Community based sentencing orders, imprisonment and parole

Options paper

April 2019

Queensland Sentencing Advisory Council
Inform. Engage. Advise.

Community based orders, imprisonment and parole: Options paper

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

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

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

Further information
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Preface

In 2016, Walter Sofronoff, now the President of the Queensland Court of Appeal, delivered a report that fundamentally re-shaped the parole system in Queensland. As part of that review, Mr Sofronoff observed a lack of flexible sentencing options in Queensland, and recommended that a body such as ours undertake a comprehensive review of the sentencing framework currently in place. In particular, the aim of such a review was to determine whether there is sufficient flexibility to enable a judge or magistrate to tailor a sentence to address the individual circumstances of both the offender and the offence.

The Council sees this as a unique opportunity. Not only has it been asked to review the sentencing options currently available, it has also been tasked with assessing whether greater flexibility is required for parole to work more effectively, and to evaluate the legislative basis for sentence calculation to determine whether this has contributed to calculation errors (identified by the Queensland Audit Office in its 2016 report *Criminal Justice System - Prison Sentences*).

The Council sees this as an opportunity to understand 'what works' in sentencing (both in terms of the factors that contribute to completion of community based orders, and in terms of addressing reoffending). Armed with a comprehensive understanding of what might be effective, the Council has an opportunity to craft a sentencing framework that can incorporate these features.

In previous work undertaken by the Council, we have heard directly from members of the community about their expectations of the sentencing system. We know the community expects not only punishment of offenders, but the opportunity for offenders to address the causes of their offending. The community knows that punishment is not the only purpose of sentencing. They support efforts to keep neighbourhoods safe by intervening to stop offenders from doing it again.

As you will no doubt see from this Options Paper, the Council has been speaking with a range of legal stakeholders about what works and what doesn't, and has exhaustively looked at Queensland sentencing data and what is in place elsewhere, to make sure any reform we recommend will improve and expand the tools that judges and magistrates have at hand.

What we offer here is a full range of options we have considered, some of which we have formed a preliminary view about, and some of which are still under consideration.

I urge you, if you have a view, to make it known to the Council, particularly in relation to the questions we pose throughout this paper.

John Robertson
Chair

Queensland Sentencing Advisory Council

Acknowledgments

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

The Council would like to acknowledge the contributions of all those who made preliminary submissions, attended meetings to discuss issues relating to the review, and who provided information and data to inform the preparation of this options paper. While not exhaustive, those who have contributed during the early stages of the review include representatives of: Queensland Corrective Services, the Queensland Law Society, the Bar Association of Queensland, Legal Aid Queensland, the Aboriginal and Torres Strait Islander Legal Service (Qld) Inc, Sisters Inside, the Prisoners' Legal Service, the Office of the Director of Public Prosecutions, the Parole Board Queensland, Court Services Queensland, the Queensland Police Service, the Office of the Commonwealth Director of Public Prosecutions, other local and interstate criminal justice agencies, academic researchers and victims of crime organisations.

The Council is very grateful to the courts and the Heads of Jurisdiction of all three levels of the court hierarchy for their ongoing support for, and input into our work on these Terms of Reference. The Council also acknowledges the input and advice provided by the Council's Aboriginal and Torres Strait Islander Advisory Panel for their contribution to this project.

In addition to hosting individual meetings, the Council convened two roundtables on 27 February and 26 March 2019 to discuss the development of options and issues relevant to the review. The Council wishes to acknowledge the assistance provided by those who attended these roundtables in advising the Council on technical, research and procedural issues relating to the inquiry.

It is also the Council's practice to establish a Project Board for every inquiry. The Council acknowledges the contributions of Project Board members and thanks Board members for giving so generously of their time during the initial stages of the review.

Call for submissions

Submissions are being called for as part of the Council's review of community based sentencing orders, imprisonment and parole options.

You are invited to make a submission based on the questions in this consultation paper, or any issues arising from the Terms of Reference.

Submission deadline: 31 May 2019

Preparing submissions

This options and questions presented address key issues under the Terms of Reference referred to the Council by the Attorney-General.

You are invited to respond to some or all of the questions and to provide your views on options presented. To assist in analysing responses, please identify the relevant question or option number/s in your submission.

Try to keep your responses succinct and focused on the question/s or issue you are responding to. If you wish to provide attachments please indicate which question/s your attachment refers to.

How your submission will be used

All submissions to this consultation paper, as well as additional consultation conducted with key stakeholders, will inform the Council's response to the Terms of Reference. A final report with recommendations will be provided to the Attorney-General by 31 July 2019 and released publicly via the Council's website: www.sentencingcouncil.qld.gov.au.

This consultation paper reflects the Council's commitment to listening to community members.

Generally, submissions will be considered public and published on the Council's website *unless* clearly marked 'confidential'.

Public submissions may be published on the Council's website, but with certain personal information redacted to protect the privacy of those making the submission.

Submissions marked as '**anonymous'** will have all identifying details removed (including the name or names of those making the submission) prior to publication.

The Council does not publish submissions that are received anonymously (that is, that do not include the name and contact details of the person making them).

Submissions marked '**confidential'** will not be published or referred to in publications. The Council treats confidential submissions as for the Council's information only.

Any personal information provided by individuals identified in this public consultation process will be collected only for the purpose of the review. Personal information will not be used within the final report. However, unless you explicitly request, details provided in your submission (other than personal information) may be directly or indirectly quoted in the final report, or other products associated with the final report. If you include details in your submission that you do not want publicly disclosed, please indicate this within your submission.

The *Right to Information (RTI) Act 2009* may apply to submissions provided as part of this consultation process. If subject to a RTI application, submissions (including those marked as confidential) will all be assessed as part of the RTI process.

While the Terms of Reference are restricted to reviewing community based sentencing orders, imprisonment or parole, the Council understands there may be other issues submitters wish to highlight or raise. Submissions containing offensive, derogatory, highly-specific information about actual offending and/or issues beyond the scope of these Terms of Reference will not be referred to in the final report and may be excluded from the consultation process.

Making a submission

Online

To submit online go to https://www.sentencingcouncil.qld.gov.au/research/intermediate-sentencing-options

Email

To submit via email, please include in the subject line of your email 'Sentencing review submission'.

Please complete and include a submission form.

Email your submission to submission@sentencingcouncil.qld.gov.au

Post

To make a postal submission, please include the following information on your correspondence 'Sentencing review submission'. Post your submission to:

Queensland Sentencing Advisory Council

GPO Box 2360

Brisbane Qld 4001

Submission assistance

If you require any assistance to participate in this public consultation process, please contact the Council on (07) 3224 7375, or use the following services:

Translating and Interpreting Service

If you need an interpreter, contact the Translating and Interpreting Service (TIS) on 131 450 and tell them:

- the language you speak;
- the council's name—Queensland Sentencing Advisory Council; and
- the Council's phone number—(07) 3224 7375.

TIS will arrange an interpreter so you can talk with us. This is a free service.

National Relay Service

The National Relay Service (NRS) is a free phone service for people who are deaf or have a hearing or speech impairment. If you need help contacting us, the NRS can assist. To contact the NRS you can:

- TTY/voice call—133 677
- Speak and Listen—1300 555 727
- SMS relay—0423 677 767

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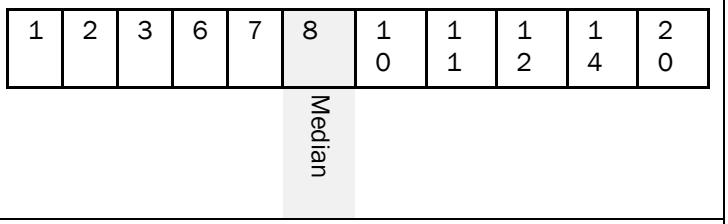
Acronyms

ABS	Australian Bureau of Statistics
ALRC	Australian Law Reform Commission
ASOC	Australian Standard Offence Classification scheme
ATSILS	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
BAQ	Bar Association of Queensland
CBO	Community based order
CBSO	Community based sentencing order
CCO	Community correction order
CDO	Community detention order
CEM	Child exploitation material
CJG	Community Justice Group
CSA	*Corrective Services Act 2006* (Qld)
CSI	Conditional Suspended Imprisonment
CSO	Community service order
DJAG	Department of Justice and Attorney-General
DPP	Director of Public Prosecutions
DP(SO)A	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)
EM	Electronic monitoring
ETCR	Electronic transfer of court records
HOPE	Hawaii Opportunity Probation and Enforcement program
ICO	Intensive correction order
IOMS	Integrated Offender Management System
LDERG	Lawful Detention Expert Reference Group
LOS	Level of service
MSO	Most serious offence
NSWLRC	NSW Law Reform Commission
OC	Oversight Committee (in relation to LDERG)
ODPP	Office of the Director of Public Prosecutions (Queensland)
PBQ	Parole Board Queensland
PPRA	*Police Powers and Responsibilities Act 2000* (Qld)
PSA	*Penalties and Sentences Act 1992* (Qld)
PSR	Pre-sentence report
PSS	Partially suspended sentence

QAO	Queensland Audit Office
QASOC	Queensland (extension to the) Australian Standard Offence Classification scheme
QC	Queen's Counsel
QCA	Queensland Court of Appeal
QCS	Queensland Corrective Services
QGSO	Queensland Government Statistician's Office
QLS	Queensland Law Society
QMERIT	Queensland Magistrates Early Referral into Treatment program
QPC	Queensland Productivity Commission
QPS	Queensland Police Service
QSAC	Queensland Sentencing Advisory Council
QSIS	Queensland Sentencing Information Service
QUT	Queensland University of Technology
QWIC	Queensland Wide Inter-Linked Courts database
RNR	Risk-Need-Responsivity framework
ROGS	Report on Government Services
RoR	Risk of reoffending
SPEA	*State Penalties Enforcement Act 1999* (Qld)
SPER	State Penalties Enforcement Register
SVO	Serious violent offence
TSAC	Tasmanian Sentencing Advisory Council
VLRC	Victorian Law Reform Commission
VSAC	Victorian Sentencing Advisory Council
WSS	Wholly suspended sentence
YJA	*Youth Justice Act 1992* (Qld)

Glossary

Bail	The release of a defendant into the community until a court decides the charge/s against them. Bail orders always include a condition that the defendant must attend court hearings. Additional conditions, such as a requirement to reside at a certain address or report to police, may be added to a person's bail.
Board ordered parole	Where a person has a parole eligibility date (either fixed by a court or by legislation) the person must apply to the Parole Board for release onto a parole order. The Parole Board then decides if the person is released on parole and on what conditions. Board ordered parole is the only form of early release from prison for offenders sentenced to imprisonment for greater than 3 years, and for sexual offences and serious violent offences for prison sentences of any length.
Case law	Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as common law.
Common law	Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as case law.
Community correction order	A flexible non-custodial sentencing order served in the community with conditions including supervision, community service, and program conditions.
Concurrent sentences	Individual sentences ordered for each offence in a case that are to be served at the same time. This means the shortest sentence is subsumed into the longest sentence (also called the 'head sentence'). For example, prison sentences of 5 years and 2 years served concurrently would be a total of 5 years' imprisonment.
Conviction	A determination of guilt made by a court.
Court of Appeal	A division of the Supreme Court. The Court of Appeal hears appeals against conviction, sentence or both. It usually comprises three judges.
Court ordered parole	A parole order where the parole release date is fixed by the court (meaning the offender is automatically released on that date). The court must fix a date for the offender to be released on parole if the offender has a sentence of 3 years or less and the sentence is not for a sexual offence or serious violent offence (with some legislated exceptions).
Crown	The prosecution may be referred to as the Crown. The Crown refers to the Queensland Government representing the community of Queensland.
Cumulative sentences	Individual sentences for each offence are served one after the other. For example, a person sentenced to 5 years for one offence and to 2 years for another and ordered to be served cumulatively would have to serve a total of 7 years' imprisonment.
Custodial sentencing order	A sentencing order that involves a term of imprisonment being imposed.
Defendant	A person who has been charged with an offence but who has not yet been found guilty or not guilty. Can be used interchangeably with accused.
Denunciation	Communication of society's disapproval of an offender's criminal conduct.
Deterrence	Discouraging offenders and potential offenders from committing a crime by the threat of a punishment or by someone experiencing a punishment. One of the five statutory sentencing purposes in Queensland.
Head sentence — imprisonment	The total period of imprisonment imposed. A person will usually be released on parole or a suspended sentence before the entire head sentence is served.

Instinctive synthesis	Sentencing by taking account of all relevant factors, balancing different and conflicting features, to arrive at a single result that takes due account of them all.
Intensive correction order	A sentence of imprisonment (custodial sentence) served by way of intensive correction in the community.
Mean	The mean is a measure used to determine where the centre of a distribution lies. The mean is calculated by adding up all the values in a dataset and dividing the sum by the total number of values. The mean is affected by outliers — extreme scores at either end of the distribution can cause the mean to shift significantly. Also referred to the average.
Median	The median is a measure used to determine where the centre of a distribution lies. The median is the middle value (or the half-way point) of an ordered dataset. Half of the values lie above the median, and half below. The advantage of using the median is that, compared to the mean, it is relatively unaffected by extreme scores at either end of the distribution. 
Minimum time served in prison before release	The minimum time an offender must serve in prison before being eligible to apply for release on parole or, in the case of a person sentenced to imprisonment with a parole release date or a partially suspended sentence, the total time that must be served before their automatic release date.
Most serious offence (MSO)	For this report, the MSO refers to an offender's most serious offence at a court event. It is the offence receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics (ABS). An offender records one MSO per court event.
Moynihan reforms	Reforms arising from a report by Martin Moynihan that resulted in an expansion of the Magistrates Courts jurisdiction and increased the District Court's general criminal jurisdiction.
Non-parole period	The time an offender serves in prison before being released on parole or becoming eligible to apply for release on parole.
Offender	A person who has been found guilty of an offence or who has pleaded guilty to an offence.
Office of the Director of Public Prosecutions	The Office of the Director of Public Prosecutions (ODPP) represents the State of Queensland in criminal cases. Also referred to as the prosecution.
Operational period (suspended sentence)	The period (up to five years) during which an offender who is subject to a suspended sentence must not commit a new offence punishable by imprisonment in order to avoid the risk of having to serve the suspended term of imprisonment in prison.
Parity (principle of parity)	Consistency between sentencing decisions involving co-offenders, which supports the principle of equality before the law.
Parole	The conditional release of a person from prison. When a person is released on parole, they serve the unexpired portion of their prison sentence in the community under supervision.
Parole eligibility date	The earliest date on which a prisoner may apply for release on parole.

