; (b) in an offensive or demeaning context; or (c) being subjected to abuse, cruelty or torture. Child exploitation material can include fictional characters.	N/A	10 years	X	✓	X	No
228B	**Making child exploitation material** A person who makes child exploitation material commits a crime. To 'make' includes producing or attempting to make child exploitation material.	N/A	10 years	X	✓	X	No
228C	**Distributing child exploitation material** A person who distributes child exploitation material commits a crime. To distribute includes: (a) communicate, exhibit, send, supply or transmit child exploitation material to someone, whether to a particular person or not; (b) make child exploitation material available for access by someone, whether by a particular person or not; (c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and (d) attempt to distribute child exploitation material.	N/A	10 years	X	✓	X	No
228D	**Possessing child exploitation material** A person who knowingly possesses child exploitation material.	N/A	5 years	X	✓	X	No
229B	**Maintaining sexual relationship with a child** The offence involves maintaining a sexual relationship with a child under the prescribed age over a period of time.	Factors relevant to sentencing include: - age of the child when the relationship began - the length of the	Life	✓	✓	✓	Yes – in certain circumstances (as for s 208)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	A sexual relationship is defined to be more than one sexual act (sodomy, indecent treatment, carnal knowledge, incest, rape, attempted rape or sexual assault) over a period of time. The prescribed age, for a child means: - if relationship involved an act or acts of sodomy < 18 years - in any other case <16 years. The Director DPP or AG must provide consent to prosecute a person for this offence.	relationship period - if penile rape occurred - if carnal knowledge occurred - if the victim bore a child to the offender - if there was a parental or protective relationship between the offender and the victim - any physical violence by the offender - any blackmail or other manipulation of the victim					
229L	**Permitting young person etc to be at place used for prostitution** A person who knowingly causes or permits a person < 18 years or a person with an impairment of the mind to be at a place used for the purposes of prostitution by 2 or more prostitutes commits an offence.	N/A	14 years	X	✓	X	Yes – unless defendant elects otherwise (*Criminal Code 1899* (Qld) s 552B)
302, 305	**Murder** Murder involves unlawfully killing another person under any of the following circumstances: (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or some other person grievous bodily harm (it is immaterial if the offender did not intend to hurt the particular person that was killed) or (b) if the death is caused by means of an act done in the prosecution of an unlawful purpose and the act is of such a nature as to be likely to endanger human life (it is immaterial that the offender did not intend to hurt any person) or (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime (it is immaterial that the offender did not intend to cause death or did not know that death was likely to result) or (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned above in (c) (it is immaterial that the offender did not intend to cause death or did not know that death was likely to result) or (e) if death is caused by wilfully stopping the breath of any person for either of such purposes (it is immaterial that the offender did not intend to cause death or did not know that death was likely to result).	If an offender is: - being sentenced for more than one murder; or - another murder conviction is taken into account; or - the person has previously been sentenced for murder; - the court can order that the offender not be released on parole until the offender has served 20 years or more imprisonment. Life imprisonment must be imposed that cannot be varied or mitigated.	Life	X	N/A	✓	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
303, 310	**Manslaughter** Where a person unlawfully kills another person in such circumstances which does not constitute murder	N/A	Life	✓	N/A	✓	No
306	**Attempt to murder** Any person who attempts unlawfully to kill another; or with intent unlawfully to kill another does any act, or omits to do any act which it is the person's duty to do, such act or omission being of such a nature as to be likely to endanger human life; commits an offence.	N/A	Life	✓	N/A	✓	No
309	**Conspiring to murder** It is an offence to conspire with any other person to kill any person, whether such person is in Queensland or elsewhere.	N/A	14 years	✓	N/A	✓	No
313	**Killing unborn child** This offence is committed in circumstances where: (a) a person has prevented a child from being born alive, and that prevention was unlawful, and it occurred when a woman was about to be delivered of a child; or (b) if a person assaults a pregnant woman and such assault was unlawful causing: - the death of unborn child; - grievous bodily harm to the unborn child; or - the transmission of a serious disease to the unborn child.	N/A	Life	✓	N/A	✓	No
315	**Disabling in order to commit indictable offence** Any person who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of an offence.	N/A	Life	✓	N/A	✓	No
316	**Stupefying in order to commit indictable offence** Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer, any stupefying or overpowering drug or thing to any person, is guilty of an offence.	N/A	Life	✓	N/A	X	No
317	**Acts intended to cause grievous bodily harm and other malicious acts** The offence is committed if a person: (a) unlawfully wounds, does grievous bodily harm or transmits a serious disease to any person; (b) unlawfully strikes or attempts to strike another person with a projectile or anything else capable of achieving the required intention;	N/A	Life	✓	N/A	✓	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	(c) unlawfully causes an explosive substance to explode; (d) sends or delivers any explosive substance or dangerous or noxious thing to any person; (e) causes any explosive substance or dangerous or noxious thing to be taken or received by any person; (f) puts any corrosive fluid or destructive or explosive substance in any place; or (g) unlawfully casts or throws any corrosive fluid or destructive or explosive substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person; (2) with intent to: (a) maim, disfigure or disable any person; (b) do some grievous bodily harm or transmit a serious disease to any person; (c) resist or prevent the lawful arrest or detention of any person; or (d) resist or prevent a public officer from acting in accordance with lawful authority. Examples include: throwing sulphuric acid with intent to, and which did, disfigure, shooting of a victim during the course of an armed robbery, intentionally transmitting the HIV virus.						
317A (1)	**Carrying or sending dangerous goods in a vehicle** The offence involves a range of conduct associated with the carrying of dangerous goods in or on a vehicle: (a) Carriage of dangerous goods in or on a vehicle – if the accused carries or places dangerous goods in or on a vehicle. (b) Delivering dangerous goods for the purpose of being placed in or on a vehicle – if the accused delivers dangerous goods to another person, and the delivery is for the purpose of the goods being placed in or on a vehicle. (c) Having dangerous goods in possession in or on a vehicle – if the accused has dangerous goods in his or her possession, and the possession is in or on a vehicle.	N/A	14 years	✓	N/A	X	No
318	**Obstructing rescue or escape from unsafe premises** It is an offence to unlawfully obstruct anyone, in that person's efforts to save the life of another who is in or escaping from dangerous, destroyed or unsafe premises.	N/A	Life	✓	N/A	X	No
319	**Endangering the safety of a person in a vehicle with intent** It is an offence to do anything that endangers, or is likely to endanger, the safe use of a vehicle, with intent to injure or endanger the safety of any person in or on the vehicle. The offence is also constituted by omitting to do a thing which the person has a duty to do.	N/A	Life	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
320	**Grievous bodily harm** A person commits the offence of grievous bodily harm if the consequences of their conduct on the complainant cause: (a) loss of a distinct part or an organ of the body; (b) serious disfigurement; or (c) any bodily injury of such a matter that, if left untreated, would endanger or be likely to endanger life, or cause to be likely to cause permanent injury to health (irrespective whether or not treatment is or could have been available). Grievous bodily harm does not include assault as an element of the offence.	N/A	14 years	✓	N/A	X	No
320A	**Torture** Involves the intentional infliction of severe pain and suffering on a person by an act or series of acts done on one or more than one occasion. 'Pain or suffering' includes any physical, mental, psychological or emotional pain or suffering whether temporary or permanent.	N/A	14 years	✓	N/A	✓	No
321	**Attempting to injure by explosive or noxious substances** It is an offence to unlawfully put any explosive or noxious substance in any place, with intent to do bodily harm to another.	N/A	14 years	✓	N/A	✓	No
321A	**Bomb hoaxes** This section involves two types of offending: (a) if the accused places an article or substance in any place or sends an article or substance in any way, and the accused intended to induce a belief in another person that the article or substance is likely to explode, ignite or discharge a dangerous or noxious substance. (b) if the accused (in Queensland or elsewhere) makes a statement or conveys information to another, and the accused knows the statement or information is false and he or she intends to induce that person or another to believe that an explosive or noxious substance, acid or other thing of a dangerous or destructive nature was present in a place in Queensland.	- An offence pursuant to para (a) - An offence of making a false statement pursuant to para (b)	7 years 5 years	✓	N/A	X	No
322	**Administering poison with intent to harm** A person who unlawfully caused a poison or another noxious thing to be administered to, or taken by, any person with intent to injure or annoy another person.	- Offence simpliciter - If the poison or other 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	7 years 14 years	✓	N/A	✓	No
323	**Wounding** An offence of wounding involves conduct that causes the complainant's true skin to be broken. Example of unlawful wounding may	N/A	7 years	✓	N/A	X	Yes – unless defendant elects otherwise (*Criminal Code*

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	include a person cut with a broken bottle or stabbed with a knife. An assault is not an element of offence of wounding but it may be part of the incident.						*1899* (Qld) s 552B)
326	**Endangering life of children by exposure** A person who unlawfully abandons or exposes a child < 7 years and the life of the child was (or was likely to be) endangered or whose health was (or was likely to be) permanently injured commits an offence.	N/A	7 years	✓	N/A	X	No
328A	**Dangerous operation of a vehicle** A person who operates, or in any way interferes with, the operation of a vehicle dangerously commits a misdemeanour. Where the offender is adversely affected by an intoxicating substance, excessively speeding or taking part in an unlawful race or unlawful speed trial, or has been previously convicted either upon indictment or summarily of an offence against this section (s 328A(2)), the person commits a crime.	- Offence simpliciter - If the offender is adversely affected by an intoxicating substance, excessively speeding or taking part in an unlawful race or unlawful speed trial, or has been previously convicted either upon indictment or summarily of an offence against this section - An offence causing death or GBH - An offence causing death or GBH where adversely affected by an intoxicating substance, excessively speeding, or taking part in an unlawful race or unlawful speed trial; or offender leaves the scene of the incident other than to obtain medical or other help	3 years 5 years 10 years 14 years	X ✓ ✓ ✓	N/A	X	328A(2) only – yes, unless defendant elects otherwise (*Criminal Code 1899* (Qld) s 552B)
339	**Assault occasioning bodily harm** Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime. Bodily harm means any bodily injury which interferes with health or comfort. Being armed means being armed with a dangerous or offensive weapon. For example a pistol or a revolver, is a dangerous weapon. An offensive weapon includes for example bludgeons, clubs and anything not in common use for any other purpose than a weapon. Assault is defined as: (a) the striking, touching, moving of, or application of force of any kind to the person of another; (b) either directly or indirectly; (c) without the other person's consent or with consent, if the consent is obtained by fraud; or (d) by any bodily act or gesture;	- Offence simpliciter - If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons	7 years 10 years	✓	N/A	X	339(1) – Yes (unless defendant elects for jury trial) (*Criminal Code 1899* (Qld) s 552B) 339(3) – Yes (see *Fullard v Vera & Byway* [2007] QSC 50 (5 March 2007))