Parole release date	The date on which a prisoner must be released on parole. A court can only set a parole release date if certain criteria are met. A parole release date cannot be set in certain circumstances, including if the sentence is greater than three years or if the person is being sentenced for a serious violent offence or a sexual offence.
Partially suspended sentence	Imprisonment of up to five years, with some actual prison time followed by release from prison with the remaining period of imprisonment suspended for a set period (called an 'operational period'). If the offender commits a further offence punishable by imprisonment during the operational period, they must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence.
Plea	The response by the accused to a criminal charge — 'guilty' or 'not guilty'.
Precedent	A sentencing decision that sets down a legal principle to be followed in similar cases in the future.
Pre-sentence report	A pre-sentence report (PSR) is a documents prepared for a court, normally at the court's request, with a view to providing information about an offender and to assist the court in determining the most appropriate manner in which to deal with an offender.
Proportionality (principle of proportionality)	A sentence must be appropriate or proportionate to the seriousness of the crime.
Prosecution	A legal proceeding by the State of Queensland against an accused person for a criminal offence. Prosecutions are brought by the Crown (through the ODPP or police prosecutors).
Remand	To place an accused person in custody awaiting further court hearings dealing with the charges against them. A person who has been denied bail, or not sought it, will be placed on remand. This is also known as 'pre-sentence custody'.
Sentence	The penalty the court imposes on an offender.
Sentencing principles	Principles developed under the common law, which serve as guideposts to assist judges and magistrates to reach a decision concerning the most appropriate sentence to impose. They include parity, parsimony, proportionality, totality, and the De Simoni principle.
Sentencing purposes	The legislated purposes for which a sentence may be imposed. In Queensland there are five sentencing purposes for the sentencing of adults: punishment, deterrence, rehabilitation, denunciation, and community protection.
Serious violent offence	If a court convicts a person of an offence declared to be a serious violent offence, the offender is unable to apply for parole until they have served 80 per cent of their sentence or 15 years in prison, whichever is less. A number of offences are identified in legislation as being 'serious violent offences', such as violent offences (including manslaughter but not murder) and child sexual offences.
Significance/significant / statistically significant/ statistical significance	These terms are used in relation to research findings in this report. Statistical significance is the likelihood that a relationship or difference between variables or groups is not caused by chance.
Supreme Court	The highest state court in Queensland. It comprises the trial division and the Court of Appeal. All trials and sentencing hearings for murder and manslaughter take place in the Supreme Court trial division.
Suspended sentence	A sentence of imprisonment of five years or less suspended in whole (called a 'wholly suspended sentence') or in part (called a 'partially suspended sentence') for a period (called an 'operational period'). If

	further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence.
Totality (principle of totality)	When an offender is convicted of more than one offence, the total sentence must be just and appropriate to the offender's overall criminal behaviour.
Wholly suspended sentence	A sentence of imprisonment of up to five years but with no actual time served in prison as part of the sentence, unless the person commits a further offence during the operational period. If further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended (unless unjust to do so), plus any other penalties issued for the new offence.

Executive Summary

This Options Paper on the Queensland Sentencing Advisory Council's review of community based sentencing orders, imprisonment and parole options has been prepared for the purpose of obtaining informed public and stakeholder feedback on reform options.

Background

The Queensland Sentencing Advisory Council was asked by the Attorney-General and Minister for Justice to examine community based sentencing orders and parole options, and deliver a report by 31 July 2019.

The Council's Terms of Reference require the Council to:

- Review sentencing and parole legislation, including but not limited to the *Penalties and Sentences Act 1992 (*Qld) and the *Corrective Services Act* 2006 (Qld), to identify any anomalies in sentencing or parole laws that create inconsistency or constrain the available sentencing options available to a court and advise how these anomalies could be removed or minimised;
- Consider Recommendation 3 of the 2016 *Queensland Parole System Review Final Report* (Parole System Review Report) and advise as to whether a court should have discretion to set a parole release date or parole eligibility date for sentences of greater than three years where the offender has served a period of time on remand and the court considers that the appropriate further period of custody before parole should be no more than 12 months from the date of sentence;
- Consider and advise on Recommendation 5 of the Parole System Review Report that court ordered parole should apply to a sentence imposed for a sexual offence;
- Assess restrictions on the ability of a court to impose a term of imprisonment with a community based order and advise on whether those restrictions should be removed or modified in order to better enable offenders to be appropriately monitored and managed upon release into the community to support the reintegration and rehabilitation of an offender and prevent recidivism;
- Consider flexible community based sentencing orders that provide for supervision in the community that are used in other jurisdictions (for example, the community correction order contained in *Sentencing Act 1991* (Vic)) and advise on appropriate options for Queensland;
- Assess whether there are any inherent complexities in the legislative framework including recognition of pre-sentence custody, that contribute to, or cause complexity in calculating an offender's overall period of incarceration, and advise on how those inherent complexities can be addressed with a view to simplifying the calculation process and preventing discharge and detention error;
- Consult with key stakeholders, including but not limited to the legal profession, the judiciary, victim of crime groups, prisoner advocacy and support groups, relevant government departments and agencies, and
- Advise on any other matters relevant to this reference.

The Council is further requested to have regard to a range of matters, including:

- The importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992* (Qld);
- The importance of sentencing orders of the court being properly administered so that they satisfy the intended purposes of the sentencing order and facilitate a fair and just sentencing regime that protects the community's safety;
- The purpose of parole is allowing an offender to serve part of their period of imprisonment in the community in order to successfully reintegrate a prisoner into the community and minimise the likelihood of an offender reoffending;
- The need to further encourage and maintain public confidence in the criminal justice system and ensure that sentencing practices meet the community's expectations; and

- The impact of any recommendation the Council may make on the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

Council's approach

Council's approach to the Terms of Reference has incorporated five stages.

The release of this Options Paper is part of Stage 4 – the testing of the draft reform framework. It provides an opportunity for the Council to test its reform proposals and identify additional areas to be addressed in the Council's final report.

Methodology

The Council's activities under the Terms of Reference have encompassed:

- Analysing current Queensland sentencing trends by high level offence type to understand the current use of intermediate sentencing orders and how the use of these orders has changed over time;
- Researching and evaluating interstate and international sentencing options;
- Developing a draft reform framework and recommendations through a consultation process with stakeholders (involving meetings, written questions, targeted policy issues papers and stakeholder roundtables) and background research; and
- Commencing work on an illustrative place-based case study project in three different Queensland locations.

The primary source of data has been the Queensland Courts database. The Council has also drawn on a research report undertaken by the Queensland Government Statistician's Office (QGSO) regarding factors associated with the outcome of community based orders.

Exclusions

Excluded from the scope of the Council's review has been:

- The Youth Justice system and the sentencing regime that applies to people sentenced as children in Queensland and in other jurisdictions;
- The mental health system and any interplay with sentencing orders;
- Aspects of the *Penalties and Sentences Act 1992* (Qld) relating to lower level orders (e.g. fines and good behaviour bonds);
- Use of diversionary options such as specialist courts, bail programs and justice mediation;
- *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) orders and post sentence detention.

The Council has not undertaken a detailed analysis of resourcing issues and implementation challenges.

Fundamental principles

In considering reform options, the Council has been guided by the following fundamental principles it developed at the early stages of its review under this Terms of Reference. These principles are that:

1. Court ordered parole should be retained.
2. Suspended sentences should be retained.
3. Legislative sentencing anomalies and complexities should be minimised.
4. Any changes to existing community based sentencing orders or new sentencing options should aim to reduce Queensland's prison population, while maintaining community safety.
5. Any reforms recommended should aim to reduce the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system.
6. Community based sentencing orders have significant advantages over imprisonment where the offender does not pose a demonstrated risk to the community.
7. Judicial discretion in the sentencing process is fundamentally important.
8. It is important to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing set out in the *Penalties and Sentences Act 1992* (Qld).

9. Limited executive power to deal with minor breaches may enhance community based sentencing order flexibility.
10. Community based sentencing orders, and the services delivered under them, must be adequately funded and properly administered.
11. Sentencing options and their administration should reflect the individual needs of all parties involved, including offenders, victims and the broader community.
12. Public confidence in the criminal justice system should be encouraged and maintained, sentencing practices should consider community expectations and take into account the impact on victims of crime.
13. Equal justice means sentencing options should, as far as practicable, not vary according to location.
14. Sex offenders serving sentences in the community should have appropriate supervision.
15. Reforms to sentencing and parole should be based on the best available evidence.

The Council's position on mandatory sentencing

In Chapter 5, the Council states its preferred position on mandatory sentencing: in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the *Penalties and Sentences Act 1992* (Qld), or in reducing recidivism. This is because, as a matter of principle, it assumes that every offence and every offender are the same which is patently not the case. The Council recommends a review of all the mandatory sentencing provisions presently in the law of Queensland and as set out in section 5.4 and Appendix 4.

We also invite feedback on whether current mandatory provisions create certainty and consistency in their application, and what reforms should be considered.

The Aboriginal and Torres Strait Islander Advisory Panel

The purpose of this nine-person panel is to provide advice to the Council as it works to understand and address the over representation of Aboriginal and Torres Strait Islander people in Queensland's criminal justice system. The Panel's advice is discussed in section 4.5.

The Advisory Panel considered and gave in-principle endorsement of Australian Law Reform Commission (ALRC) recommendations on community based sentences, published in *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017). The Panel has also assisted the Council by advising on issues including:

- supporting the offender through to successful completion of their sentence;
- supported community based sentencing options that allow for greater flexibility (including the importance of early identification of the issues facing an offender and whether some conditions could trigger breaches);
- benefit of governments, agencies and others working together to support offenders through their order; and
- community-designed and community-run programs should exist and be tailored to the individual context of each community in Queensland.

More information about the Advisory Panel is available on the Council's website.

Reform Options

Guided by these fundamental principles, the reform options put forward by the Council in the Options Paper focus on:

- Intensive correction orders;
- Community correction orders;
- Suspended sentences; and
- Court ordered parole.

The Council's preliminary views on a preferred option have been outlined, including advantages, the supporting basis as well as potential high-level risks and implementation challenges.

Intensive Correction Orders

The options relating to intensive correction orders that are being considered by the Council are:

- Option 1: Retain in their current form
- Option 2: Abolish as a sentencing option
- Option 3: Reform to provide greater flexibility and powers on breach.

Of these alternatives, Council's preferred option is Option 2 - abolishing intensive correction orders as a sentencing option. The Council considers these orders have limited utility in their current form (evidenced by their decreasing use) and that a community correction order, especially when coupled with a suspended sentence (including for one charge) could achieve the same result as a more flexible form of order.

Community correction orders

In looking at community corrections orders, the Council has developed three options:

- Option 1: Retain probation and community service orders with no or minor changes only.
- Option 2: Introduce a limited form of community correction order, replacing probation and community service orders.
- Option 3: Introduce community correction orders, replacing probation, community service orders and intensive correction orders.

Option 3 is considered by the Council to be the preferred long-term model for Queensland. The Council's preliminary view is that the ability to provide for different tailored packages of conditions (built on a foundation of minimal standard conditions) has the potential to improve the ability of such an order to respond to the individual factors contributing to offending.

Suspended sentences

Options considered for suspended sentences in Queensland are:

- Option 1: Retain suspended sentences in their current form, or with minor reforms only.
- Option 2: Reform suspended sentences to allow a court to order a combined suspended sentence and community based order for a single offence.
- Option 3: Introduce a new conditional form of suspended sentence order.

Option 2 is the Council's preferred option. It would ensure flexibility and consistency, and is the most common form of mixed order used in Australia.

Court ordered parole

The options under consideration for court ordered parole are:

- Option 1 – No change to the current operation of court ordered parole.
- Option 2: Reform court ordered parole to extend availability – increase the three-year cap for court ordered parole (retaining other criteria, but applying the same principles to sexual offences) by giving courts discretion to set either a parole release or eligibility date:
    - for sentences over the three-year cap, if the appropriate release date is no more than 12 months from date of sentence (Parole System Review Report Recommendation 3), or
    - for sentences of over three years, and up to five years, or
    - for all sentences up to five years (aligning with the suspended sentence regime).
- Option 3: Reform court ordered parole to extend availability by removing cap - Remove the cap for the setting of a parole release date altogether, giving courts full discretion to set either a parole release or a parole eligibility date, and extending this discretion to all offences, other than serious violent offences, offences for which a life sentence is imposed, or other offences or circumstances which are expressly excluded (such as through the operation of mandatory sentencing provisions).

The Council does not identify a preferred option. As a matter of principle, it would prefer an option that gives courts the greatest level of discretion. However, a reported lack of consensus (based on research evidence)

of the relative effectiveness of court-ordered versus board-ordered parole has presented challenges for the Council in considering which of these options should be preferred. The Council' s concern is that the existing evidence about the efficacy of court ordered parole is not robust enough to support an extension of court ordered parole beyond those offences to which it currently applies, or to apply it to longer sentences.

The Council invites further views, including on future research that may be required to test effectiveness in this regard.

An alternative approach would be to provide courts with a discretion to order either a parole release date or eligibility date when sentencing up to the current three-year cap, but without extending the availability of court ordered parole beyond this period or to other offences until the effectiveness of the scheme has been further evaluated. This could also be extended to allow a court to set a release date, where appropriate.

Implementation – issues and challenges

The Council has considered a number of additional issues related to the successful implementation of any future sentencing reforms. These include the legal framework that supports the use of pre-sentence assessments and court advice, resourcing issues and challenges, and timeframes for reform.

The Council has identified three options relating to the availability and use of pre-sentence reports (PSRs) which are currently an important source of sentencing advice for the court.

- Option 1: make no change to the current legislative framework for PSRs.
- Option 2: create a presumption in favour of PSRs being provided for the making of specific order types (for example, if a new CCO model is introduced), with some exclusions.
- Option 3: require a PSR or suitability assessment report to be prepared only when considering specific conditions or condition types (for example, electronic monitoring).

Council is currently in favour of Option 1. Cultural reports, and potential opportunities to build on Queensland's successful community justice group report model, are also discussed in this context.

Resourcing challenges

The Council was not asked to consider any funding implications of its recommendations. Hence, the Council has not undertaken any detailed analysis of resourcing issues and implementation challenges. However, it recognises the importance of ensuring adequate funding across the system to:

- encourage the use of community based sentencing orders that are fit for purpose; and
- implement evidence-based interventions;

to reduce the risks of people reoffending and coming back into contact with the criminal justice system.

The role of support services and interventions in the community to address underlying issues that may be associated with offending is also highlighted.

The Council will be exploring this issue in more detail in its final report through the use of three illustrative place-based case studies.

Timeframes for reform

The Council has examined how other jurisdictions have implemented large-scale sentencing reforms, and the timeframes involved.

During the next stage of its review, the Council will consider what potential reforms might be considered for immediate introduction and what reforms should be delayed until the necessary preparatory work has been completed.

Specific feedback questions

In addition to providing the options for reform and Council's proposals, there are questions for specific consideration and stakeholder feedback that have been included throughout the Options Paper. These are listed on page 12 of this paper.

These questions relate to:

1. Sentencing principles;
2. Mandatory sentencing provisions;
3. Legislative guidance on use of CCOs and imprisonment
4. Home detention;
5. Suspended sentences;
6. Guidance on setting of operational period;
7. Power of court dealing with offender on breach of a suspended sentence;
8. Breach powers;
9. Combined suspended sentence/ community based order
10. Setting of parole release date;
11. Court powers where offence committed while offender on parole;
12. Sentence calculation;
13. Time in pre-sentence custody which is declarable;
14. Availability of parole for short sentences;
15. Pre-sentence reports;
16. Operation of sections 651 and 561 *Criminal Code* (Qld) and section 189 of the *Penalties and Sentences Act 1992* (Qld);
17. The sentencing disposition – convicted and not further punished;
18. Ability of higher courts to deal with breach of a Magistrates Court CBO;
19. Power of lower courts to deal with higher court CBO breach; and
20. Magistrates Courts' power to deal with breach of a CBO Imposed by a Magistrates Court on own initiative.

Next steps

Council is inviting feedback on this Options Paper – particularly the reform options and specific questions - by **31 May 2019**.

Feedback received by Council will inform the preparation of its final report.

Chapter 1 Introduction

1.1 Background to the review

On 25 October 2017, the Attorney-General and Minister for Justice, the Honourable Yvette D'Ath MP, issued Terms of Reference to the Sentencing Advisory Council (Council) asking it to undertake a review of community based sentencing orders (CBSOs), imprisonment and parole options.

The review followed two reports highlighting issues with the operation of the parole system in Queensland, the use of imprisonment as a sentencing option and the administration of prison sentences:

- *Queensland Parole System Review: Final Report* (2016) — a report of a review led by Walter Sofronoff QC on the parole system's operation in Queensland, including the effectiveness of the legislative framework for parole in Queensland; and
- Queensland Audit Office, Criminal Justice System — *Prison Sentences, Report 4: 2016–17* (2016) – a review by the Queensland Audit Office of how well the Queensland adult criminal justice system exchanges and records data to calculate and administer custodial (prison) sentences accurately.

The review recognises opportunities to improve current criminal justice system responses to offending by improving the flexibility of Queensland sentencing orders, reducing the complexity of sentencing legislation, and providing courts with the tools they need to respond to the individual circumstances of a case.

The benefits of a sentencing system which is efficient, yet flexible, and supports the making of sentencing orders that meet the purposes of sentencing within a clear, accessible, easy to understand and coherent legislative framework are self-evident. Such a system promotes greater certainty and clarity about how the law is to be applied, reduces the risk of error, and appeals required to correct such errors, and the length of sentencing proceedings. It also ensures courts can tailor orders to meet the purposes of sentencing and respond to the individual needs and circumstances of victims and offenders, while taking into account the broader impacts of these offences and expectations of the broader community.

While the legal framework for sentencing – in particular, that which supports the use of CBSOs – is the main focus of the review, the Council recognises that appropriate funding of services and supports to address issues associated with offenders' risks of reoffending is central to the effective administration of sentences in Queensland, and to ensuring that those sentences meet their intended objectives.

The issue of resourcing across the criminal justice system is being separately considered by the Queensland Productivity Commission as part of its current inquiry into how government resources and policies may be best used to reduce imprisonment and recidivism to improve outcomes for the community. The Commission is due to report with its findings by 1 August 2019.

The Council's review of the current sentencing framework for CBSOs in Queensland follows a number of similar reviews that have led to significant sentencing reform in other Australian jurisdictions – most recently in the ACT, NSW, South Australia, Tasmania and Victoria. A number of these reviews have resulted in the introduction of a new form of community order — a community correction order (CCO) — a single, flexible form of order intended to replace, to a greater or lesser extent, other forms of intermediate orders. The Council has been asked to consider the CCO model as a potential model for introduction in Queensland as part of its current inquiry.

The most challenging aspect of the reference concerns how to ensure the legislative frameworks that support sentencing in Queensland operate in a cohesive and coherent way while promoting the availability and use of flexible sentencing options. The concern, outlined in the Terms of Reference, is that there may be existing anomalies that create inconsistency or constrain available sentencing options that need to be removed or minimised.

The Council is conscious that it is not possible to transpose solutions adopted by other jurisdictions directly to the Queensland context. For example, the form of court ordered parole adopted in Queensland, which enables courts to order the date of release on parole to be the date of sentence, and also makes this order available for short prison sentences, is unique to Queensland. Any changes to the availability or use of one order must therefore take into account the likely impact on the use of other orders.

The Council has approached the reference with a view to reducing any existing anomalies and providing courts with a broad range of flexible orders to better respond to the individual circumstances of a case, while seeking to maintain the integrity of the current Queensland sentencing framework.

The Council has been greatly assisted in developing its draft proposals by the contributions of key criminal justice agencies and stakeholders in preliminary submissions made and meetings held. While the draft proposals put forward are the Council's alone, the input of these stakeholders has been invaluable in assisting the Council to better understand the operation of current legislation and existing anomalies, how current sentencing orders are being used, and potential areas for reform.

1.2 Terms of Reference

The Terms of Reference ask the Council to:

- review sentencing and parole legislation, including but not limited to the *Penalties and Sentences Act 1992* (Qld) (PSA) and the *Corrective Services Act 2006* (Qld) (CSA), to identify any anomalies in sentencing or parole laws that create inconsistency or constrain the available sentencing options available to a court and advise how these anomalies could be removed or minimised;
- consider Recommendation 3 of the 2016 *Queensland Parole System Review Final Report* (Parole System Review Report) and advise as to whether a court should have discretion to set a parole release date or parole eligibility date for sentences of greater than three years where the offender has served a period of time on remand and the court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence;
- consider and advise on Recommendation 5 of the Parole System Review Report that court ordered parole should apply to a sentence imposed for a sexual offence;
- assess restrictions on the ability of a court to impose a term of imprisonment with a CBSO and advise on whether those restrictions should be removed or modified in order to better enable offenders to be appropriately monitored and managed upon release into the community to support the reintegration and rehabilitation of an offender and prevent recidivism;
- consider flexible CBSOs that provide for supervision in the community that are used in other jurisdictions (for example, the community correction orders contained in *Sentencing Act 1991* (Vic)) and advise on appropriate options for Queensland;
- assess whether there are any inherent complexities in the legislative framework, including recognition of pre-sentence custody, that contribute to, or cause complexity in calculating an offender's overall period of incarceration, and advise on how those inherent complexities can be addressed with a view to simplifying the calculation process and preventing discharge and detention error;
- consult with key stakeholders, including but not limited to the legal profession, the judiciary, victim of crime groups, prisoner advocacy and support groups, relevant government department and agencies; and
- advise on any other matter relevant to this reference.

The Council is required to report back to the Attorney-General by 31 July 2019.

In developing its advice, the Council has been asked to have regard to a range of matters, including:

- the importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992*;
- the importance of sentencing orders of the court being properly administered so that they satisfy the intended purposes of the sentencing order and facilitate a fair and just sentencing regime that protects the community's safety;
- the purpose of parole is allowing an offender to serve part of their period of imprisonment in the community in order to successfully reintegrate a prisoner into the community and minimise the likelihood of an offender reoffending;

- the need to further encourage and maintain public confidence in the criminal justice system and ensure that sentencing practices meet the community's expectations; and
- the impact of any recommendation the Council may make on the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

The principles that have guided the Council in approaching this review are outlined in Chapter 4 of this paper.

A copy of the Terms of Reference is provided in Appendix 1.

1.3 Council's approach

The Council is conducting the review over five key stages (summarised in Figure 1-1 below).

Figure 1-1: Council's approach to review of community based sentencing orders, imprisonment and parole options

Stage 1 - Project initiation

The first stage of this review involved establishing the governance framework to guide the Council's work. The Council appointed a Project Board to oversee the Terms of Reference to ensure all timeframes were met and quality standards achieved. The Project Board for this review initially comprised the Secretariat Director and three Council members (Helen Watkins, John Allen QC and Debbie Kilroy OAM). Two additional Council members (John Robertson (Chair) and Vicky Loury QC) joined the Project Board after their appointment to the Council in June 2018. Following the appointment of John Allen and Vicky Loury to the District Court of Queensland in December 2018, Kathleen Payne joined the Project Board. The Council appointed two Council members as Project Assurance to the review (Jo Bryant and Dan Rogers) in early 2019 to review public reports produced for the purposes of the review in detail on behalf of the Council.

Stage 2 - Research and preliminary consultation

The Council's initial consultation on the review was concerned with scoping the issues and determining what should be explored as part of the review. This included meetings with a number of key stakeholders, including legal professionals, the judiciary, policy officers, researchers and advocacy groups.

Stage 3 – Targeted stakeholder consultation and development of a draft reform framework

Over stage 3 of the review, the Council:

- Released a series of Policy Issues Papers seeking submissions and feedback from key stakeholders;
- Conducted quantitative and qualitative research, including analysing administrative data to produce two Sentencing Spotlights on sentencing trends in the Queensland higher and lower courts (released in August 2018);
- Hosted roundtables and meetings with content experts in the area of CBSOs, imprisonment and parole, including legal and support and advocacy services;
- Consulted with other domestic and international jurisdictions on their approach to CBSOs, imprisonment and parole; and
- Engaged the Queensland University of Technology (QUT) to conduct a literature review on the effectiveness of CBSOs.

A list of stakeholders consulted is at Appendix 2 of this paper.

Stage 4 – Testing of the draft reform framework

The release of this Options Paper marks an important stage in the review process as it provides an opportunity for the Council to test its reform proposals and identify additional areas to be addressed in the Council's final report.

Alongside this work, the Council is conducting more detailed case studies in three de-identified locations across Queensland to illustrate differences in service accessibility and availability across sites in Queensland and how this may impact upon sentencing practices of the courts. This work will be reported on in the Council's final report.

Stage 5 – Development of final report

The final stage of the review will involve consideration of written submissions, a final round of consultation and the development and delivery of the Council's Final Report.

1.4 Terminology

Throughout this report the terms 'CBSOs', 'community based orders' and 'intermediate sentencing orders' are used interchangeably to refer to sentencing orders falling between immediate imprisonment and absolute discharges, recognisance orders (also sometimes referred to as 'good behaviour bonds') and fines.

The use of these terms is broader than the legal definition of a 'community based order' under section 4 of the *Penalties and Sentences Act 1992* (Qld) which is defined as: 'any community service order, graffiti removal order, intensive correction order or probation order'. While this definition encompasses those orders that have formed the focus of the Council's current review, the review has also considered the operation and use of suspended sentences given these are orders served wholly or partly in the community.

As required under the Terms of Reference, the Council has also considered the intersection of these intermediate orders with the operation and use of parole – in particular, court ordered parole.

Intermediate sanctions have formerly been described as falling into two broad categories:

> 'substitutional sanctions', which empower a court on imposing a term of imprisonment to alter the form of imprisonment (such as suspended sentence orders); and
>
> 'alternative sanctions', which are not dependent on a term of imprisonment being imposed, but rather exist as sentencing orders in their own right (such as [community based orders]).[1]

The distinction between 'substitutional sanctions' and 'alternative sanctions' is important for a number of reasons. While both forms of sanctions can be used in place of immediate imprisonment, in the case of substitutional sanctions, such as suspended sentences and intensive correction orders, a court must first impose a term of imprisonment before deciding whether it is appropriate to either suspend the order or make the order. In both cases, a conviction must be recorded and if the person does not comply with the terms of the order, the court may (or in some cases, must) order the person to serve the whole or part of the sentence remaining at the time of the breach or the period suspended in prison.