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	(e) attempting or threatening to apply force of any kind to the person of another; (f) without the other person's consent; (g) in circumstances where the person making the attempt or threat has, actually or apparently, a present ability to effect that purpose.						
340	**Serious assault** A serious assault is committed if a person – (a) assaults another with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person; (b) assaults, resists, or wilfully obstructs, a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting; (c) unlawfully assaults any person while the person is performing a duty imposed on the person by law; (d) assaults any person because the person has performed a duty imposed on the person by law; (e) assaults any person in pursuance of any unlawful conspiracy respecting any manufacture, trade, business, or occupation, or respecting any person or persons concerned or employed in any manufacture, trade, business, or occupation, or the wages of any such person or persons; (f) unlawfully assaults any person who is 60 years or more; or (g) unlawfully assaults any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device.	N/A	7 years	✓	N/A	X	Yes – on prosecution election (*Criminal Code 1899*(Qld) s 552A)
349	**Rape** Involves the following sexual conduct without a person's consent: (a) sexual or anal intercourse with a person or (b) penetrating a female's vulva or vagina or a person's anus to any extent with a thing or a part of the person's body that is not a penis or (c) penetrating the mouth of the other person to any extent with the person's penis. If the victim is a child < 12 years an offence of rape would be preferred rather than indecent treatment or carnal knowledge, as a child < 12 years is incapable of giving consent.	N/A	Life	✓	✓	✓	Yes – in certain circumstances (as for s 208)
350	**Attempt to commit rape** Any person who attempts to commit rape is guilty of a crime.	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
351	**Assault with intent to commit rape** The section makes it an offence for a person to assault another person with intent to commit rape.	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
352	**Sexual assaults** This offence is committed if a person: (a) unlawfully and indecently assaults another person; or (b) procures another person, without	- Offence simpliciter - If the indecent assault or act of gross indecency includes bringing into contact	10 years 14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	the person's consent – (i) to commit an act of gross indecency; or (ii) to witness an act of gross indecency by the person or any other person.	any part of the genitalia or the anus of a person with any part of the mouth of a person - If: (a) immediately before, during, or immediately after, the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with any other person; or (b) for an offence defined in subsection (1)(a), the indecent assault includes the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis; or (c) for an offence defined in subsection (1)(b)(i), the act of gross indecency includes the person who is procured by the offender penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the body of the person who is procured that is not a penis.	Life				
354	**Kidnapping** A person kidnaps another person if the person unlawfully and forcibly takes or detains the other person with intent to gain anything from any person or to procure anything to be done or omitted to be done by any person.	N/A	7 years	✓	N/A	X	No
354A	**Kidnapping for ransom** The offence of kidnapping for ransom involves any person who – (a) with intent to extort or gain anything from or procure anything to be done or omitted to be done by any person by a demand containing threats of detriment of any kind to be caused to any person, either by the offender or any other person, if the demand is not complied with, takes or entices away, or detains, the person in respect of whom the threats are made; or (b) receives or harbours the said person in respect of whom the threats are made, knowing such person to have been so taken or enticed away, or detained.	- Offence simpliciter - If the person kidnapped has been unconditionally set free without having suffered any GBH - Attempts to kidnap another person for ransom	14 years 10 years 7 years	✓	N/A	X	No
364	**Cruelty to children under 16** A person who, having the lawful care	N/A	7 years	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	or charge of a child < 16 years, causes harm to the child by any prescribed conduct that the person knew or ought reasonably to have known would be likely to cause harm to the child commits an offence. 'Harm' to a child means any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing, whether temporary or permanent. 'Prescribed conduct' means: (a) failing to provide the child with adequate food, clothing, medical treatment, accommodation or care when it is available to the person from his or her own resources; (b) failing to take all lawful steps to obtain adequate food, clothing, medical treatment, accommodation or care when it is not available to the person from his or her own resources; (c) deserting the child; or (d) leaving the child without means of support.						
409 & 411	**Robbery** Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen.	- Offence simpliciter - If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, the offender wounds or uses any other personal violence to any person	14 years Life	✓	N/A	✓ (only s 411(2) offence)	No
412	**Attempted robbery** Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen.	- Offence simpliciter - If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons - If the offender is armed with any dangerous or offensive weapon, instrument or noxious substance, and at or immediately before or immediately after the time of the assault the offender wounds, or uses other personal violence to, any person by the weapon, instrument or noxious substance	7 years 14 years Life	✓	N/A	✓	No
417A	**Taking control of an aircraft** This offence involves taking control	- Offence simpliciter - If another person not	7 years 14 years	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
	of an aircraft directly or indirectly.	being an accomplice is on board the aircraft - If the offender uses or threatens actual violence to any person or property or is armed with any dangerous or offensive weapon or instrument or is in company or takes or exercises such control by any fraudulent representation trick device or other	Life				
419	**Burglary** (s 419(1) if s 419(3)(b)(i) or (ii) applies) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits an offence. A person who breaks any part, whether external or internal, of a dwelling or any premises, or opens, by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar, flap, or other thing, intended to close or cover an opening in a dwelling or any premises, or an opening giving passage from one part of a dwelling or any premises to another, is said to break the dwelling or premises. A person is said to enter a dwelling or premises as soon as any part of the person's body or any part of any instrument used by the person is within the dwelling or premises. A person who obtains entrance into a dwelling or premises by means of any threat or artifice used for that purpose, or by collusion with any person in the dwelling or premises, or who enters any chimney or other aperture of the dwelling or premises permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the dwelling or premises.	If the offender – - uses or threatens to use actual violence (s 419(3)(b)(i)); or - is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance (s419(3)(b)(ii))	Life	✓	N/A	X	No
Corrective Services Act 2006 **(Qld)**							
122(2)	**Taking part in a riot or mutiny** A prisoner must not take part in a riot or mutiny. 'Prisoner' means a prisoner in a corrective services facility. 'Mutiny' is defined as three or more prisoners collectively challenging authority under this Act, with intent to subvert the authority, if the security of the corrective services facility is endangered. 'Riot' means an unlawful assembly that has begun to act in so tumultuous a way as to disturb the peace.	- If the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, property and the security of the facility is endangered by the act - If the prisoner demands something be done or not be done with threats of injury or detriment to any person or property - If the prisoner escapes or attempts to escape from lawful custody, or helps another	Life 14 years 14 years	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
		prisoner to escape or attempt to escape - If the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, any property - otherwise.	10 years 6 years				
124(a)	**Other offences – prepare to escape from lawful custody** A prisoner must not prepare to escape from lawful custody.	N/A	2 years	✓	N/A	X	Yes
Drugs Misuse Act 1986 **(Qld)**							
5	**Trafficking in dangerous drugs** This offence involves a person who carries on the business of unlawfully trafficking in a dangerous drug. The penalty is dependent on the type of drug involved.	- Schedule 1 *Drugs Misuse Regulation 1987* - Schedule 2 *Drugs Misuse Regulation 1987*	25 years 20 years	✓	N/A	X	No
6	**Supplying dangerous drugs** (if the offence is one of aggravated supply) This offence involves a person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland. 'Supply' means: (a) to give, distribute, sell, administer, transport or supply (b) to offer to do any act specified in paragraph (a) (c) to do or offer to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in paragraph (a). An aggravated supply involves if the offender is an adult and the person to whom the supply is made is a minor or an intellectually impaired person, or the supply is within an educational institution or a correctional facility, or the person does not know he or she is being supplied with the thing. The penalty is dependent on the type of drug involved.	- Schedule 1 *Drugs Misuse Regulation 1987* - Schedule 2 *Drugs Misuse Regulation 1987*	25 years 20 years	✓	N/A	X	No
8	**Producing dangerous drugs** (if the circumstances mentioned in paras (a) or (b) apply which refer to the type of drug involved) This section creates the offence of unlawfully producing dangerous drugs. The penalty is dependent on the type and amount of the drug.	- Schedule 1 *Drugs Misuse Regulation 1987* of or exceeding the quantity specified in Schedule 4 - Schedule 1 *Drugs Misuse Regulation 1987* of or exceeding the quantity specified in Schedule 3 but less than the quantity specified in Schedule 4 and: - person is drug dependent - otherwise.	25 year 20 years 25 years	✓	N/A	X	No

Notes:

1 As defined for the purposes of Part 9A *Penalties and Sentences Act 1992* (Qld) and set out in Schedule 1 to the Act. In addition to those offences listed in this table, Schedule 1 includes equivalent offences since repealed by the *Criminal Law Amendment Act 1997* (Qld) (Criminal Code s 208 – unlawful anal intercourse; s 221 – conspiracy to defile; s 222 – incest by a man; s 223 – incest by adult female; s 318 – preventing escape from wreck) and the *Corrective Services Act 2006* (Qld) (*Corrective Services Act 2000* (Qld) s 92(2) – unlawful assembly, riot and mutiny; and s 94(a) – other offences).

2 As defined in section 160 of the *Penalties and Sentences Act 1992* (Qld) but, for the purposes of this table, excluding offences under the *Classification of Computer Games and Images Act 1995* (Qld), *Classification of Films Act 1991* (Qld) and *Classification of Publications Act 1991* (Qld), as well as Commonwealth offences under the *Crimes Act 1914* (Cth), *Criminal Code* (Cth) and *Customs Act* (Cth). Section 160 defines a 'sexual offence' as a sexual offence within the meaning of the *Corrective Services Act 2006* (Qld). In addition to those offences listed in this table, sexual offences in Schedule 1 of the *Corrective Services Act* include equivalent offences since repealed by the *Criminal Law Amendment Act 1997* (Qld) (*Criminal Code 1899* (Qld) s 208 – unlawful anal intercourse; s 221 – conspiracy to defile; s 222 – incest by a man; s 223 – incest by adult female; s 318 – preventing escape from wreck) and the *Corrective Services Act 2006* (Qld) (*Corrective Services Act 2000* (Qld) s 92(2) – unlawful assembly, riot and mutiny; and s 94(a) – other offences).