Courts have more flexibility in the case of alternative sanctions, such as probation and community services orders. The duration of these orders is not set by reference to the term of imprisonment the person would otherwise have served had the order not been made, and can be ordered with or without a conviction being recorded. If the person fails to comply with the order, courts can either amend the order, or revoke it and re-sentence the person taking into account the extent to which the person complied prior to being revoked.

1.5 Scope

The review has included to date:

- Analysing current Queensland sentencing trends by high level offence type (at QASOC Level 1) to understand the current use of intermediate sentencing orders (community service, probation, imprisonment with probation, intensive correction orders, partially suspended sentences,

[1] Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (1999) 108 as cited in Sentencing Advisory Council (Victoria), *Suspended Sentences and* Intermediate *Sentencing Orders* — Part 2 (2008) 49.

wholly suspended sentences, imprisonment with court ordered parole, imprisonment with board ordered parole) and how use of these orders has changed over time.
- Researching and evaluating interstate and international sentencing options.
- Developing a draft reform framework and recommendations throughout the consultation process based on initial views received, consultation with stakeholders (through meetings, written questions, targeted policy issues papers and stakeholder-roundtables) and background research.
- Commencing work on illustrative case studies in three Queensland locations.

It has not been possible to analyse some areas initially identified by the Council as important due to the availability of data. For example, the Council had hoped to analyse pre-sentence custody and its impact on how sentencing options are used but this was not possible as only formally declared pre-sentence custody is recorded in courts data.

Excluded from the project scope are:

- The Youth Justice system and the sentencing regime that applies to people sentenced as children in Queensland an in other jurisdictions.
- The mental health system and any interplay with sentencing orders.
- Aspects of the *Penalties and Sentences Act 1992* (Qld) relating to lower level orders (e.g. fines and good behaviour bonds). While there is a relationship between fines and imprisonment, this is likely to merit a separate comprehensive review of how fines operate.
- Use of diversionary options such as specialist courts, bail programs and justice mediation (as stand-alone mechanisms, as distinct from components of community based orders).
- *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA) (Qld) orders and post-sentence detention.

Also outside of scope is a detailed analysis of resourcing issues and challenges. As discussed above, the Queensland Productivity Commission is current considering this issue as part of a separate review. Place based case studies are also being developed by the Council to illustrate some of the existing system challenges.

1.6 Data sources

The primary source of data for this review is data extracted from the Queensland Courts (Queensland Wide Inter-Linked Courts (QWIC)) database, as provided to the Council by the Queensland Government Statistician's Office (QGSO).

In most cases in this report, this data is reported in accordance with the Australian Standard Offence Classification (ASOC) scheme and Queensland extension to this scheme (QASOC). This classification scheme aims to provide 'a uniform national statistical framework for classifying offences used by criminal justice agencies in Australia' and was developed by the Australian Bureau of Statistics in consultation with criminal justice agencies.[2]

The Council has also drawn on research undertaken by the QGSO — factors associated with the outcome of community based orders as reported on in Chapter 3 of this paper.[3] This work was led by the QGSO and included a qualitative and quantitative analysis of factors impacting on successful completion of orders.

1.7 Structure of this paper

Chapter 2 sets out the current challenges facing the Queensland criminal justice system, including growth in prisoner numbers, the decentralised nature of the Queensland population and associated service delivery challenges, the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, and current performance measures.

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2 Queensland Government, Office of Economic and Statistical Research, *Australian Standard Offence Classification (Queensland Extension) (QASOC)* (2008) 1.

3 Queensland Government Statistician's Office, *Factors Associated with the Outcome of Community Based Orders* (2019, in press).

Chapter 3 provides an overview of findings of research on 'what works' in reducing risks of reoffending, an analysis of recidivism of Queensland offenders based on Queensland courts data, and findings of the QGSO's research on factors affecting successful completion of supervised community based orders.

Chapter 4 outlines the fundamental principles that have guided the Council's review. It also discusses how the legislative framework that guides sentencing can either contribute to or detract from the efficient operation of the criminal justice system and to community understanding and confidence in CBSOs.

Chapter 5 describes the sentencing process and framework in Queensland, with a focus on CBSOs. It considers a range of factors that guide and, in some cases, limit the exercise of a court's sentencing discretion.

Chapter 6 considers the operation of intensive correction orders in Queensland and options to either abolish or reform this order to address barriers to its use.

Chapter 7 discusses the range of other community orders available in Queensland, and the potential introduction of community correction orders in Queensland to replace these orders and give courts a broader range of more flexible options.

Chapter 8 explores the operation and use of suspended sentences in Queensland and potential improvements, including to enable conditions to be ordered where appropriate and to respond to breaches of orders.

Chapter 9 considers the current legal framework for court ordered parole in Queensland. In particular, it discusses changes recommended by the Queensland Parole Review report to extend its availability to sexual offences and to allow a release date to be set for sentences of over three years where a court considers that the appropriate period to be served in custody is not more than 12 months from the date of sentence.

Chapter 10 examines sentencing practices for sexual offences, with a particular focus on the use of custodial orders. It considers specific issues relevant to the extension of court ordered parole to sexual offences and options for reform.

Chapter 11 discusses implementation issues, including the provision of pre-sentence assessments and court advice, and current resourcing challenges. It also considers implementation issues and reform challenges.

Chapter 12 reviews other issues raised by stakeholders, including the powers of courts to vary, amend or revoke community based orders and to convict and not further punish, the operation of section 189 of the PSA which allows courts to take outstanding offences into account in sentencing and section 651 of the *Criminal Code* (Qld) which relates to the ability of a court to hear and decide summary offences where charged on indictment. It also considers the issue of sentencing for domestic and family violence offences, which the Council suggests warrants a separate review given the complexity of issues this raises, and data quality issues.

Chapter 2 Sentencing context in Queensland

This chapter describes the current sentencing context in Queensland. It outlines major reviews and reforms that have shaped our current sentencing options. It provides a description of offences appearing in our criminal courts and how they have changed over the period 2015-06 to 2016-17, and then presents sentencing outcomes separately for the Magistrates and Higher Courts. The chapter then identifies some of the key challenges facing our current system: rising prisoner numbers, demand on the court system, and the challenge of delivering services to a dispersed population.

2.1 Reforms, reviews and legislative changes

Several reviews and reforms over the past decade have shaped Queensland's criminal justice system and sentencing framework. These are summarised in Table 2-1.

Table 2-1: Major reviews and reform programs

Review	Year	Description
Review of the civil and criminal justice system in Queensland[4] (Moynihan review)	2008	A review of the civil and criminal justice system with the aim of identifying improvements to resolve cases more quickly and fairly. The Moynihan reforms resulted in significant expansion of the Magistrates Courts' jurisdiction to determine indictable offences in the *Criminal Code* (Qld) and *Drugs Misuse Act 1986* (Qld), resulting in many matters previously dealt with in the District Court being dealt with instead in a Magistrates Court.
Inquiry on strategies to prevent and reduce criminal activity in Queensland[5]	2014	An inquiry on strategies to prevent and reduce criminal activity, by examining: the trends and type of criminal activity in Queensland; the social and economic contributors to crime; the impacts of this criminal activity on the community and individuals, including social and economic impacts; the effectiveness of crime prevention strategies, including imprisonment, justice reinvestment, early intervention, alternative dispute resolution, and other models used in national and international jurisdictions; the experiences of Queenslanders of the criminal justice system; and possible strategies to increase collaboration and co-operation between various participants in the criminal justice system.
Not now, not ever: Putting an End to Domestic and Family Violence in Queensland[6] (Taskforce report)	2015	An independent review of Queensland's domestic and family violence support systems to make recommendations about how the system could be improved. The review led to a number of reforms impacting sentencing practices, including the establishment of specialist Domestic and Family Violence Courts (commencing with a trial in Southport), an increase in the maximum penalties for first-time and subsequent breaches of domestic violence orders (increased to 3 and 5 years' imprisonment respectively), and increase in maximum penalties for breaches of police protection notices and release conditions to three years' imprisonment, introduction of a notation scheme to helps ensure that patterns of behaviour of those who commit acts of domestic and family violence are clearly evident to police officers and courts, and to make domestic and family violence an aggravating factor on sentencing for criminal offences under the PSA.
Queensland Organised Crime Commission of Inquiry[7]	2015	An independent review of extent and nature of organised crime in Queensland and the economic and societal impacts of such activity. The Commission's recommendations included the introduction of new offences and circumstances of aggravation carrying higher maximum penalties targeting organised criminal activity.

4 Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2009).

5 Queensland Parliament, Legal Affairs and Community Safety Committee, *Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland, Report No 82* (2014).

6 Special Taskforce on Domestic and Family Violence in Queensland, *Not now, not ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

7 Queensland Organised Crime Commission of Inquiry, *Final Report* (2015).

Review	Year	Description
Taskforce on Organised Crime Legislation[8]	2016	A review of legislation introduced in 2013 to combat organised crime, in particular, outlaw motor cycle gangs. The Taskforce report made 60 recommendations, including the introduction of a serious organised crime circumstance of aggravation.
Queensland Parole System Review[9] (Sofronoff review)	2016	An independent review of the parole system that made 91 recommendations in relation to the legislative framework and sentencing, assessment and management of offenders, rehabilitation programs, re-entry services, the Parole Board and the management of offenders in the community. The Queensland Government supported 89 of the recommendations (6 in principle).[10]
Inquiry into imprisonment and recidivism Queensland Productivity Commission	2019	In September 2018, the Queensland Government asked the Queensland Productivity Commission to undertake an inquiry on imprisonment and recidivism, to understand how government resources and policies can best be used to improve outcomes for the community. The final report of the Inquiry will be published in August 2019.

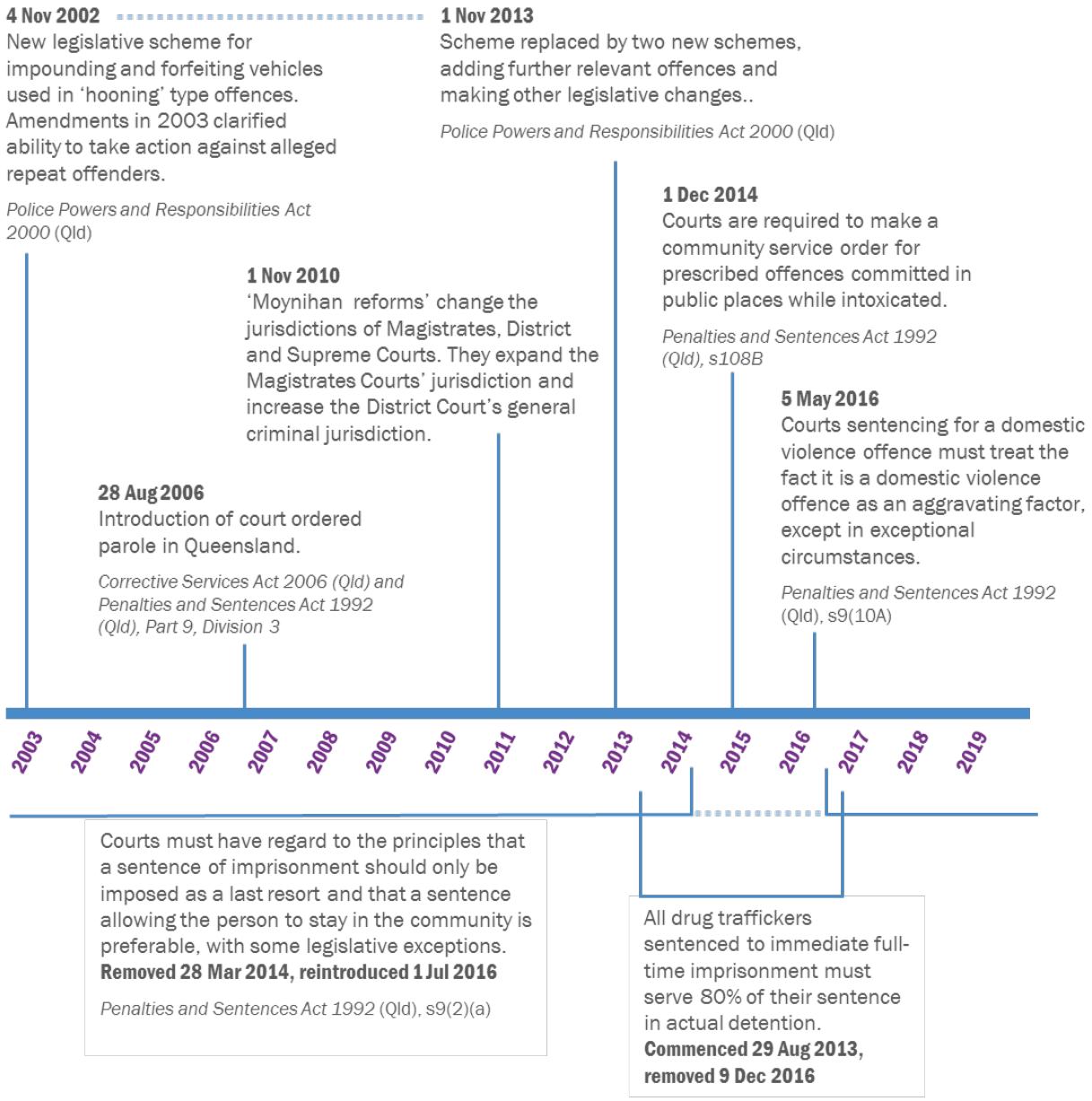
In addition to these reforms and reviews, a raft of legislative amendments have impacted on the range of sentencing options available to the courts, and in turn, these have influenced sentencing practices (see Figure 2-1).

8 Queensland, Taskforce on Organised Crime Legislation, *Report of the Taskforce on Organised Crime Legislation* (2016).

9 Queensland Parole System Review, *Queensland Parole System Review Final Report* (2016).

10 Queensland Government, *Response to Queensland Parole System Review Recommendations* (2016).

Figure 2-1: Summary of legislative amendments with an impact on sentencing, 2002–2019



2.2 Trends in offences

2.2.1 Changing patterns of offences sentenced in Queensland

The current context: Changing patterns of offending

- Patterns of offending differ between the higher courts and the Magistrates Court.
- In the higher courts the offence categories responsible for the greatest volume of sentencing events are drug offences, acts intended to cause injury and justice and government offences.
- The offence categories that have experienced the highest average annual percentage change in volume in the higher courts were weapons offences, drug offences, and traffic and vehicle offences.
- Drug offences in the higher courts have risen sharply since 2010–11, which is important considering this is the offence category responsible for the largest volume of sentencing events in these Courts.
- In the Magistrates Courts, traffic and vehicle offences were present in about 40 per cent of sentencing events over the past 13 years.
- The offence categories with the highest average annual percentage increase in the Magistrates Court were abduction and harassment, weapons offences, drug offences and sexual assault.

This section provides an overview of Queensland Courts Services data (sourced from the QGSO) about sentencing in Queensland over the period 2005–06 to 2016–17. Overall in Queensland, there have been 4,010,731 penalty outcomes in the criminal courts in Queensland (see Table 2-2), the majority of which have been decided in the Magistrates Courts. Given the very different profile of offences heard in each of the higher and lower court jurisdictions, information in this section is presented separately for the Magistrates Courts and the higher courts (District and Supreme Courts). For each level of court, data relating to the offence profiles and penalty outcomes (including by offence and over time) are presented.

Table 2-2: Count of elements, by court level, Queensland 2005–06 to 2017-18

Court level	Offenders †	Sentencing events	Offences	Penalties ‡
Magistrates	730,049 (98.6%)	1,915,662 (96.9%)	3,652,035 (93.1%)	3,753,879 (93.6%)
District	38,337 (5.2%)	49,620 (2.5%)	214,152 (5.5%)	209,621 (5.2%)
Supreme	9,255 (1.3%)	11,000 (0.6%)	58,612 (1.5%)	47,231 (1.2%)
Total	**740,307 (100%)**	**1,976,282 (100%)**	**3,924,799 (100%)**	**4,010,731 (100%)**

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
† Percentages will not add to 100% as some offenders may appear in multiple courts during the reporting period. Counts of offenders is only available to 31 December 2017.
‡ A unique count of penalties is available from 2011-12, prior to this a penalty may be counted multiple times if it is imposed for multiple offences.

Offences sentenced in the Magistrates Courts

Table 2-3 shows the number of offenders and events associated with each offence type. Substantial overlap occurs within the offender and event elements, so the percentages for each add to more than 100.

Traffic and vehicle offences were by far the most common offence category with 62.2 per cent of all unique offenders sentenced for a traffic offence at some point over the 13-year period. Offences against justice procedures were the second most common across all elements, being a sentenced offence for 26.6 per cent of all sentenced offenders and occurring in 23.5 per cent of all sentencing events.

Excluding robbery and extortion (due to the small sample size), the offence categories that experienced the largest average annual percentage change in the Magistrates Courts were abduction and harassment (average 8.5% increase), weapons offences (average 5.9% increase), drug offences (average 5.8% increase) and sexual assault (average 5.0% increase).

The offence categories with the largest average annual decreases were dangerous or negligent acts endangering persons (average 4.0% decrease) and public order offences (average 2.6% decrease).

Table 2-3: Magistrates Courts offenders and court events by offence division, 2005-06 to 2017-18

Offence (ASOC Division)	Offenders †	Sentencing Events ‡	Average annual percentage change in sentencing events
Homicide	0 (0.0%)	0 (0.0%)	-
Acts intended to cause injury	53,134 (7.3%)	68,899 (3.6%)	2.4% ▲
Sexual assault	1,573 (0.2%)	1,710 (0.1%)	5.0% ▲
Endangering persons	108,811 (14.9%)	127,759 (6.7%)	-4.0% ▼
Abduction, harassment	5,132 (0.7%)	5,864 (0.3%)	8.5% ▲
Robbery, extortion	188 (0.0%)	199 (0.0%)	*48.1% ▲
Unlawful entry	23,931 (3.3%)	36,251 (1.9%)	1.7% ▲
Theft	102,246 (14.0%)	193,552 (10.1%)	3.0% ▲
Fraud	38,386 (5.3%)	47,424 (2.5%)	1.2% ▲
Drugs	131,300 (18.0%)	256,419 (13.4%)	5.8% ▲
Weapons	33,367 (4.6%)	42,752 (2.2%)	5.9% ▲
Property and environment	48,681 (6.7%)	64,818 (3.4%)	0.8% ▲
Public order	162,084 (22.2%)	304,379 (15.9%)	-2.6% ▼
Traffic and vehicle	453,810 (62.2%)	781,342 (40.8%)	-0.7% ▼
Justice and government	193,884 (26.6%)	450,384 (23.5%)	2.9% ▲

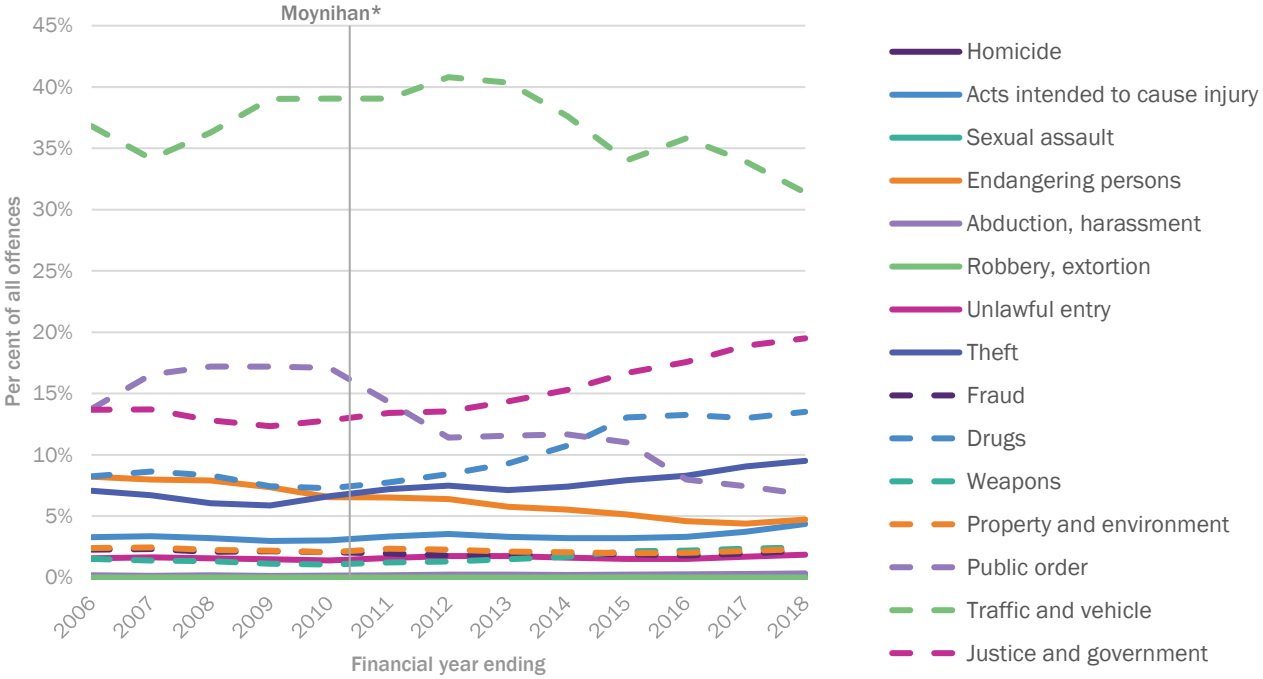
† Totals do not add to 100% as some offenders may be sentenced for multiple types of offences.
‡ Totals do not add to 100% as some events may involve multiple types of offences.
* caution, small sample sizes. The data is skewed by an increase from 3 cases in 2009-10 to 15 cases in 2010-11 (a 400% increase).
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

The following figures report an offender's Most Serious Offence (MSO) at a court event. The MSO is the offence receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics (ABS). An offender records one MSO per court event.

Figure 2-2 shows trends for offences (MSO) in the Magistrates Courts over time between 2005–06 and 2017–18. It shows that while the average annual percentage change for traffic and vehicle offences was small over the whole data period, this offence category has generally declined since 2011–12. Public order offences also decreased considerably. Between the 2005–06 and 2010–11 this category of offence was the second largest (by proportion of all cases, MSO) in the Magistrates Courts, but by 2017–18 was the fifth most common.

At the same time that public order and traffic and vehicle offences decreased, other offence categories became more prominent as a proportion of all offences. In particular, there were considerable increases in justice and government offences, drug offences and theft between the 2011–12 and 2017–18 financial years (see Figure 2-2).

Figure 2-2: Magistrates Courts change in offence categories over time (MSO), 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
* The vertical line depicts reforms which could impact on the data. The 'Moynihan reforms' commenced 1/11/2010 and changed the jurisdiction of the Magistrates, District and Supreme Courts. See Figure 2-1 for more details.

Offences sentenced in the higher courts

Table 2-4 shows that over the 13 year data period, the offence categories responsible for the greatest proportion of sentencing events in the higher courts were drug offences (26.9%), acts intended to cause injury (26.6%) and justice and government offences (23.4%).

Over the same data period, the offence categories with the largest average annual change in volume were weapons offences (average 16.6% increase), drug offences (average 9.5% increase) and traffic and vehicle offences (average 7.9% increase). The offence category with the largest average annual decrease was fraud (average 4.6% decrease), followed by unlawful entry (average 2.6% decrease). Note that the percentage change refers to the change in the absolute number of court events, although the number of sentencing events may be increasing, the per capita crime rate may not follow the same trend.

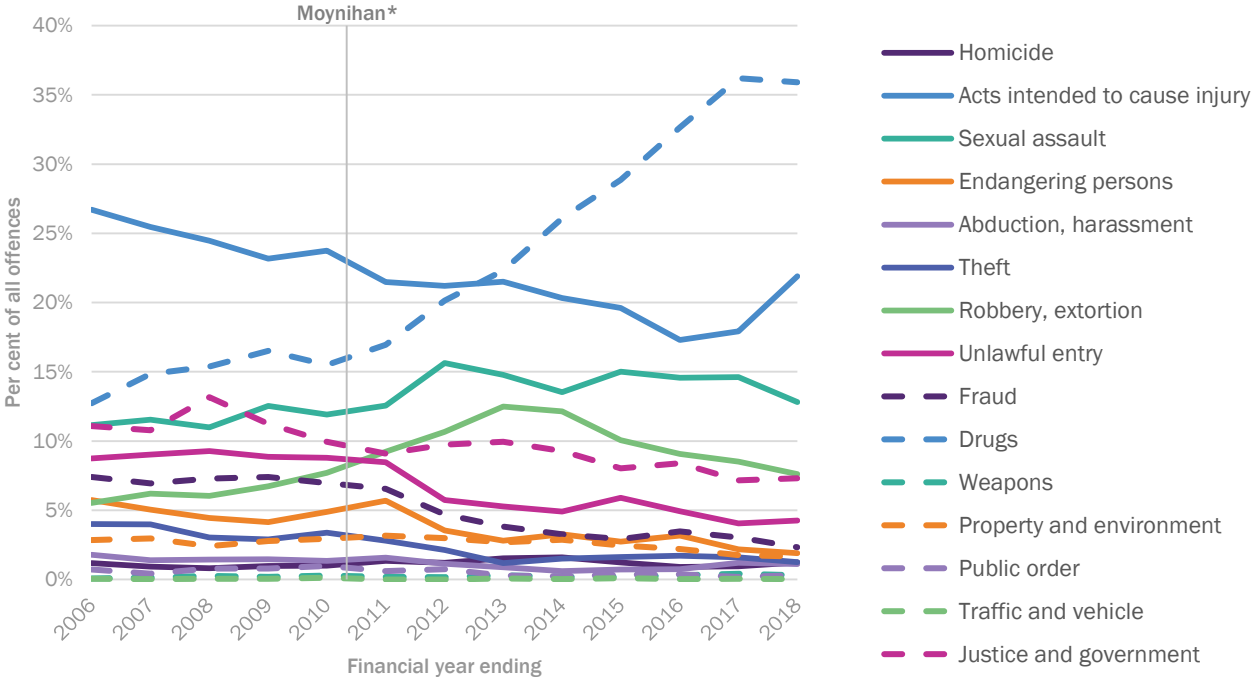
Table 2-4: Higher courts offenders and court events by offence division, 2005-06 to 2017-18

Offence (ASOC Division)	Offenders†	Sentencing Events‡	Average annual percentage change in sentencing events
Homicide	631 (1.4%)	678 (1.1%)	2.9% ▲
Acts intended to cause injury	13,970 (30.2%)	16,113 (26.6%)	0.6% ▲
Sexual assault	7,312 (15.8%)	8,149 (13.4%)	2.2% ▲
Endangering persons	3,711 (8.0%)	3,988 (6.6%)	-1.8% ▼
Abduction, harassment	1,921 (4.2%)	2,065 (3.4%)	3.0% ▲
Robbery, extortion	4,982 (10.8%)	5,647 (9.3%)	3.2% ▲
Unlawful entry	6,942 (15.0%)	8,168 (13.5%)	-2.6% ▼
Theft	9,183 (19.8%)	10,961 (18.1%)	1.2% ▲
Fraud	4,750 (10.3%)	5,148 (8.5%)	-4.6% ▼
Drugs	13,973 (30.2%)	16,330 (26.9%)	9.5% ▲
Weapons	2,224 (4.8%)	2,522 (4.2%)	16.6% ▲
Property and environment	4,853 (10.5%)	5,335 (8.8%)	-0.3% ▼
Public order	2,381 (5.1%)	2,612 (4.3%)	1.8% ▲
Traffic and vehicle	2,494 (5.4%)	2,810 (4.6%)	7.9% ▲
Justice and government	10,995 (23.8%)	14,166 (23.4%)	3.1% ▲

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.
Note: Percentages for each column may add to slightly less than 100%, as the offence types 'miscellaneous' and 'cannot be assigned' have been excluded.
† Percentages may add to more than 100% as some offenders may be sentenced for multiple types of offences. Counts of offenders is only available to 31 December 2017.
‡ Percentages may add to more than 100% as some events may involve multiple types of offences.