3 As defined for the purposes of Part 10 of the *Penalties and Sentences Act 1992* (Qld). 'Qualifying offences' for an indefinite sentence also include offences: repealed by the *Criminal Law Amendment Act 1997* (Qld) (*Criminal Code 1899* (Qld) s 208 – unlawful anal intercourse; s 221 – conspiracy to defile; s 222 – incest by a man; s 223 – incest by adult female); amended, renumbered or repealed by the *Criminal Law Amendment Act 2000* (Qld) (*Criminal Code 1899* (Qld) s 215 – carnal knowledge of girls under 16; s 336 – assault with intent to commit rape; s 337 – sexual assaults; s 347 – rape; and s 349 – attempt to commit rape); and s 209 of the *Criminal Code 1899* (Qld) (attempted sodomy) repealed by the *Criminal Code and Other Acts Amendment Act 2008* (Qld).

4 'Offence simpliciter' means the basic offence without any circumstance of aggravation. A circumstance of aggravation is a further element of the offence that increases the seriousness of the offence and penalty.

Appendix 4 – Glossary

Aggravating factor	A factor that may increase a sentence for an offence – for example, the use of violence or targeting a vulnerable victim.
Bench book	Bench books are guidelines made available to the courts on relevant topics, to assist the courts in a number of areas.
Common law	Also known as case law. It is developed through decisions of the courts rather than through legislation.
Compensation order	A compensation order requires an offender to make a payment for any personal injury suffered by the complainant. This order can be made in addition to any other sentence.
Community service order	This is a penalty that requires an offender to perform unpaid community service for a set number of hours, and comply with reporting and other conditions.
Concurrent sentence	If an offender is found guilty of more than one offence and sentenced to multiple terms of imprisonment, the individual imprisonment terms can be ordered to run concurrently with one another. The period of imprisonment that the offender must serve is the highest sentence of imprisonment imposed by the court for an offence that forms part of the sentence.
Culpability	The degree of individual fault for an offence.
Cumulative sentence	If an offender is ordered to serve imprisonment for more than one offence, the court may order the terms of imprisonment to be served one after the other, as opposed to concurrently.
Fine	A monetary penalty imposed with or without recording a conviction.
Full-time imprisonment	An order of imprisonment that must be served in custody until parole is granted. It excludes partially or wholly suspended sentences.
Head sentence	The total period of the sentence including the non-parole period and the parole period. For example, if a court sentences an offender for an offence to 5 years imprisonment with a non-parole period of 2 years, 5 years is the head sentence.
Indefinite sentence	This is a penalty that the court may impose on its own initiative or after an application by the prosecution. It requires an offender to be held indefinitely in prison. An indefinite sentence continues until a court orders it discharged.
Indictable offence	An indictable offence is a type of offence that is usually dealt with in the higher courts (the District and Supreme Courts). Such offences are heard by a judge and jury or a judge alone. In some instances an indictable matter can be heard in the Magistrates Court.
Intensive correction order	If a court sentences a person to 12 months imprisonment or less, the court may make an intensive correction order. The effect of the order is that the offender serves the sentence in the community, not in a prison, and must comply with strict requirements. See pt 6 *Penalties and Sentences Act 1992* (Qld).
Interquartile range (IQR)	A measure of dispersion among values. It represents the middle 50 per cent range of values. For the Council's analysis, the IQR measures variability of values near the average sentence length midpoint.
Mandatory sentence	The only sentence that can be imposed for an offence that cannot be deviated from or mitigated by the sentencing court. For example, murder carries a mandatory life sentence, which means that all offenders

	sentenced for murder must be sentenced to life imprisonment.
Maximum penalty	This is the maximum penalty that can be imposed on an offender for a given offence. Each criminal offence has a maximum penalty, and Parliament decides what this should be.
Maximum sentence	Out of the range of sentences imposed on different offenders for the same offence, the maximum sentence represents the highest sentence that was imposed on any offender for that offence.
Median absolute deviation (MAD)	A measure of dispersion among values. A small MAD means values are grouped closely and a large number means they have a broader deviation from the mid-point. In this paper, the MAD is used to provide an indication of how closely the length of imprisonment terms imposed for certain offences are clustered and consistency in sentence lengths. For more information about the median absolute deviation, refer to the research paper *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).
Minimum sentence	Out of the range of sentences imposed on different offenders for the same offence, the minimum sentence represents the lowest sentence that was imposed on any offender for that offence.
Mitigating factor	A factor that may reduce a sentence imposed on an offender for an offence – for example, pleading guilty or cooperating with police.
Non-parole period	The period during which an offender is serving their sentence in prison, prior to any eligibility date for release on parole.
Offence	An illegal act as defined by legislation.
Offence simpliciter	An offence simpliciter is the basic offence without any circumstance of aggravation. A circumstance of aggravation is a further element of the offence that increases the seriousness of the offence and penalty. For example, for the offence of assault occasioning bodily harm (s 339 Criminal Code (Qld)), assault occasioning bodily harm is the offence simplicter and attracts a penalty of 7 years imprisonment. If a person is, or pretends to be, armed with a dangerous or offensive weapon or instrument, or is in company with one more people, these are circumstances of aggravation and a higher maximum penalty of 10 years imprisonment applies.
Parole	The period of time when a person serving a term of imprisonment is released from prison to serve out the remainder of their sentence in the community under strict supervision.
Parole boards	The parole boards are independent statutory bodies responsible for determining if prisoners are released to parole. There are three parole boards in Queensland – the Queensland Parole Board, the Southern Queensland Regional Parole Board and the Central and Northern Queensland Regional Parole Board.
Parole eligibility date	A parole eligibility date is the date at which an offender is eligible to apply for parole. The parole eligibility date is set by the courts or by legislation.
Parole release date	A parole release date is a date set by the court upon which the offender is to be released from prison.
Partially suspended sentence	The partial suspension of a term of imprisonment. The court can impose a partially suspended sentence if an offender is sentenced to imprisonment for five years or less. See pt 8 *Penalties and Sentences Act 1992* (Qld).

Penalty	The sentence or sanction imposed by a court for an offender found guilty of an offence.
Probation	Probation is a sentencing order that allows the offender to remain in the community under strict requirements set by the court and Queensland Corrective Services. See pt 5 *Penalties and Sentences Act 1992* (Qld).
Queensland Sentencing Information Service (QSIS)	QSIS is a computer-based recording system that contains a large collection of linked sentencing-related information, including full-text criminal Queensland Court of Appeal Judgments, case summaries, and revised Sentencing Remarks from the Supreme and District Courts, dating back to 1999.
Recognisance order	This is a penalty that allows an offender to remain in the community if they agree to a court order to be of good behaviour and comply with any other conditions the court thinks is appropriate. The offender may or may not be required to pay a surety. See pt 3, divs 2, 3, 3A *Penalties and Sentences Act 1992* (Qld).
Restitution order	A restitution order requires an offender to make payment for or replace property that was taken or damaged as a result of the offender's conduct. This order can be made in addition to any other sentence.
'Serious violent offence' (SVO) as defined in the *Penalties and Sentences Act 1992* (Qld)	A 'serious violent offence', as defined for the purposes of Part 9A of the *Penalties and Sentences Act 1992* (Qld), are offences listed in Schedule 1 of the Act. A declaration by a court that an offender has been convicted of a 'serious violent offence' means that the offender must serve 80 per cent of his or her prison sentence or 15 years in prison (whichever is the lesser) before being eligible to apply for parole.
Serious violent offence	A serious violent offence, in the ordinary use of the term, means an offence involving serious violence against the person.
Standard non-parole periods	A standard non-parole period is a legislated period intended to provide guidance to courts on the minimum length of a non-parole period to be set for a given offence.
Summary offence	Summary offences are dealt with in the Magistrates Court and are heard by a magistrate alone.
Surety	A surety is a sum of money paid to the court in accordance with certain conditions. If those conditions are breached, the money may be forfeited to the court. For example, a surety may be made in conjunction with a good behaviour bond or in relation to bail.
The Council	The Sentencing Advisory Council.
Wholly suspended sentence	The complete suspension of a term of imprisonment. The court can impose a wholly suspended sentence if an offender is sentenced to imprisonment for five years or less. See pt 8 *Penalties and Sentences Act 1992* (Qld).

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ENDNOTES

Chapter 1

1 Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 198.
2 *Penalties and Sentences Act 1992* (Qld) s 160B. The exception to this is if the offender has had a court-ordered parole order cancelled under sections 205 or 209 of the *Corrective Services Act 2006* (Qld) during the offender's period of imprisonment, in which case the court must fix the date the offender is eligible for parole (rather than a parole release date): *Penalties and Sentences Act 1992* (Qld) s 160B(2).
3 *Penalties and Sentences Act 1992* (Qld) ss 160C and 160D. A court must set a parole eligibility date for sentences of imprisonment of over 3 years (which do not include a sentence for a sexual offence or serious violent offence) if the offender had a current parole eligibility date (*Penalties and Sentences Act 1992* (Qld) s 160C(2)) and, in the case of sentences of imprisonment which include a sentence for a serious violent offence or a sexual offences, if the offender had a current parole eligibility date or a current parole release date (*Penalties and Sentences Act 1992* (Qld) s 160D(2)).
4 *Corrective Services Act 2006* (Qld) s 182.
5 *Penalties and Sentences Act 1992* (Qld) s 160D; *Corrective Services Act 2006* (Qld) s 182(3).
6 Terms of Reference issued by the NSW Attorney-General to the NSW Sentencing Council on 30 March 2009, NSW Sentencing Council, see <http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_current_projects> accessed 20 April 2011.
7 See <http://www.ipc.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_index> accessed 3 May 2011.
8 *Muldrock v The Queen* [2011] HCATrans 055 (11 March 2011). Leave is also being sought in the matter of *R v Mahmud* [2011] HCATrans 106. One of the grounds of appeal relates to the constitutional validity of the NSW SNPP scheme.
9 These offences include murder; manslaughter; child homicide; defensive homicide; causing serious injury intentionally; threats to kill; rape; assault with intent to rape; incest (in circumstances other than where both people are aged 18 or older and each consented as defined in s 36 of the *Crimes Act 1958* (Vic) to engage in the sexual act); sexual penetration of child under the age of 16; persistent sexual abuse of child under the age of 16; abduction or detention; abduction of child under the age of 16; kidnapping; armed robbery; sexual penetration of child under the age of 10; sexual penetration of child aged between 10 and 16; an offence that, at the time it was committed, was a serious offence; either of the common law offences of rape or assault with intent to rape; an offence of conspiracy to commit, incitement to commit or attempting to commit, an offence referred to in this list: *Sentencing Act 1991*(Vic) s 3(1).
10 Reference from the Victorian Attorney-General Robert Clark, to the Victorian Sentencing Advisory Council on baseline sentences and gross violent offences issued 13 April 2011, see <http://www.sentencingcouncil.vic.gov.au/page/our-work/projects/baseline-sentences> accessed 29 April 2011. The Council has also been asked whether any offences additional to those committed to by the Government should be included, either in the additional introduction of baseline sentences or subsequently.
11 See <http://www.sentencingcouncil.vic.gov.au/landing/our-work/projects> accessed 3 May 2011.
12 The Hon Robert Clark MP, Attorney-General and Minister for Finance, 'New Sentencing Survey Seeks Views of All Victorians' (Media Release, 31 May 2011).