Considering drug offences were responsible for the greatest volume of sentencing events in the higher courts over the data period, the average annual increase in these offences is worth examining in greater detail. Figure 2-3 shows the change in offence categories over time in the higher courts, demonstrating that drug offences generally increased each year in the time period. This also highlights that drug offences increased sharply between the 2010–11 and 2016–17 financial years, before falling slightly in 2017–18, when they accounted for more than 35 per cent of all offences in the higher courts.

Figure 2-3: Higher courts change in offence categories over time (MSO), 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
* The vertical line depicts reforms which could impact on the data. The 'Moynihan reforms' commenced 1/11/2010 and changed the jurisdiction of the Magistrates, District and Supreme Courts. See Figure 2-1 for more details.

2.2.2 Offences sentenced for specific demographic cohorts

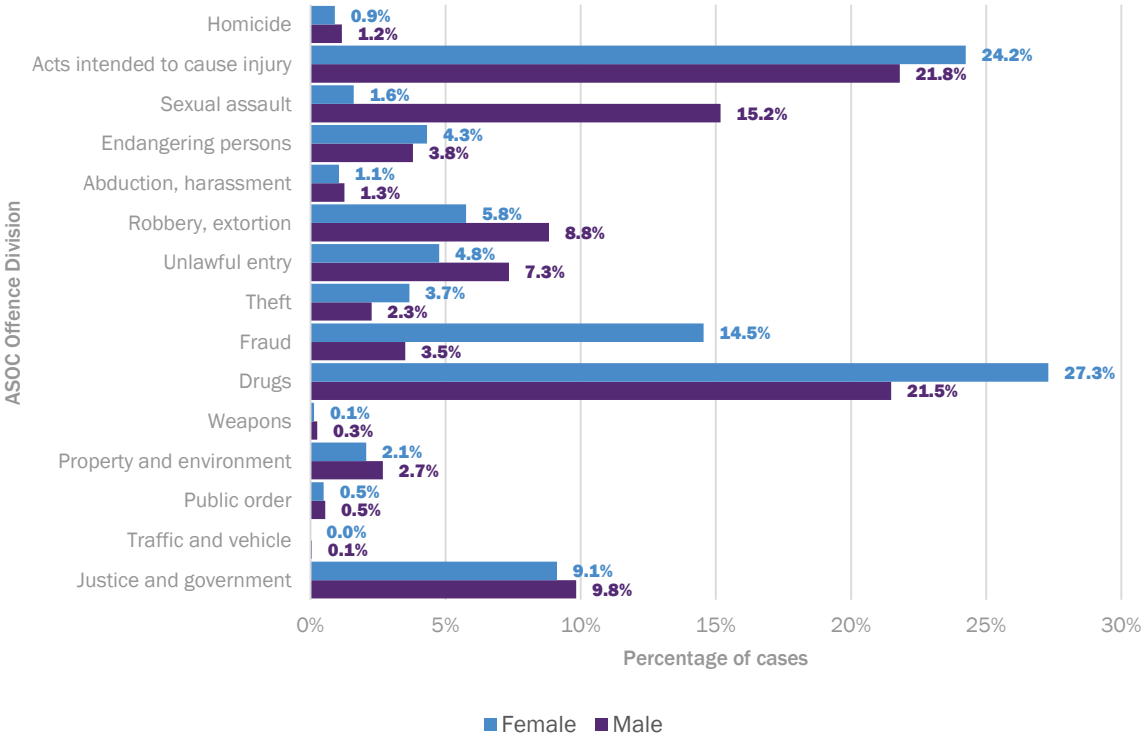
The current context: Patterns of offending for specific demographic cohorts

- Patterns of offending differ between male and female offenders, and between Aboriginal and Torres Strait Islanders and non-Indigenous offenders. Different demographic cohorts tend to commit different categories of offences.
- The biggest differences in offence categories between male and female offenders are in sexual assault (accounts for a far greater proportion of cases in males than females) and fraud (accounts for a far greater proportion of cases in females than males).
- Comparing offenders by Aboriginal and Torres Strait Islander status, acts intending to cause injury account for a considerably larger proportion of cases for Aboriginal and Torres Strait Islander offenders, and drug offences make up a much greater proportion of cases for non-Indigenous offenders.

Different demographic cohorts tend to commit different categories of offences. As Figure 2-4 shows, the offence categories (MSO) with the largest difference between male and female offenders are sexual assault (accounting for 15.2% of offences committed by males (MSO) compared to only 1.6% of females) and fraud (14.5% of offences committed by females (MSO) are fraud, compared to only 3.5% of males).

Smaller differences in offending are also visible across other categories. Drug offences account for a greater percentage of the cases for female offenders by MSO (27.3%) compared to males (21.5%). Males are more likely to commit offences in the categories of robbery/extortion (8.8% of cases for males compared to 5.8% for females) and unlawful entry (7.3% of cases for males compared to 4.8% for females).

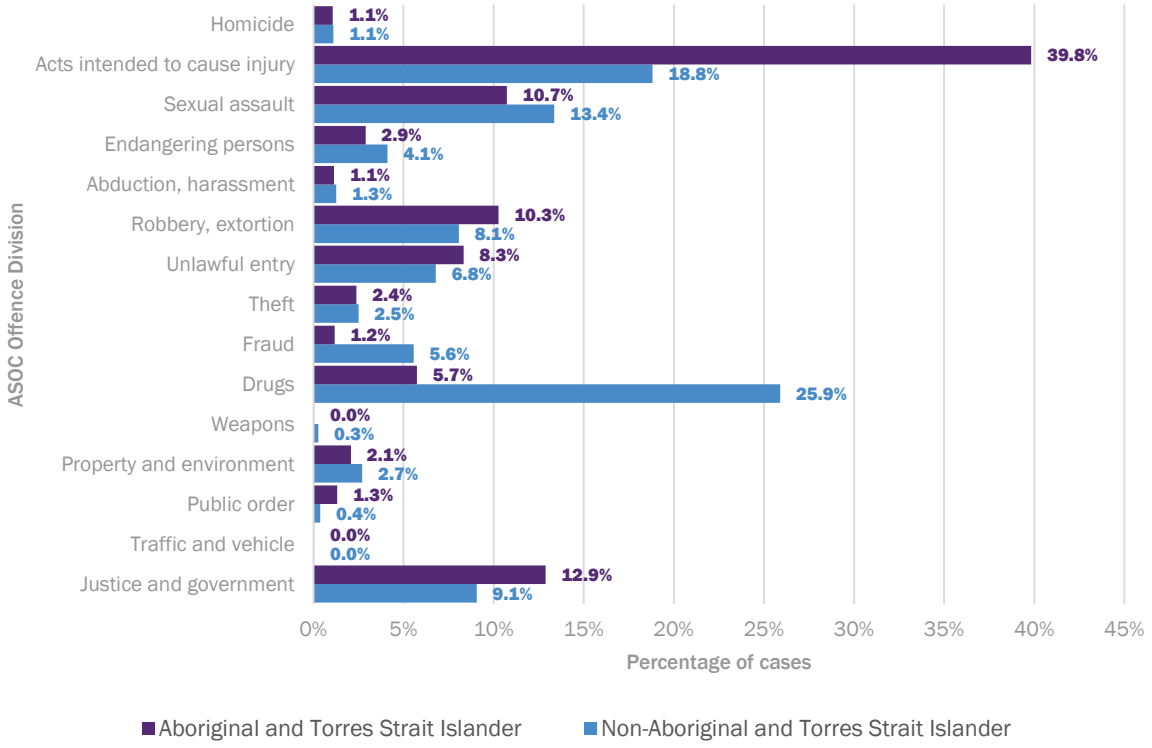
Figure 2-4: Offence division (MSO) by gender, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Patterns of offending also differ depending on whether the offender identifies as Aboriginal and Torres Strait Islander (see Figure 2-5). Acts intending to cause injury (MSO) account for 39.8 per cent of cases for Aboriginal and Torres Strait Islander offenders, compared to 18.8 per cent of non-Indigenous offenders (a difference of 21.0%). There is also a large difference in drug-related offending (MSO), which accounts for 25.9 per cent of cases for non-Indigenous offenders, compared to 5.7 per cent of cases for Aboriginal and Torres Strait Islander offenders (a difference of 20.2%).

Figure 2-5: Offence division (MSO) by Indigenous status, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

2.2.3 Trends in sentences imposed

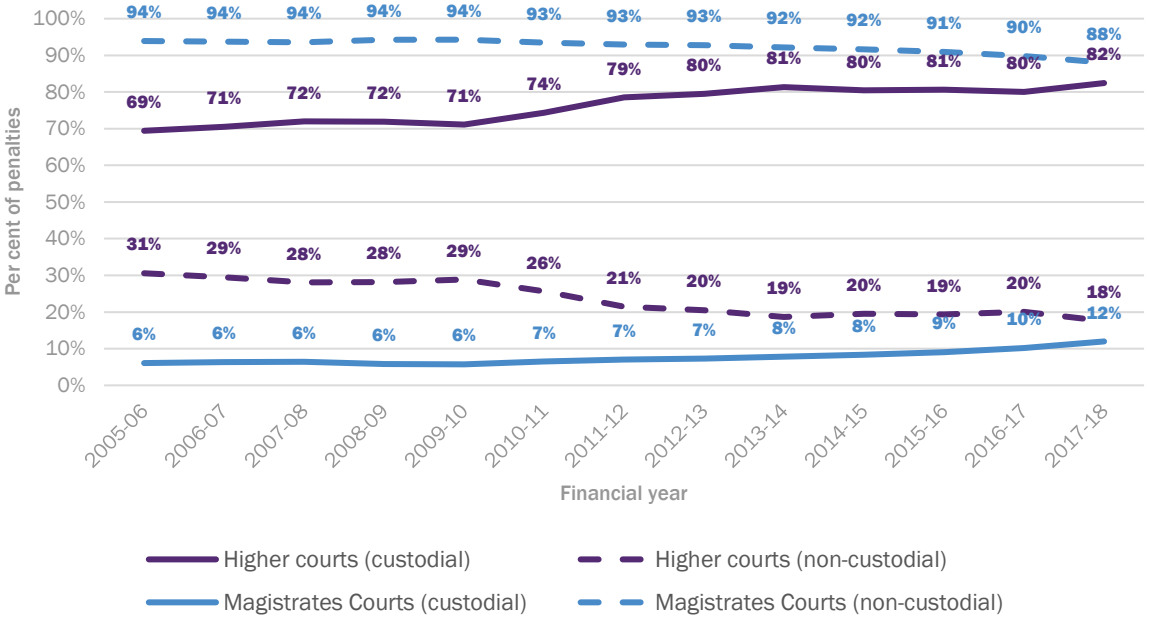
Trends in sentencing: Penalty types

- The use of custodial penalties has increased over time in both the Magistrates Courts and the higher courts. In the higher courts the use of non-custodial orders has decreased, while in the Magistrates Courts the use of non-custodial orders has increased.
- Imprisonment increased on average over the 13-year data period (average annual increase of 7.8% in the higher courts and 8.2% in the Magistrates Courts), while the use of partially suspended sentences and intensive correction orders decreased on average.
- The non-custodial order type with the largest average annual decrease in the higher courts was community service orders, with an average annual decrease of 8.3 per cent.
- In the Magistrates Courts, non-custodial orders saw an average annual increase over the data period; the largest increases were probation orders (average annual increase of 4.5%), followed by community service orders (average annual increase of 4.2%).

The use of custodial and non-custodial penalties has changed over time in both the higher courts and Magistrates Courts, as Figure 2-6 shows. In both courts, the use of custodial penalties has increased over the past 13 years, from six to 12 per cent in the Magistrates Courts and from 69 to 82 per cent in the higher courts.

At the same time, the use of non-custodial penalties decreased from 94 to 88 per cent in the Magistrates Courts and from 31 to 18 per cent in the higher courts.

Figure 2-6: Use of custodial and non-custodial penalties, by court type (MSO), 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Penalties imposed in the Magistrates Courts

Table 2-5 sets out the penalties imposed in Queensland over the period 2005–06 to 2017-18, and are shown within the two broad penalty categories of custodial and non-custodial. Custodial orders include imprisonment, intensive correction orders (ICOs) and suspended sentences of imprisonment. Non-custodial orders include community service orders, probation, fines and recognisance orders/good behaviour bonds.

By far the most common penalty imposed in the Magistrates Courts is a fine, with 78.9 per cent of sentencing events resulting in a fine.