Chapter 2

13 Premier and Minister for Arts and Attorney-General and Minister for Industrial Relations 'Standard Minimum Jail Terms Part of Sentencing Reform' (Media Release, 25 October 2010).
14 Ibid.
15 Ibid.
16 Terms of Reference – Minimum Standard Non-Parole Periods (20 December 2010).
17 See Karen Gelb, *Myths and Misconceptions: Public Opinion versus Public Judgement about Sentencing* (Sentencing Advisory Council (Victoria), 2006) 11; Julian Roberts and David Indermaur, *What Australians Think About Crime and Justice: Results from the 2007 Survey of Social Attitudes* (Australian Institute of Criminology, 2009); and Smart Justice Victoria, 'Public Opinion and Sentencing Factsheet' (2010).
18 For example, a recent study measuring public confidence in the NSW criminal justice system found that 66 per cent of NSW residents believed that sentences are too lenient: Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public Confidence in the New South Wales Criminal Justice System' (Crime and Justice Bulletin No 118, New South Wales Sentencing Council and NSW Bureau of Crime Statistics and Research, 2008).
19 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' (2007) *Criminal Law Review* 769.
20 Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World* (Syracuse University Press, 1991) cited in Karen Gelb, M*easuring Public Opinion About Sentencing* (Sentencing Advisory Council (Victoria), 2008).
21 Gelb (2008), above n 20.
22 Brent Davis and Kim Dossetor, '(Mis)perceptions of Crime in Australia' (Trends and Issues in Crime and Criminal Justice No 396, Australian Institute of Criminology, 2010).
23 Ibid.
24 See, for example, John Walker, Mark Collins and Paul Wilson 'How the Public Sees Sentencing: An Australian Survey' (Trends and Issues in Crime and Criminal Justice No 4, Australian Institute of Criminology, 1987). The study randomly selected 2551 participants from the Australian public. This national study demonstrated that views on sentencing vary in relation to attitudes towards the

seriousness of the crime, the culpability of offenders and/or the punitive nature of the sentences. It found that a period of imprisonment is the preferred sentence option for offences involving violence or drug trafficking, while non-custodial sentences are generally preferred for non-violent offences.

25 Lovegrove (2007), above n 19.

26 Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Trends and Issues in Crime and Criminal Justice No 407, Australian Institute of Criminology, 2011).

27 Interestingly, a small study conducted in Western Australia (n=53) found that prisoners also believe that sentences provided to sex offenders are too lenient: David Indermaur, 'Offenders' Perceptions of Sentencing' (1994) 29 *Australian Psychologist* 140–44.

28 Jill Levenson et al, 'Public Perceptions About Sex Offenders and Community Protection Policies' (2007) 7(1) *Analyses of Social Issues and Public Policy* 137.

29 Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy* (Australian Institute of Criminology, 2004) cited in Karen Gelb, *Recidivism of Sex Offenders Research Paper* (Sentencing Advisory Council (Victoria), 2007).

30 Gelb (2007) above n 23.

31 See, for example, Warner (2011), above n 26.

32 See, for example, the remarks of Lord Lane in *R v Bibi* (1980) 2 Cr App R (S) 177, 179.

33 *Penalties and Sentences Act 1992* (Qld) s 3(c).

34 *Markarian v The Queen* (2005) 228 CLR 357 [39].

35 Martin Moynihan AC QC, *Review of the Civil and Criminal Justice System in Queensland* (2010) [233].

36 *Penalties and Sentences Act 1992* (Qld) s 3(g).

37 Madonna King, Interview with Cameron Dick Attorney-General of Queensland (Radio Interview ABC 612 Brisbane, 26 October 2010).

38 Chief Justice of Queensland, The Honourable Paul de Jersey AC, 'Launch of the Queensland Sentencing Information Service' (Speech delivered at the Banco Court, Supreme Court of Queensland, Brisbane, 27 March 2007).

39 *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(i).

40 *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(ii).

41 *Penalties and Sentences Act 1992* (Qld) s 9(3).

42 *Penalties and Sentences Act 1992* (Qld) s 9(5).

43 *Penalties and Sentences Act 1992* (Qld) s 9(5)(b).

44 *Penalties and Sentences Act 1992* (Qld) s 9(5A).

45 *Penalties and Sentences Act 1992* (Qld) s 9(6A).

46 *Veen v The Queen (No 2)* (1988) 164 CLR 465 [15].

47 For example, the offence of murder has a minimum penalty of life imprisonment that cannot be mitigated or varied (*Criminal Code 1899* (Qld) s 305) .

48 QSIS is based on the Judicial Information Research System (JIRS) developed in NSW to assist the courts in achieving a consistent approach in sentencing offenders. It contains a large collection of linked sentencing-related information including: full-text criminal Queensland Court of Appeal judgments, case summaries, and revised Sentencing Remarks from the Supreme and District Courts, dating back to 1999.

49 At the launch of QSIS, Queensland's Chief Justice, The Honourable Paul de Jersey AC, suggested that its introduction was 'potentially the most significant development in recent years in the streamlining of our criminal justice system', noting that the objective of the database was 'increased consistency and predictability in sentencing'. Chief Justice of Queensland, The Honourable Paul de Jersey AC, 'Launch of the Queensland Sentencing Information Service' (Speech delivered at the Banco Court, Supreme Court of Queensland, Brisbane, 27 March 2007).

50 *R v Ryan* (2003) 141 A Crim R 403, 441.

51 Ibid.

52 *R v Bloomfield* (1998) 44 NSWLR 734.

53 Some indictable offences can be dealt with summarily in the Magistrates Court.

54 Criminal Code (Qld) ss 668D and 669A. For further information on the appeal process see <http://www.courts.qld.gov.au/Factsheets/D-COA-FS-Appeal_Applications.pdf > accessed 11 March 2010.

55 *Criminal Code 1899* (Qld) s 668E.

56 Located in *Justices Act 1886* (Qld) s 222(2).

57 *Justices Act 1886* (Qld) s 225(1).

58 *Justices Act 1886* (Qld) s 225(1).

59 *Justices Act 1886* (Qld) s 225(2).

60 *Justices Act 1886* (Qld) s 226.

61 *Justices Act 1886* (Qld) s 227.

62 See *R v Willis* (1974) 60 Cr App R (S) 146 on buggery (unlawful sodomy) which suggested a sentencing range of 3 to 5 years for cases not presenting any aggravating or mitigating factors, and *R v Taylor, Roberts and Simmons* (1977) 64 Cr App R (S) 182 on unlawful sexual intercourse with a girl under the age of 16 years.

63 On the duty of courts to follow guideline judgments, see *R v Johnson* (1994) 15 Cr App R (S) 827, 830; *Attorney-General References Nos. 37, 38 and Others of 2003* [2004] 1 Cr App R (S) 499, 503.

64 Kate Warner, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8, 9.

65 Chief Justice James Spigelman AC, 'Consistency and Sentencing' (Keynote Address to Sentencing 2008 Conference, National Judicial College of Australia, Canberra, 8 February 2008).

66 *Attorney-General's Application No 3 of 2002* [2004] NSWCCA 303 (8 September 2009).

67 Inserting Part 2A into the *Penalties and Sentences Act 1992* (Qld). These provisions came into operation on 26 November 2010 (2010 SL No 330).
68 Explanatory Memorandum, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 1–2.
69 Geraldine Mackenzie, 'Achieving Consistency in Sentencing: Moving to Best Practice?' (2002) 22 *University of Queensland Law Journal* 74, 90.
70 Chief Justice of Queensland, The Honourable Paul de Jersey AC, 'Commentary on Professor Arie Freiberg's Paper on "The Victorian Sentencing Advisory Council, Engaging the Community"', Current Legal Issues Seminar Series 2010 (Banco Court, Supreme Court of Queensland, Brisbane) 14 October 2010.
71 Chief Justice of Queensland, The Honourable Paul de Jersey AC and Her Honour Chief Judge Patricia M Wolfe, Introduction, *Supreme and District Courts Benchbook* online at <http://www.courts.qld.gov.au/2265.htm> accessed 11 March 2010.
72 Judicial Commission of NSW, *Sentencing Bench Book* <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing> accessed 11 March 2010.
73 This is accessible on the Judicial College's website: <http://www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual> accessed 11 March 2010.
74 John Robertson and Geraldine Mackenzie, *Queensland Sentencing Manual* (1998–). This service is accessible via Thomson Reuters Legal Online.
75 Under the *Penalties and Sentences Act 1992* (Qld) Part 9A.
76 *Corrective Services Act 2006* (Qld) s 182.
77 *Corrective Services Act 2006* (Qld) s 181(3).
78 *Corrective Services Act 2006* (Qld) s 181(2).
79 A 'serious violent offence' is defined as a serious violent offence of which an offender is convicted under s 161A of Pt 9A of the Act: *Penalties and Sentences Act 1992* (Qld) s 4.
80 For the purposes of these provisions, a 'sexual offence' is defined as a sexual offence within the meaning of the *Corrective Services Act 2006* (Qld). This includes a broad range of offences, including a number of sexual offences under the *Criminal Code 1899* (Qld) such as rape (s 349), sexual assault (s 352), child pornography offences (s 228A–D), maintaining a sexual relationship with a child (s 229B), and carnal knowledge with or of a child under 16 years (s 215).
81 *Penalties and Sentences Act 1992* (Qld) s 160B. This is what is referred to as 'court ordered parole'.
82 *R v Ross* [2009] QCA 7 (10 February 2009) [6] (de Jersey CJ).
83 *R v Blanch* [2008] QCA 253 (29 August 2008) [24] (Keane JA).