Table 2-5 also presents the average annual percentage change in orders over the period 2005-06 to 2017-18 in the Magistrates Courts, showing that in the custodial penalties category, imprisonment increased on average by 8.2 per cent per year, wholly suspended sentences increased on average by 4.6 per cent per year, and partially suspended sentences decreased by 1.6 per cent on average per year. ICOs showed the largest average annual percentage decrease (7.1%) in this category.

In the non-custodial category, probation and community service orders had the largest average annual increases (4.5% and 4.2%). The use of good behaviour orders and recordings of convictions with no further punishment increased on average each year over the data period (by 1.0% and 8.2% respectively).

Table 2-5: Magistrates Courts offenders and court events by penalty, 2005–06 to 2017-18

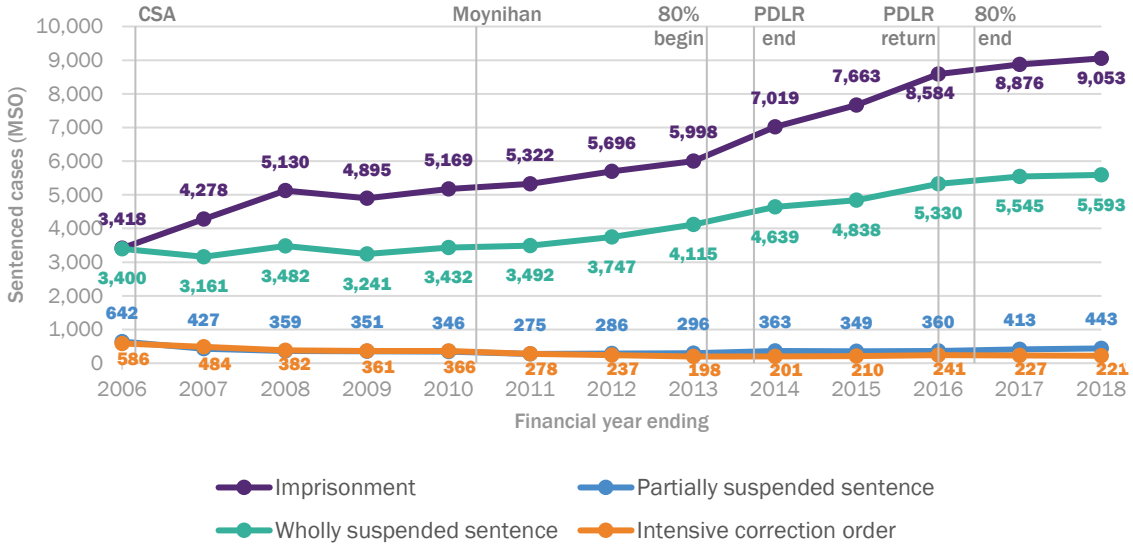
Penalty	Offenders†	Sentencing Events‡	Average annual percentage change in sentencing events
Custodial penalties			
Imprisonment	35,696 (4.9%)	82,017 (4.3%)	8.2% ▲
Partially suspended sentence	4,611 (0.6%)	5,094 (0.3%)	-1.6% ▼
Wholly suspended sentence	40,184 (5.5%)	56,624 (3.0%)	4.6% ▲
Intensive correction order	3,715 (0.5%)	4,013 (0.2%)	-7.1% ▼
Non-custodial penalties			
Community service	33,653 (4.6%)	42,060 (2.2%)	4.2% ▲
Probation	74,781 (10.2%)	103,785 (5.4%)	4.5% ▲
Fine	657,929 (90.1%)	1,512,215 (78.9%)	-1.2% ▼
Good behaviour, recognisance	117,468 (16.1%)	135,718 (7.1%)	1.0% ▲
Convicted, not punished	75,289 (10.3%)	119,548 (6.2%)	8.2% ▲

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Ancillary penalties such as compensation, restitution or licence disqualification have been excluded; rising of the court has also been excluded.
† Percentages may add to more than 100% as some offenders may be sentenced for multiple types of offences. Counts of offenders is only available to 31 December 2017.
‡ Percentages may add to more than 100% as some events may involve multiple types of offences.

Custodial sentences – Magistrates Courts

Figure 2-7 shows imprisonment was by far the most commonly used form of custodial penalty – the most used across each year, and increasing over the entire reporting period. Wholly suspended sentences were the second most common penalty type, while ICOs and partially suspended sentences were used far less often at any point over the reporting period.

Figure 2-7: Magistrates Courts custodial penalties imposed on adult offenders by penalty type (MSO), 2005–06 to 2017–18

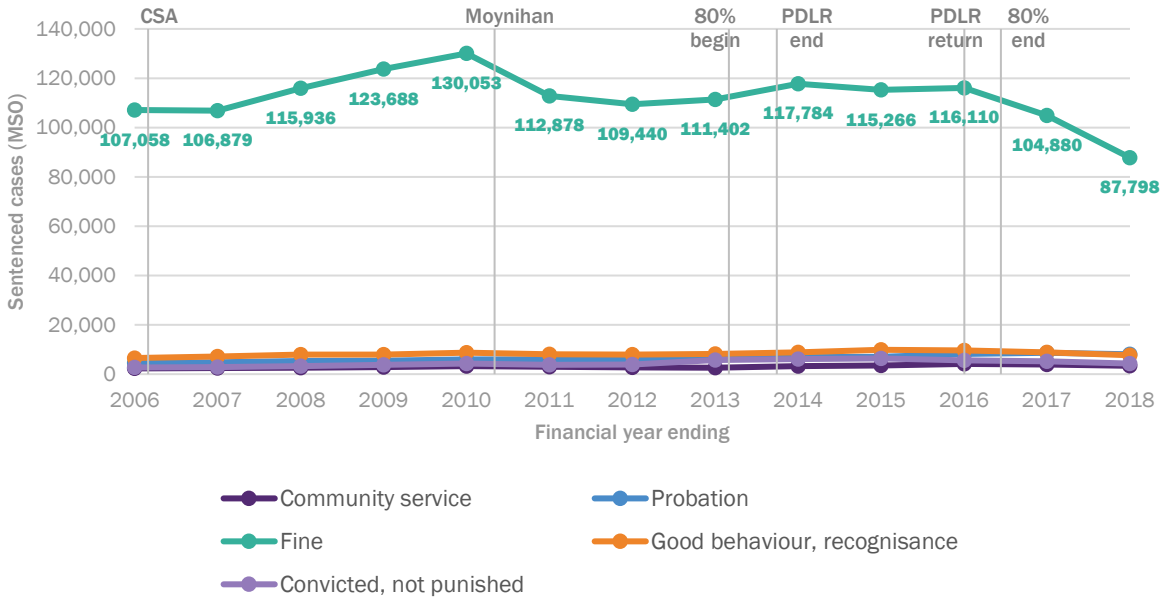


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: for an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.

Non-custodial sentences – Magistrates Courts

Figure 2-8 shows that fines were by far the most commonly used form of non-custodial penalty across all years. The penalty types of probation and convicted not further punished have increased in number across time, though from a low initial baseline in 2005–06.

Figure 2-8: Magistrates Courts non-custodial penalties imposed on adult offenders by penalty type (MSO), 2005–06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: for an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.

Penalties imposed in the higher courts

Table 2-6 shows the count of offenders and events by penalty type in the higher courts. Substantial overlap occurs within the offender and event elements, so the percentages for each add to more than 100. This shows that the majority of penalties imposed in the higher courts are custodial sentences – the complete reverse of the pattern in the Magistrates Courts.

Examining the average annual percentage change of particular order types for both courts illustrates which penalties are contributing most substantially to these trends.

In the higher courts, imprisonment was given as a penalty to more than half of offenders sentenced between 2005–06 and 2017–18, and experienced an average percentage increase of 7.8 per cent per year during this period. Although the use of custodial penalties increased overall, the remaining custodial order types demonstrated an average annual percentage decrease, which was particularly evident for ICOs (average annual decrease of 17.2%).

The orders with the largest annual percentage decreases in the non-custodial category were community service orders (average annual decrease of 8.3%) and fines (average annual decrease of 5.6%). Some non-custodial penalties (good behaviour, convicted with no further punishment) actually show an average annual percentage increase in use over the time period.

Table 2-6: Higher courts offenders and court events by penalty, 2005–06 to 2017–18

Penalty	Offenders †	Sentencing Events ‡	Average annual percentage change in sentencing events
Custodial penalties			
Imprisonment	23,346 (50.5%)	29,046 (47.9%)	7.8% ▲
Partially suspended sentence	8,171 (17.7%)	8,706 (14.4%)	-2.3% ▼
Wholly suspended sentence	8,344 (18.0%)	8,856 (14.6%)	-2.0% ▼
Intensive correction order	1,450 (3.1%)	1,474 (2.4%)	-17.2% ▼
Non-custodial penalties			
Community service	3,351 (7.2%)	3,455 (5.7%)	-8.3% ▼
Probation	8,441 (18.2%)	9,004 (14.9%)	-0.4% ▼
Fine	2,773 (6.0%)	2,908 (4.8%)	-5.6% ▼
Good behaviour, recognisance	2,210 (4.8%)	2,347 (3.9%)	5.1% ▲
Convicted, not punished	13,607 (29.4%)	17,157 (28.3%)	6.4% ▲

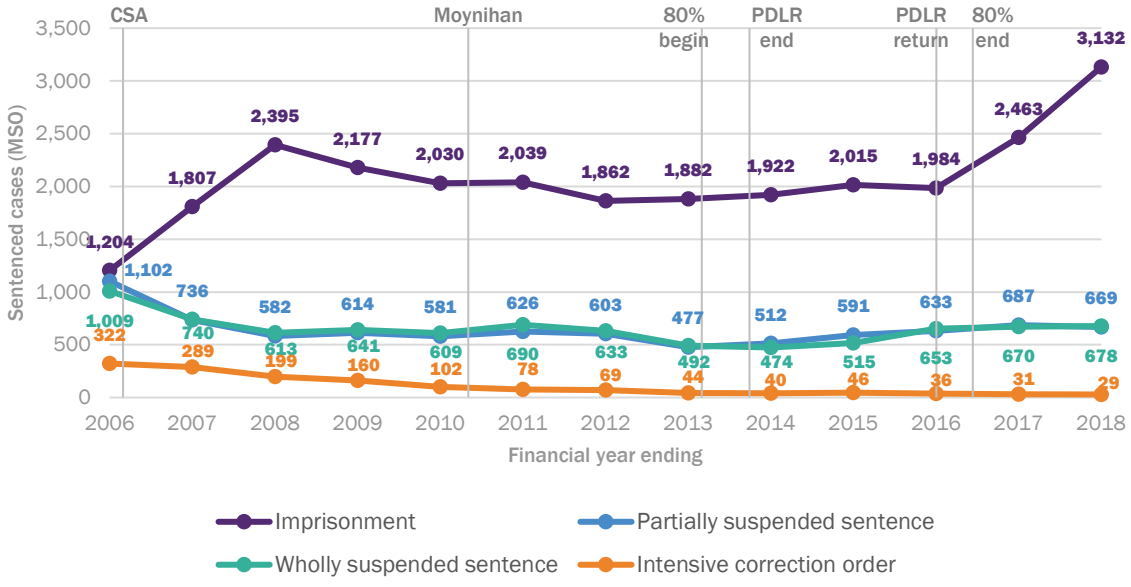
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.
Note: Ancillary penalties such as compensation, restitution or licence disqualification have been excluded; rising of the court has also been excluded.
† Percentages may add to more than 100% as some offenders may be sentenced for multiple types of offences. Counts of offenders is only available to 31 December 2017.
‡ Percentages may add to more than 100% as some events may involve multiple types of offences.

Custodial sentences – higher courts

Figure 2-9 shows imprisonment was by far the most commonly used form of custodial penalty - the most used across each year, and increasing over the dataset. Imprisonment was also the most common of all penalty types imposed by the higher courts over the 13-year period.

The use of ICOs has reduced considerably over time, decreasing from 322 orders (MSO) made in 2005–06 to 29 in 2017-18.

Figure 2-9: Higher courts custodial penalties imposed on adult offenders by penalty type (MSO), 2005–06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: for an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.

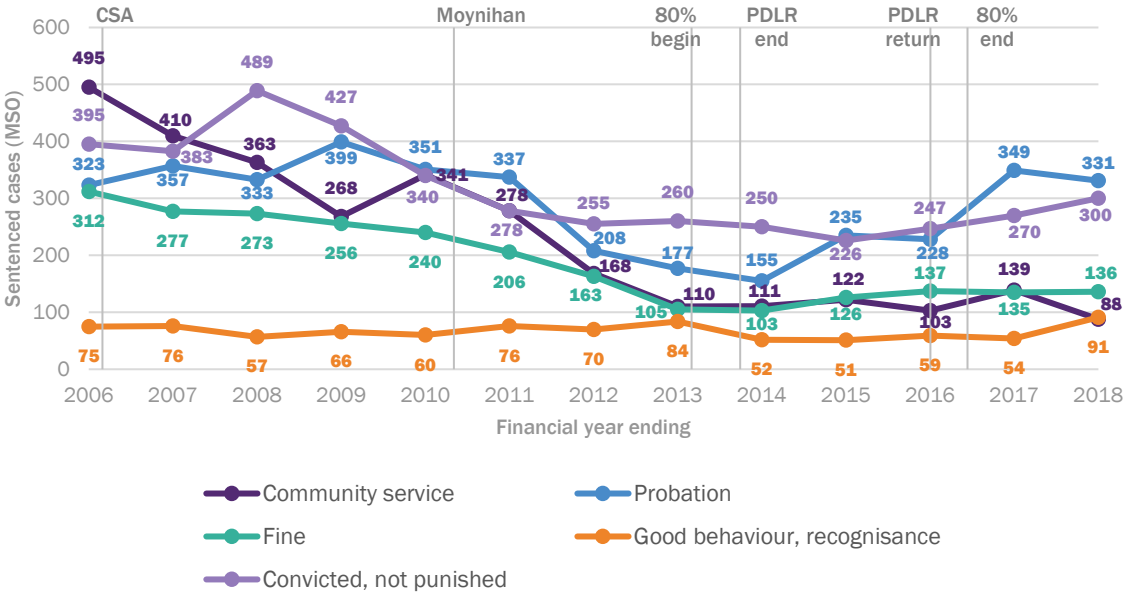
Non-custodial sentences – Higher Courts

Figure 2-10 shows that most non-custodial penalties (MSO) saw a steady decrease from 2005–06 to 2012–13, including orders of community service, probation, fines and offenders that were convicted but not further punished. From 2012-13 to 2017-18, probation orders saw an increase from 155 to 331 MSO penalties.