Chapter 3

84 *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) amending the *Crimes (Sentencing Procedure) Act 1999* (NSW).
85 Table to Part 4, Division 1A of *Crimes (Sentencing Procedure) Act 1999* (NSW) as introduced.
86 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (Hon Bob Debus, Attorney-General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).
87 Ibid.
88 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
89 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2).
90 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1).
91 *Crimes (Sentencing Procedure) Act1999* (NSW) s 54D(3).
92 New South Wales, *Parliamentary Debates*, above n 86, 5818–19.
93 'The outcome for individual cases will depend upon the range of objective and subjective considerations that are to be taken into account. Given the absence of any consistent proportion between the non-parole period and maximum penalties prescribed for the Table offences, and the absence of any consistent relativity between those non-parole periods apparent from an examination of the statistics, it may be that for some offences the sentencing pattern will move upwards, while for others it will not': *R v Way* (2004) 60 NSWLR 168, 195.
94 *R v Way* (2004) 60 NSWLR 168, 190.
95 Peter Johnson SC, 'Reforms to New South Wales Sentencing Law' (2003) 6 *The Judicial Review* 313, 331.
96 New South Wales Sentencing Council, *Firearms Offences and the Standard Non-Parole Sentencing Scheme* (New South Wales Sentencing Council, 2004) 15.
97 The limitations of the JIRS statistics in a broader sense were acknowledged by the CCA NSW in *R v Aem; R v Kem; R v MM* [2002] NSWCCA 58 (13 March 2002) [114]–[115].
98 New South Wales Sentencing Council (2004) above n 96.
99 See, for example, *R v Way* (2004) 60 NSWLR 168, 195; *R v Henry* [2007] NSWCCA 90 (2 April 2007) [26].
100 See, for example, Warner (2003) above n 64, 14.
101 By virtue of the operation of s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
102 New South Wales Bar Association, Submission to the NSW Sentencing Council on the Review of the Standard Non-Parole Period Scheme, 28 May 2009.
103 [2007] NSWCCA 24 (14 February 2007).
104 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44 requires the NPP to be at least 75 per cent of the head sentence in the absence of special circumstances.
105 *Marshall v The Queen* [2007] NSWCCA 24 (14 February 2007) [34].

106 (2004) 60 NSWLR 168, 182.
107 Ibid 186.
108 Ibid.
109 Ibid 188.
110 Ibid 187.
111 Ibid 188–9.
112 *Hillier v DPP* (NSW) 198 A Crim R 565.
113 See, for example, *R v Hopkins* [2004] NSWCCA 105 (10 May 2004).
114 See, for example, *R v Sellars* [2010] NSWCCA 133 (25 June 2010); *R v McEvoy* [2010] NSWCCA 110 (21 May 2010) [89]; *R v Cheb* [2009] NSWCCA 134 (1 May 2009); *R v Knight; R v Biuvanua* (2007) A Crim R 338; *Dunn v The Queen* [2010] NSWCCA 128 (16 June 2010); *R v Farrawell-Smith* [2010] NSWCCA 144 (14 July 2010); *Mitchell v The Queen* [2010] NSWCCA 145 (12 July 2010); *OH Hyunwook v The Queen* [2010] NSWCCA 148 (19 July 2010); *R v LP* [2010] NSWCCA 154 (21 July 2010).
115 In the matter of *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338 an appeal case from a first instance decision in which the sentencing judge described the objective seriousness of the offence as being 'at least in the mid-range of objective seriousness', Justice Howie found that this approach constituted an error and that: 'Although such an assessment cannot be made with absolute precision, it must at least indicate whether the offence is assessed as below, of, or above midrange of seriousness with some indication as to the degree to which it departs from the midrange if that is the finding' (at [4]).
116 See, for example, *R v McEvoy* [2010] NSWCCA 110 (21 May 2010).
117 *R v Burgess* [2006] NSWCCA 319 (6 October 2006).
118 *Muldrock v The Queen* [2011] HCATrans 055 (11 March 2011); *Mahmud v The Queen* [2011] HCATrans 106 (18 April 2011).
119 New South Wales, *Parliamentary Debates*, above n 86.
120 A list of meetings with NSW representatives appears in Appendix 2 to this paper.
121 See *Silvell v The Queen* [2009] NSWCCA 286 (3 December 2009) [2]–[5] (McClellan CJ). See also G*eorgopolous v The Queen* [2010] NSWCCA 246 (5 November 2010) [31]–[32] (Howie J); and *Okeke v The Queen* [2010] NSWCCA 266 (1 December 2010) [32] (Howie AJ).
122 *Georgopolous v The Queen* [2010] NSWCCA 246 (5 November 2010) [30] (Howie J).
123 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1). This includes a court's finding of 'special circumstances' under s 44(2). See Mark Marien, 'Standard Non-Parole Sentencing – The New Sentencing Reforms' (2003) 14(11) *Judicial Officers' Bulletin* 83; and *R v Way* (2004) 60 NSWLR 168, 190.
124 Marien (2003), above n 123, 86.
125 (2006) 164 A Crim R 93.
126 Judicial Commission of NSW, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (Monograph 33, 2010) 23.
127 Ibid.
128 *R v Reyes* [2005] NSWCCA 218 (16 June 2005).
129 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A inserted by *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) sch 2 [14] which commenced operation on 14 March 2011.
130 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(4A).
131 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(4B).
132 The rate of appeal is the frequency with which an offender or the state appeals against a first instance sentence. Rates are calculated within two years of first instance sentence.
133 See *R v Way* (2004) 60 NSWLR 168, 184.
134 New South Wales, *Parliamentary Debates*, above n 86.
135 Prison expenditure information presented in this section includes real recurrent expenditure. Figures do not include recurrent capital costs as they are not consistently reported in Report on Government Services publications.
136 The scheme only applies to persons aged 10–18 years if the young person is sentenced as an adult, sentenced to imprisonment, or otherwise transferred or ordered to serve his or her sentence in prison: *Criminal Law (Sentencing) Act 1988* (SA) s 31A.
137 A 'serious offence against the person' is defined as a major indictable offence (other than murder) that results in the death of the victim or the victim suffering total incapacity: *Criminal Law (Sentencing) Act 1988* (SA) s 32(10)(d). The definition includes conspiracy to commit such an offence, or aiding, abetting, counselling or procuring such an offence. A person suffers total incapacity if they are permanently physically or mentally incapable of independent function: *Criminal Law (Sentencing) Act* (SA) s 32(10)(e).
138 Introduced by the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007* (SA) amending the *Criminal Law (Sentencing) Act 1988* (SA).
139 South Australia, *Parliamentary Debates*, House of Assembly, 8 February 2007, 1743–4 (Michael Atkinson, Attorney-General).
140 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab).
141 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ba).
142 *R v Ironside* [2009] SASC 151 [32] (Doyle CJ).
143 Ibid [38] (Doyle CJ).
144 Ibid.
145 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(2)(a).
146 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(c).
147 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(2)(b).
148 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3).

149 This opposition to the introduction of the scheme was acknowledged during the Second Reading Speech of the Bill by the then Minister for Police, Paul Holloway: South Australia *Parliamentary Debates,* Legislative Council, 24 July 2007, 447.
150 See, for example *R v Ironside* [2009] SASC 151 (3 June 2009); *R v Barnett* [2009] SASC 332 (30 October 2009); *R v Harkin* [2010] SASCFC 39 (14 October 2010); *R v Jones* [2010] SASCFC 58 (23 November 2010). Additionally, in the matter of *R v A,D* [2011] SASCFC 5 (3 March 2011), the court referred to a summary provided by Counsel for A which summarised the differing opinions that have been expressed by the court regarding the operation of the legislation [28].
151 Pursuant to *Criminal Law (Sentencing) Act 1988* (SA) s 18A.
152 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5a)(c).
153 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5a)(d).
154 [2008] SASC 136.
155 Ibid [42] (Doyle CJ, with whom Bleby and Anderson JJ agreed).
156 Ibid [43].
157 Ibid [43]. In this case, the court started with a head sentence of imprisonment of 12 years (for the more serious offence) less 15 per cent for the guilty plea. The court took into account the offender's pre-sentence custody to reduce the head sentence to imprisonment for 11 years and 2 months. The court determined that a lengthier non-parole period was appropriate (than four-fifths) and fixed a non-parole period of 9 years and 2 months.
158 See, for example, *R v Jones* [2010] SASCFC 58 (23 November 2010). In dismissing the appeal, members of the court took different views on how the special circumstances provisions should be applied. David J (in the majority) was of the view that a sentencing judge is not required to make a specific finding that the offending is at the lower end of the range of objective seriousness before being able to set a non-parole period below the mandatory minimum period [114]. Peek J (also in the majority) found that the fixing of a non-parole period below the mandatory minimum based on special reasons involved a two-stage process: (1) the preliminary special reasons inquiry and (2) the substantive fixing of the non-parole period [165]. For an overview of some of the differing opinions expressed by the courts in setting a shorter non-parole period as a result of a finding of special reasons, see *R v A, D* [2011] SASCFC 5 (3 March 2011) [28].
159 *R v Jones* [2010] SASCFC 58 (23 November 2010).
160 *Sentencing Act 1995* (NT) s 53A. Aggravated circumstances are if the victim was killed while carrying out the duties of or in connection with their occupation, and the victim's occupation was a police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service. The act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct either before or after the victim's death that would constitute a sexual offence against the victim. The offender is being sentenced for two or more unlawful homicides or has one or more previous convictions for homicide. *Sentencing Act 1995* (NT) s 53A(3).
161 *Sentencing Act 1995* (NT) s 53(1).
162 This scheme was introduced by the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT), and was influenced by the introduction of SNPPs by NSW in 2003.
163 *Sentencing Act 1995* (NT) s 53A(4).
164 *Sentencing Act 1995* (NT) s 53A(6).
165 *Sentencing Act 1995* (NT) s 53A(7),(8).
166 *Sentencing Act 1995* (NT) s 53A(5).
167 [2004] NTSC 63 (8 December 2004).
168 Ibid 67 (Martin CJ).
169 Ibid 69 (Martin CJ).
170 Ibid 76.
171 Ibid 77.
172 Ibid 78.
173 Ibid 101 (Martin CJ).
174 Ibid 103.
175 Ibid 106.
176 *Sentencing Act 1995* (NT) ss 55 and 55A.
177 *Sentencing Act 1995* (NT) ss 55(2) and 55A (2).
178 *Sentencing Act 1995* (NT) s 55.
179 *Sentencing Act 1995* (NT) s 55A. These offences are the Criminal Code offences of sexual intercourse and gross indecency with a child under 16 (s 127); sexual intercourse and gross indecency with a mentally ill or handicapped person (s 130); attempt 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); acts intended to cause serious harm or prevent apprehension (s 177(1)); serious harm (s 181); endangering the life of a child by exposure (s 184); harm (s 186); female genital mutilation (s 186B); common assault (s 188); and sexual intercourse without consent (s 192(4)).
180 *Sentencing Act 1995* (NT) s 54(1), (2).
181 *Sentencing Act 1995* (NT) ss 53(1) and 54(3).
182 *Corrective Services Act 2006* (Qld) s 184.
183 New Zealand Law Commission, *Sentencing Guidelines and Parole Reform* (2006).
184 Before the change in government, the Law Commission had developed a comprehensive set of draft sentencing guidelines, with the assistance of four judges seconded to the Commission. These guidelines were modeled on the English form of sentencing guidelines. After the shelving of the Law Commission's draft guidelines, the NZ Court of Appeal issued two guideline judgments, drawing

extensively on the work originally undertaken by the Law Commission: Warren Young and Andrea King, 'Sentencing Practice and Guidance in New Zealand' (2010) 22(4) *Federal Sentencing Reporte*r 254.

185 These provisions were inserted into the *Sentencing Act 2002* (NZ) on 1 June 2010 by the *Sentencing and Parole Reform Act 2010* (NZ).

186 The list of serious violent offences is provided in s 86A *Sentencing Act 2002* (NZ) and includes a range of offences such as sexual offences (including child sexual offences), murder, manslaughter, offences involving personal violence, firearm offences and robbery.

187 See, for example *R v Smith* [1987] 1 SCR 1045.

188 See, for example *R v Latimer* [2001] 1 SCR 3, where the offender was found guilty of second degree murder. After a second trial and a verdict of guilty the trial judge granted a constitutional exemption from the MMS and sentenced the offender to 1 year imprisonment and 1 year probation. On appeal, the court affirmed the conviction but reversed the sentence, imposing the MMS of life imprisonment without parole eligibility for 10 years. This sentence was upheld on further appeal.

189 Tim Quigley, 'Sentencing and Penal Policy in Canada: Cases, Material and Commentary – Book Review' (2009) *Canadian Criminal Law Review* 313.

190 Marvin Bloos and Michael Plaxton, 'Starting-Point Sentencing and the Application of *Laberge* in Unlawful Act Manslaughter Cases' (2003) 6th series *Criminal Reports (Articles).*

191 See *R v Sandercock,*(1985) Carswell Alta 190 – which provides a starting point sentence for major sexual assault being 3 years. Affirmed in *R v Arcand* [2010] ABCA 363.

192 *R v Arcand* [2010] ABCA 363 [121].

193 Ibid [122].

194 Ibid [129].

Chapter 4

195 *R v WES* (Unreported, District Court of Queensland, Dodds J, 15 December 2010). The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.

196 *R v Peisley* (2010) NSWDC 240 (8 October 2010).

197 Criminal Code (Qld) s 305(1).

198 Part 10 of the *Penalties and Sentences Act 1992* (Qld).

199 *Mental Health Act 2000* (Qld) s 97.

200 E-mail communication from Commissioner's Representative, Parole Boards Queensland to Thomas Byrne, 10 May 2011.

201 *Criminal Code 1899* (Qld) ss 613, 645 and 647.

202 *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 23 and 52. The 'limiting term' as this period is referred to, operates as the maximum period the person can be detained as a forensic patient for the offence which was the subject of the special hearing.

203 *Penalties and Sentences Act 1992* (Qld) s 144.

204 (Unreported, Supreme Court of South Australia, Sulan J, 13 April 2011).

205 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54C. However, the failure of the court to comply with this section does not invalidate the sentence: s 54(2).

206 *Criminal Code 1899* (Qld) s 552H(1)(a).

207 *Criminal Code 1899* (Qld) s 552H(1)(b).

208 *Criminal Code 1899* (Qld) s 552D.

209 *Criminal Law (Sentencing) Act 1988* (SA) s 31A.

210 The *Youth Justice Act 1992* (Qld) defines a 'child' as a person who is yet to turn 17 years of age: sch 4.

211 *Penalties and Sentences Act 1992* (Qld) s 9(8)–(9).

212 *Sentencing Act 2002* (NZ) ss 86A–86I.

213 Part 9A *Penalties and Sentences Act 1992* (Qld).

214 Part 10 *Penalties and Sentences Act 1992* (Qld).

215 Terms of Reference – Baseline Sentences; Gross Violence Offence (issued by the Attorney-General, Robert Clark, 12 April 2011).

216 The Israeli Penal Law Bill (Amendment No 92, Structuring Judicial Discretion in Sentencing) 5766-2006.

217 Oren Gazal-Ayal, and Ruth Kannai, 'Determination of Starting Sentences in Israel – System and Application' (2010) 22(4) *Federal Sentencing Reporter* 232, 233.

218 The Israeli Penal Law Bill (Amendment No. 92, Structuring Judicial Discretion in Sentencing) 5766–2006 s 40I(a) as cited in Gazal-Ayal and Kannai (2010) above n 217, 232.

219 Gazal-Ayal and Kannai (2010) above n 217, 233.

220 *R v Way* (2004) 60 NSWLR 168, 192.

221 *Muldrock v The Queen* [2011] HCATrans 55 (11 March 2011).

222 *R v Way* (2004) 60 NSWLR 168, 193.

223 The Hon Robert Clark MP, Attorney-General and Minister for Finance (2011), above n 12.

224 See, for example, *R v Way* (2004) 60 NSWLR 168, 195; *R v Henry* [2007] NSWCCA 90 (2 April 2007) [26].

225 See, for example, Warner (2003) above n 64, 14.

226 [2007] NSWCCA 24 (14 February 2007). This matter involved an offence of breaking and entering (*Crimes Act 1900* (NSW) s 112(2)) which carries a maximum penalty of 20 years imprisonment.

227 In adopting the reasoning of Howie J, this would provide a SNPP of 37.5 per cent of the maximum penalty. Queensland does not have an equivalent provision.

228 The term of 25 years was selected based on the pre-existing non-parole periods associated with the offence of murder. If a person is convicted of one murder and has not been previously convicted of murder, the non-parole period is 15 years (*Corrective Services Act*

2006 (Qld) s 181(3)). If the person is convicted of murder and has previously been convicted of murder or another murder is taken into account, the non-parole period is 20 years (*Corrective Services Act 2006* (Qld) s 181(2)).

229 The particular discount that applies for a guilty plea was discussed in the matter of *R v Blanch* [2008] QCA 253 (29 August 2008) [24] (Keane JA), where it was recognised that: 'It is the common practice of sentencing Courts in Queensland to recognise the value of an early plea of guilty and other circumstances in mitigation by ordering that the offender be eligible for parole after serving one-third of the term of imprisonment imposed as the head sentence.'

230 In the UK, guidelines developed by the Sentencing Council for England and Wales and associated starting points and sentencing ranges have been put on a statutory basis: *Coroners and Justice Act 2009* (UK) pt 4, ch 1. A court in sentencing an offender must follow any sentencing guidelines that are relevant to the offender's case and, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines that are relevant to the exercise of the function unless the court is satisfied that it would be contrary to the interests of justice to do so: s 125.

231 Sentencing Guidelines Council (UK), *Definitive Guideline: Robbery* (2006).

232 Ibid 11.

233 The court has discretion to wholly or partially suspend a sentence as it thinks appropriate. The effect of imposing a suspended sentence is to provide a fixed release date after which the offender is released into the community without any supervision. A release on parole would require the offender to be supervised in the community until the expiration of the entire sentence.

234 *Penalties and Sentences Act 1992* (Qld) s 144.

235 Sentencing Advisory Council (Qld), *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).

236 Ibid.

237 *Corrective Services Act 2006* (Qld) s 182.

238 *Penalties and Sentences Act 1992* (Qld) s 160D.

239 *Penalties and Sentences Act 1992* (Qld) s 161A.

240 See *R v AAG & AAH* [2009] QCA 158 (12 June 2009) – a rape conviction of 9 years with a declaration based on the circumstances of the offence and to maintain parity with the sentences imposed on the other offenders; *R v Orchard* [2005] QCA 141 (6 May 2005) – an armed robbery conviction of 9 years with the declaration overturned on appeal.

241 *R v A* [2003] QCA 538 (2 December 2003).

Chapter 5

242 *Corrective Services Act 2006* (Qld) s 4 and sch 4.

243 *Criminal Code 1899* (Qld) s 228 (Obscene publications and exhibitions); s 228A (Involving child in making child exploitation material); s 228B (Making child exploitation material); s 228C (Distributing child exploitation material); and s 228D (Possessing child exploitation material).

244 *Crimes Act 1914* (Cth) s 50BA (Sexual intercourse with a child under 16); s 50BB (Inducing child under 16 to engage in sexual intercourse); s 50BC (Sexual conduct involving a child under 16); s 50BD (Inducing child under 16 to be involved in sexual conduct); s 50DA (Benefiting from offence against this Part); s 50DB (Encouraging offence against this Part); *Criminal Code* (Cth) s 270.6 (Sexual servitude offences) and s 270.7 (Deceptive recruiting for sexual services); and *Customs Act 1901* (Cth) s 233BAB (Special offence relating to tier 2 goods).

245 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A, Table–Standard Non-Parole Periods.

246 *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) s 3, sch 1 [8]–[9], [11]–[14].

247 *Crimes Amendment (Sexual Offences) Act 2008* (NSW) s 4 (sch 2, 2.4[5]).

248 New South Wales, *Parliamentary Debates*, above n 86, 5813.

249 New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2667 (John Hatzistergos, Attorney General, and Minister for Justice).

250 *Criminal Law (Sentencing) Act 1988* (SA) s 32(10)(d).

251 *Sentencing Act 1995* (NT) s 53A(1).

252 *Sentencing Act 1995* (NT) s 55 and s 192(3) *Criminal Code* (NT).

253 *Sentencing Act 1995* (NT) s 55A.

254 *Sentencing Act 1995* (NT) ss 53A(5) (murder), 55(2) (sexual offences involving sexual intercourse without consent), 55A(2) (sexual offences against children under 16 years), and 53(1).

255 A 'serious violent offence' is defined in section 86A of the *Sentencing Act 2002* (NZ) and includes a broad range of sexual and serious violent offences under the *Crimes Act 1961* (NZ), including sexual violation (s 128B); sexual connection with dependent family member under 18 years (s 131(1)); sexual connection with child (s 132(1)); indecent act on child (s 132(3)); sexual connection with young person (s 134(1)); indecent act on young person (s 134(3)); indecent assault (s 135); murder (s 172); attempted murder (s 173); manslaughter (s 177); wounding with intent to cause grievous bodily harm or injure (s 188); injuring with intent to cause grievous bodily harm (s 189(1)); aggravated wounding (s 191(1)); aggravated injury (s 191(2)); discharging firearm or doing dangerous act with intent to do grievous bodily harm or to injure (s 198); kidnapping (s 209); aggravated burglary (s 232(1)); robbery (s 234); and aggravated robbery (s 235).

256 New Zealand, 'Third Reading – Sentencing and Parole Reform Bill', *Parliamentary Debates,* House of Representatives, 25 May 2010 (Judith Collins, Minister of Corrections).

257 Legal Issues Roundtables, 17 and 22 February 2011; Community Issues Roundtable, 18 February 2011. The commitments referred to are under the Queensland Aboriginal and Torres Strait Islander Justice Agreement, signed on 19 December 2000 which aims to achieve a 50 per cent reduction in the rate of Aboriginal and Torres Strait Islander people incarcerated in the Queensland criminal justice system by the year 2011. A new draft Aboriginal and Torres Strait Islander Justice Strategy 2011–2014 has been released by Aboriginal and Torres Strait Islander Services in the Department of Communities for comment: Queensland Government, *Draft Aboriginal and Torres Strait Strategy 2011–2014* (2011) < http://www.atsip.qld.gov.au/government/programs-initiatives/justice-strategy/default.asp> accessed 2 May 2011.

258 Sentencing Advisory Council (Qld) (2011), above n 235.
259 Based on the Council's analysis of the most serious offence profile of offenders sentenced to full-time imprisonment in the higher courts over the period 2005–06 to 2009–10, 8.5 per cent of Aboriginal and Torres Strait Islander offenders were convicted of wounding (compared with 2.1% of non-Indigenous offenders) and 20.2 per cent of assault occasioning bodily harm (compared with 9.7% of non-Indigenous offenders). Other offences for which Aboriginal and Torres Strait Islanders are overrepresented are grievous bodily harm (8.1%, compared with 4.3% of non-Indigenous offenders) and serious assault (7.5%, compared with 2.9% of non-Indigenous offenders).
260 In addition to the subjective circumstances that a court must take into account in sentencing all offenders, section 9(2)(p) of the *Penalties and Sentences Act 1992* (Qld) requires a court, in sentencing an offender who is an Aboriginal or Torres Strait Islander person, to take into account any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender into account including the offender's relationship to his or her community, any cultural considerations, or any considerations relating to programs and services established for offenders in which the community justice group participates.
261 Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1986) 64–5.
262 (1988) 164 CLR 465, 472, 485–6, 490–1, 496. For a discussion of what is meant by 'objective circumstances', see Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd edn, 1999) 224–27 [3.506]–[3.509].
263 Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 61.
264 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 478 (Mason CJ, Brennan, Dawson, Toohey JJ) citing *Ibbs v The Queen* (1987) 163 CLR 447, 451–2.
265 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 106–8.
266 Ibid.
267 The Victorian Sentencing Advisory Council has advised that it conducted research on this issue in 2010, however this research is yet to be published: e-mail from Nina Hudson to Victoria Moore, 11 April 2011.
268 These matters include appeals against conviction and applications for leave to appeal against sentence (by the person convicted); appeals against sentence by the Attorney-General of Queensland; applications for an extension of time within which to appeal; applications for leave to appeal against sentence (by the person convicted); and applications for leave to appeal against sentence by the Commonwealth Director of Public Prosecutions.
269 Queensland, Department of Justice and Attorney-General, Courts Performance and Reporting Unit, unpublished data. This excludes one matter that was withdrawn.
270 Ibid.
271 *Everett v The Queen* (1994) 181 CLR 295, 300 (Brennan, Deane, Dawson and Gaudron JJ).
272 The Parole Boards' website states that: 'In considering an application for release to a parole order the board holds community safety paramount': <http://www.correctiveservices.qld.gov.au/About_Us/community_corrections_board/index.shtml#regulations> accessed 8 April 2011.
273 For a brief discussion of some of the criticisms of general and special deterrence, see Chapter 5 of this paper.
274 Rachel Simpson, 'Parole: An Overview' (Briefing Paper No 20/1999, NSW Parliamentary Library Research Service, 1999).
275 Ibid.
276 Sentencing Advisory Council (2011), above n **Error! Bookmark not defined.**.
277 A list of meetings with NSW legal practitioners attended by the Council Secretariat is provided in Appendix 2.
278 *Penalties and Sentences Act 1992* (Qld) s 9(1)(c).
279 See, for example, *R v Sokol* [2011] QCA 20 (18 February 2011), an appeal against a sentence imposed for unlawful wounding. The Chief Justice said: 'The prevalence of offending, where intoxicated patrons respond irrationally to perceived slights by punching with a fist containing a glass, warrants strongly deterrent sentences': [9].
280 *Dixon-Jenkins* (1985) 14 A Crim R 372, 376.
281 *R v J* [1998] QCA 143 (Davies JA) (a case involving a mother convicted of grievous bodily harm and assault occasioning bodily harm committed against her 18-month-old daughter).
282 R v Bulloch [2003] QCA 578 (29 December 2003)[36] (McMurdo P) (theft by a security officer from his employer).
283 *Kumantjara v Harris* (1992) 109 FLR 400.
284 Gazal-Ayal and Kannai (2010), above n 217, 232.
285 Mackenzie and Stobbs (2010), above n 263, 45.
286 For a summary of relevant research, see Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney and Per-Olaf Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing 1999). For a discussion of the number of criticisms of deterrence theory, see Ashworth (2010), above n 265, 78–84.
287 For a discussion of this and other findings of the Judicial Commission of NSW's 2010 evaluation of the NSW scheme, see Chapter 3.
288 *Criminal Code 1899* (Qld) s 552B.
289 *Criminal Code 1899* (Qld) s 552A.
290 *Criminal Code 1899* (Qld) s 552BA.
291 *Criminal Code 1899* (Qld) s 552D(1).
292 Meeting with the NSW DPP (11 March 2011). The NSW situation is somewhat different from that in Queensland where, for offences in which the prosecution has the power of election, the presumption is that the matter will proceed on indictment unless an election is made. In NSW the reverse is true, and prosecutors must elect to have certain offences dealt with on indictment rather than summarily: *Criminal Procedure Act 1986* (NSW) s 260.
293 Richard Edney and Mirko Bagaric *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 203.
294 Department of Justice and Attorney-General Court Unit Record Data, unpublished data. For a discussion of these findings, see Sentencing Advisory Council (Qld), above n 235.

295 The common practice of Queensland sentencing courts in imposing a term of imprisonment is to recognise the value of an early plea of guilty and other circumstances in mitigation by ordering the offender be eligible for parole after serving one-third of his or her sentence: *R v Blanch* [2008] QCA 253 (29 August 2008)[24] (Keane JA).
296 This category consists of the offences of 'grievous assault' (including unlawful wounding), 'serious assault', 'serious assault (other)' and 'common assault').
297 Queensland Police Service, unpublished data. This data is based on incidents where glass was the primary weapon. A glass weapon is identified as any type of glass (including drink glasses, shards/pieces of glass of any type of glass material, for example window or mirror and bottle). These data are preliminary and may be subject to change.
298 Queensland Police Service, unpublished data. Rates are calculated based on the estimated residential population as at 30 June of each year. These rates are preliminary and may be subject to change.
299 Ibid.
300 See also Dr Peter Cassematis and Professor Paul Mazerolle, *Understanding Glassing Incidents on Licensed Premises: Dimensions, Prevention and Control* (Griffith University and Queensland Government, 2009).

Chapter 6

301 *Penalties and Sentences Act 1992* (Qld) s 9(3) and (4) and s 9(5), (5A) and (6).
302 *Criminal Code 1899* (Qld) s 305(1). The only exception to this is where the court determines it appropriate to sentence the offender to an indefinite sentence under Pt 10 of the *Penalties and Sentences Act 1992* (Qld).
303 *Criminal Code 1899* (Qld) s 302(1).
304 Queensland Police Service, *2009–2010 Annual Statistical Review* (2010) 36.
305 Ibid.
306 Ibid 2.
307 Ibid 78.
308 Ibid 79.
309 Criminal Code (Qld) s 305(2) and *Corrective Services Act 2006* s 181(2) and 181(4).
310 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1).
311 *Criminal Code 1899* (Qld) s 303.
312 *Criminal Code 1899* (Qld) s 310. An offender convicted of manslaughter is 'liable to imprisonment for life'. Cf murder, for which a person is liable to imprisonment for life, which cannot be mitigated or varied under this Code or any other law': *Criminal Code 1899* (Qld) s 305(1).
313 Queensland Police Service (2010), above n 304, 2.
314 Ibid 78–9.
315 *R v Meiers* [2008] QSC (Unreported, Lyons J, 8 August 2008).
316 *R v Clancy* [2008] QSC (Unreported, Douglas J, 6 October 2008).
317 *R v Cramp* [2008] QSC (Unreported, White J, 30 January 2008).
318 *R v Jordan* [2010] QSC (Unreported, Douglas J, 7 April 2010).
319 *R v Saltner* [2004] QSC (Unreported, Dutney J, 28 October 2004).
320 Justice Mervyn Finlay QC, *Review of the Law of Manslaughter in New South Wales* (2003) 57–75.
321 Paul Fairall, *Review of Aspects of the Criminal Code of the Northern Territory* (2004) Recommendation 4.
322 In this case the offender had a mental illness (untreated at the time of the offence) that was found to have directly contributed to her offending. She had moved to Australia with her husband from Pakistan and had poor social supports. There was no suggestion that she intended to hurt her daughter. On being sentenced to 18 months imprisonment, the offender was released immediately on parole: *R v Farah* (Unreported, Queensland Supreme Court, Byrne J, 10 March 2008).
323 Two cases were in this category, and both sentences were reduced on appeal.
324 See, for example, *R v Whiting; Ex parte Attorney-General* [1995] 2 Qd R 199, 202.
325 *R v DeSalvo* (2002) 127 A Crim R 229 (McPherson JA, with whom Williams JA agreed).
326 *R v Chard*; *Ex parte A-G (Qld)* [2004] QCA 372 (Williams JA, with whom the Chief Justice and Jones J agreed).
327 *R v Sebo; Ex parte Attorney-General (Qld)* [2007] QCA 426 (30 November 2007)[16] (Holmes JA).
328 Queensland Police Service (2010), above n 304, 2.
329 Ibid 10.
330 Ibid 37.
331 Ibid.
332 Ibid.
333 'Glassing' is defined for the purposes of the *Liquor Act 1992* (Qld) as 'an act of violence that involves the use of regular glass and causes injury to any person': s 96.
334 *Criminal Law (Sentencing) Act 1988* (SA) s 32(1)(b).
335 *R v SG* (Unreported, District Court of Queensland, McGinness J, 28 October 2009). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
336 See, for example, *R v CJS* (Unreported, District Court of Queensland, Forde J 15 May 2009). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.

337 *R v DJJ* (Unreported, District Court of Queensland, Bradley J, 9 February 2006). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted. A fine of $2000 imposed for unlawful wounding with a knife.
338 *R v NJW* (Unreported, District Court of Qld, Wolfe DCJ, 25 September 2006). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted. Four years imprisonment because of the nature of the offence (stabbing his de facto in the face) compounded with a history of violence towards women involving knives.
339 *R v GCD* (Unreported, District Court of Queensland, Kingham J, 4 September 2006). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
340 *R v JJS* [2009] DCQ (Unreported, District Court of Queensland, Koppenol J, 5 May 2009). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
341 *R v BLS*(Unreported, District Court of Queensland, Rafter J, 20 April 2011). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
342 *R v KTB* (Unreported, District Court of Queensland, Newton J, 20 July 2005). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
343 *R v BRS* (Unreported, District Court of Queensland, Newton J, 29 March 2010). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
344 *R v Coomer* [2010] QCA 6 (5 February 2010).
345 *R v CJC* (Unreported, District Court of Queensland, Healy J, 9 January 2004). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
346 *R v Maddox* [2008] QCA 208 (22 February 2008).
347 *R v Hills* [2004] QCA 205 (18 June 2009).
348 *R v West* [2006] QCA 252 (14 July 2006).
349 *R v Hadland* [2000] QCA 182 (16 May 2000).
350 *R v Jones* [2008] QCA 181 (10 July 2008).
351 *R v KP* (Unreported, District Court of Queensland, Tutt J, 8 April 2011). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
352 Queensland Police Service (2010), above n 304, 11.
353 Ibid.
354 Ibid 78–9.
355 Ashworth (2010), above n 265, 134.
356 Ibid.
357 Ibid.
358 *Criminal Law Amendment Act 2000* (Qld) s 24. These changes commenced on 27 October 2000.
359 [2010] QCA 26 [17] (de Jersey CJ, Holmes and Muir JJA).
360 *R v JFL* (Unreported, District Court of Queensland, Searles J, 30 November 2007). Note: The name of the defendant in this matter has been abbreviated to his initials as access to the QSIS database from which this case example has been drawn is restricted.
361 *R v Jackson* (Unreported, Queensland Court of Criminal Appeal, Andrews CJ, Thomas and de Jersey JJ, 7 March 1988).
362 'Sexual intercourse' is defined in section 61H of the *Crimes Act 1900* (NSW) and includes acts of digital penetration and oral penetration.
363 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A Table – Standard Non-Parole Periods.
364 *Crimes Act 1900* (NSW) ss 61I, 61J and 61JA.
365 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A Table – Standard Non-Parole Periods.
366 *Sentencing Act 1995* (NT) s 55.
367 *Criminal Code* (NT) s 192(3).
368 Judicial Commission of NSW (2010), above n 126, 29–30.
369 [2008] QCA 154 (13 June 2008).
370 *R v Newman* [2007] QCA 198 (15 June 2007)[43] (Williams JA) and [54] (Jerrard JA), referring to the earlier statement of the range by the court in *R v Mallie* [2000] QCA 188 (17 May 2000).
371 *R v Atwell* [2000] QCA 266 (5 July 2000)(McPherson JA) referring to earlier cases of *R v CA Jackson* in 1967 and *R v Killen* in 1991.
372 *R v KU & Ors; Ex parte A-G (Qld)* [2008] QCA 154 (13 June 2008) [158] (de Jersey CJ, McMurdo P and Keane JA), referring to decisions including *R v Bielefeld* [2002] QCA 369 (19 September 2002), *R v Pont* [2002] QCA 456 (28 October 2002), *R v Myers* [2002] QCA 143 (19 April 2002), *R v P* [2001] QCA 25 (9 February 2001), *R v SAS* [2005] QCA 442 (2 December 2005), *R v Casey* (Unreported, Court of Appeal Qld, 3 March 1992, *R v Haar* (Unreported, Court of Appeal Qld, 24 June 1992).
373 *R v AM* [2010] 2 NZLR 750.
374 *R v AM* [2010] 2 NZLR 750 [27]–[29].
375 The bands are: Rape band one: 6–8 years – appropriate for offending at the lower end of the spectrum where aggravating features are either not present or present to a limited extent. Rape band two: 7–13 years – appropriate for a scale of offending and levels of violence and premeditation that are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is also appropriate for cases that involve two or three of the factors increasing culpability to a moderate degree. Rape band three: 12–18 years – encompassing offending accompanied by aggravating features at a, relatively speaking, serious level. Rape band three is appropriate for offending that involves two or more of the factors increasing culpability to a high degree, such as a particularly vulnerable victim and serious additional violence, or more than three of the relevant factors increasing culpability to a moderate degree. Particularly cruel, callous or violent single episodes of

offending involving rape also fall into this band. Rape band four: 16–20 years – similar factors present to band three, but offending likely to involve multiple offending over considerable periods of time rather than single instances of rape (such as repeated rapes of one or more family members over a period of years): *R v AM* [2010] 2 NZLR 750.

376 *Crimes Act 1961* (NZ) s 128(2).

377 Queensland Police Service (2010), above n 304, 68. The QPS victims data do not provide a unique victim count, and one person may be counted several times if they were the victim of more than one offence. The actual numbers of child victims of these reported offences may therefore be significantly lower.

378 The Australian Institute of Criminology has suggested that a conservative estimate of sexual offences reported to police would be around 30 percent or less of all victim incidents: Australian Institute of Criminology, 'Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents' (December 2007) *Crime Facts Info* No. 162.

379 Queensland Police Service (2010), above n 304, 37.

380 Ibid.

381 Australian Bureau of Statistics, *Personal Safety Survey Australia* (2005).

382 *Criminal Code 1899* (Qld) s 552B(1)(a).

383 *Criminal Code 1899* (Qld) s 552D(1).

384 *Crimes Act 1900* (NSW) s 66A. 'Circumstances of aggravation' are defined in section 66A(3) and include infliction of actual bodily harm, threatening infliction of harm with a weapon, the offender being in company, the victim being under the authority of the offender, and that the victim has a serious physical disability or cognitive impairment.

385 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A, Table–Standard Non-Parole Periods.

386 NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1* (2008) Recommendations 5 and 22.

387 *Sentencing Act 1995* (NT) s 55A.

388 This is because the data are presented by most serious offence and, as with the offences above, offences at the more serious end of the sentencing range are likely to be charged alongside other more serious sexual offences, such as rape and maintaining a sexual relationship with a child. These data should therefore be approached with caution.

389 Sentencing Advisory Council (Qld) (2011), above n 235.

390 See for example: *R v Corr; ex parte A-G* (Qld) [2010] QCA 40 - Appeal against sentence upheld. 9 years imprisonment and a serious offence declaration increased on appeal to 12 years. *R v Ritchie; ex parte A-G* (Qld) [2009] QCA 270 - Appeal against a sentence of 12 months' imprisonment wholly suspended for 18 months on one count of unlawful carnal knowledge increased on appeal to 12 months' imprisonment suspended after serving two months with an operational period of three years. *R v ZA; ex parte A-G* (Qld) [2009] 249 - Appeal allowed against a sentence of nine and a half years' imprisonment for two counts of maintaining an unlawful sexual relationship with a child to a sentence of 10 years imprisonment (of which, the offender would have to serve 8 years, or 80%).

391 [2008] QCA 370 (28 November 2008) [39] (Mackenzie AJA, with whom Fraser JA and Daubney J agreed).

392 Ibid [20].

393 *Penalties and Sentences Act 1992* (Qld) s 9(5) inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5. This provision came into operation on 26 November 2010 (2010 SL No. 330). Section 9(5A) permits a court, in deciding whether there are exceptional circumstances in a given case, to have regard to the closeness in age between the offender and the child.

Chapter 7

394 Judicial Commission of NSW (2010), above n 126, 60. The evaluation's authors, however, caution that 'it is not possible [from the results of their evaluation] to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently': Ibid 60–1.

395 These meetings were attended by representatives of the Council Secretariat and took place in Sydney on 10–11 March 2011. For a list of these meetings, see Appendix 2.

396 Judicial Commission of NSW (2010), above n 126.

397 Ibid.

398 Ibid.

399 Ibid.

400 A list of preliminary Roundtables appears in Appendix 2 of this paper.

401 *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW). The SNPP provisions therefore applied to offences committed before the commencement of the amendments on 1 January 2008. The exception to this was if the court had already convicted the person being sentenced or the court had accepted a plea of guilty and the plea had not been withdrawn before the commencement of the amendments.

Chapter 8

402 These principles include requiring that legislation has sufficient regard to the rights and liberties of individuals, including that it is consistent with principles of natural justice and does not adversely affect rights and liberties, or impose obligations, retrospectively: *Legislative Standards Act 1992* (Qld) s 4(2) and 4(3)(b) and (g).

403 Marin Shanahan and Ron Donato, 'Counting the Cost: Estimating the Economic Benefit of Paedophile Treatment Programs' (2001) 25 *Child Abuse and Neglect* 541 as cited by NSW Department of Community Services <http://www.community.nsw.gov.au/benefits_assessment_group_page/counting_the_cost_estimating_the_economic_benefit_of_pedophile_treatment_programs.html> accessed 20 April 2011. The original study presented these costs in 1998 dollars (ranging from $176 940 to $356 190, depending on the methodology used to calculate these costs).

404 *Corrective Services Act 2006* (Qld) s 184.