Fines and community service orders (MSO) have remained relatively stable from 2012-13 to 2017-18, ending the period with 136 and 88 MSO penalties respectively.

Over the 13-year data period, recognisance orders as the MSO have remained the least frequently used order in the higher courts.

Figure 2-10: Higher courts non-custodial penalties imposed on adult offenders by penalty type (MSO), 2005–06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: for an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.

2.3 Challenges facing Queensland's criminal justice system

2.3.1 Rising prisoner numbers

The current context: Rising prisoner numbers

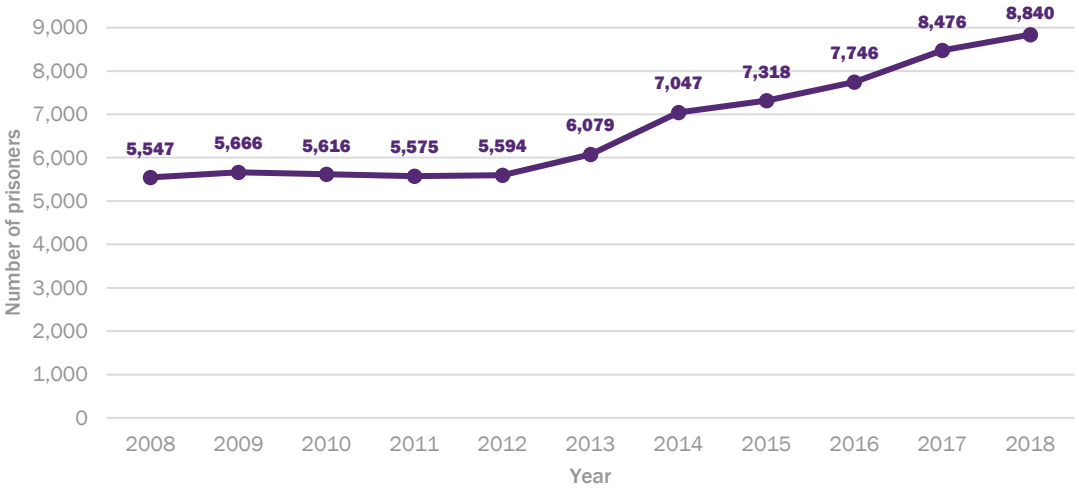
- After remaining relatively steady between 2008 and 2012, prisoner numbers in Queensland increased substantially between 2012 and 2018.
- The Aboriginal and Torres Strait Islander imprisonment rate also rose substantially over this time, but decreased slightly between 2017 and 2018.
- The age standardised imprisonment rate for Aboriginal and Torres Strait Islanders was 10 times the non-Indigenous rate in 2018.
- The female imprisonment rate also grew considerably between 2008 and 2018.

Growing prisoner numbers and prison capacity are a major challenge facing the criminal justice system. As the Queensland Productivity Commission notes in its draft report into imprisonment and recidivism, the current rate of imprisonment is higher than at any other time since 1900.[11]

As Figure 2-11 highlights, the number of prisoners in Queensland remained fairly steady between 2008 and 2012, but increased substantially each year after this point. The prison population in the state grew from 5,594 to 8,840 in the six year period between 2012 and 2018.

[11] Queensland Productivity Commission, *Draft Report – Inquiry into Imprisonment and Recidivism* (2019) 37.

Figure 2-11: Total number of prisoners, Queensland, 2008 to 2018

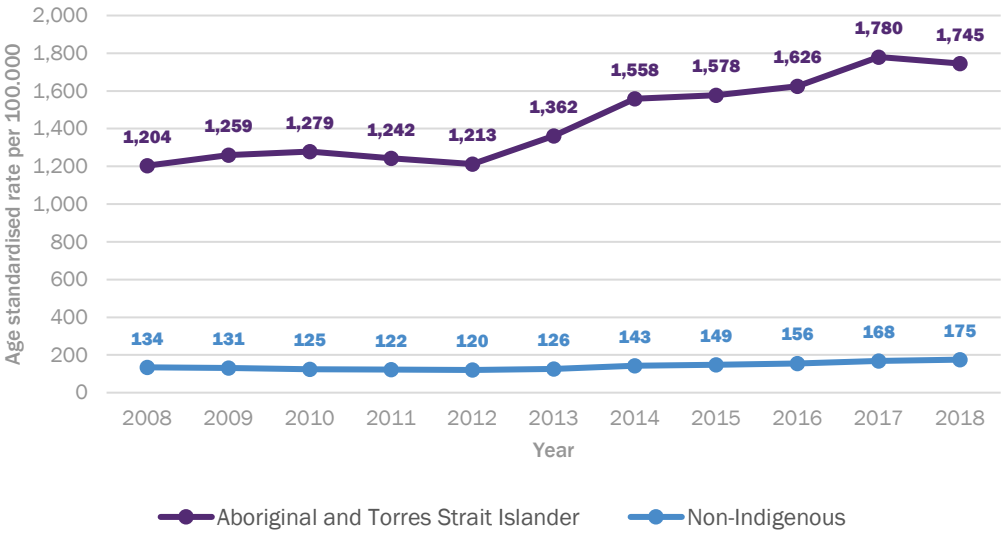


Source: Australian Bureau of Statistics, 2018, *Prisoners in Australia*, cat. no. 4517.0.

In Queensland, Aboriginal and Torres Strait Islanders accounted for 31.1 per cent of the total prison population.[12] The imprisonment rate for Aboriginal and Torres Strait Islanders has increased considerably since 2012, rising from 1,213 per 100,000 Aboriginal and Torres Strait Islander population and peaking at 1,780 per 100,000 in 2017 before decreasing slightly in 2018 (to 1,745 per 100,000 Aboriginal and Torres Strait Islander population).

The imprisonment rate for non-Indigenous Queenslanders also rose during this time period, but much less drastically, from 120 per 100,000 adult non-Indigenous population in 2012 to 175 per 100,000 in 2018 (see Figure 2-12). In 2018, the age standardised imprisonment rate for Aboriginal and Torres Strait Islanders was 10 times more than the non-Indigenous rate.[13]

Figure 2-12: Age standardised imprisonment rate, Aboriginal and Torres Strait Islander vs non-Indigenous, Queensland, 2008 to 2018



Source: Australian Bureau of Statistics, 2018, *Prisoners in Australia*, cat. no. 4517.0.

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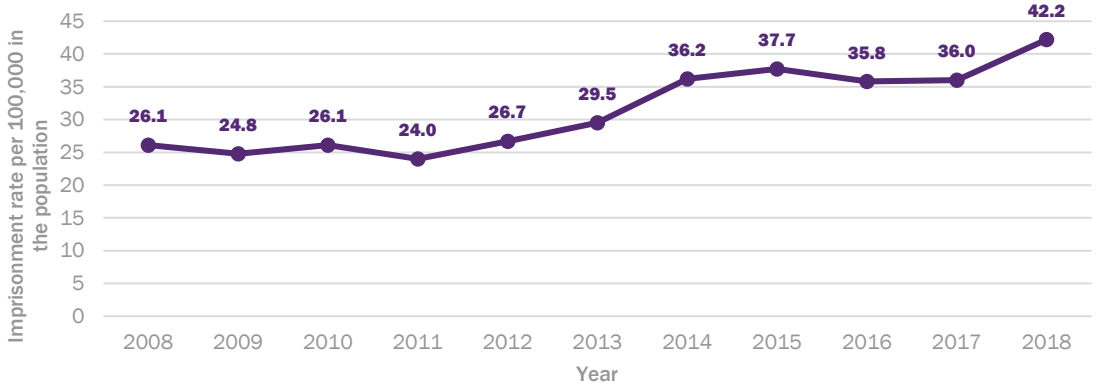
12 Australian Bureau of Statistics, *Prisoners in Australia 2018*, Cat No 4517.0 (2019). For an explanation of age standardisation, see explanatory notes 65-71. In summary:

> There are differences in the age distributions between Australia's Aboriginal and Torres Strait Islander and non-Indigenous populations with the former having a much younger population. Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations.

13 Ibid.

The female imprisonment rate has also grown considerably over the past 10 years (see Figure 2-13). While fluctuating slightly, it remained fairly steady between 2008 and 2011, before growing from 24.0 to 37.7 per 100,000 population between 2011 and 2015. It then decreased slightly to 36.0 per 100,000 in 2017 before increasing sharply in 2018 to 42.2 per 100,000.

Figure 2-13: Female imprisonment rate per 100,000 in the population, Queensland, 2008–2018



Source: Australian Bureau of Statistics, 2018, *Prisoners in Australia*, cat. no. 4517.0.

2.3.2 Demand facing the court system

The current context: Demand facing the court system

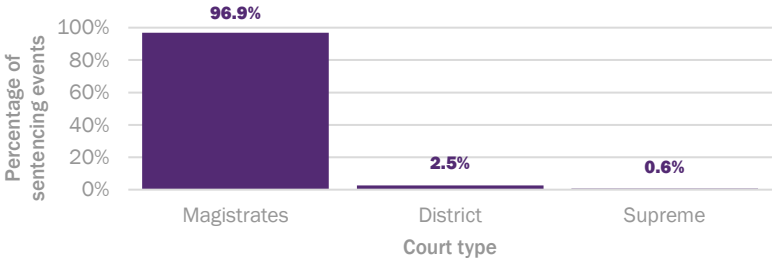
- The Magistrates Courts deal with the vast majority of sentencing events in the court system.
- Backlog indicators and clearance rates are one way of understanding the demand facing the court system.
- In the Magistrates Courts, backlog (proportion of pending cases older than six and 12 months from the date of lodgement) has increased each year since the 2012–13 financial year.
- In 2016–17, the Magistrates Courts had the highest proportion of pending cases older than six and 12 months of any Australian jurisdiction.
- Backlog indicators in the higher courts show a different pattern, which varies between the Supreme and District Courts.
- In the Magistrates Courts the clearance rate (cases finalised compared to cases lodged) declined steadily between 2010–11 and 2013–14, before climbing each year to reach 101.3 per cent in 2016–17.

A second challenge facing the criminal justice system is demand on the court system. The pressure placed on the court system can be examined by looking at indicators used for the Report on Government Services, particularly those relating to timeliness and delay.[14] This is measured by a number of indicators, including backlog and clearance rates.

It is particularly important to consider the pressure facing the Magistrates Courts in Queensland, as this jurisdiction is responsible for hearing the vast majority of sentencing events, as Figure 2-14 shows. Between the 2005–06 and 2017–18 financial years, 96.9 per cent of sentencing events were dealt with in the Magistrates Courts, with the small remainder (3.1%) heard in the higher courts (2.5% in the District Court and 0.6% in the Supreme Court).

[14] Australian Government, Productivity Commission, *Report on Government Services 2018* (2018).

Figure 2-14: Proportion of sentencing events by court type, 2005–06 to 2017–18



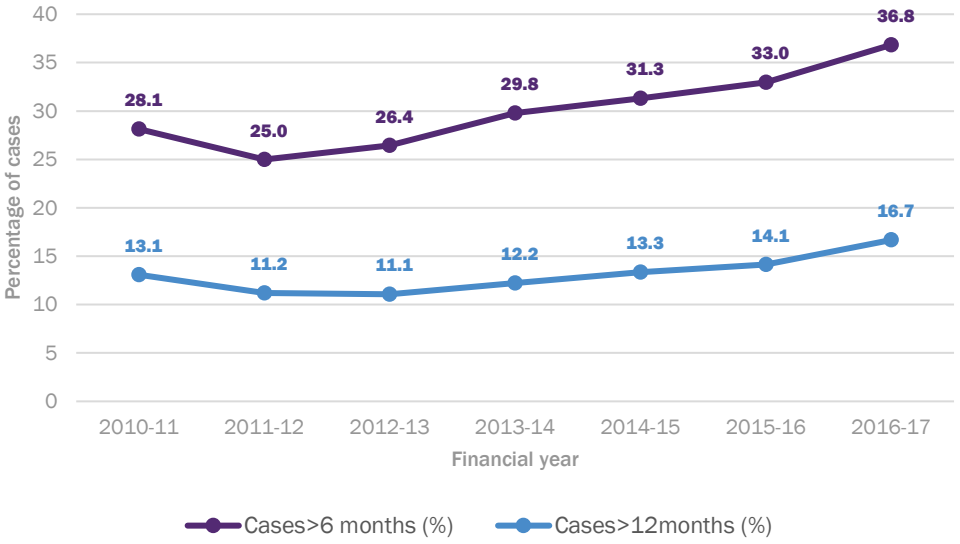
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Backlog

Backlog is a measure of the age of a court's active pending caseload, defined as the number of cases in the age category (e.g. more than 12 months old) as a percentage of the total pending caseload.[15]

In the Magistrates Courts, the proportion of cases pending completion that are more than six months old increased each year between the 2011–12 and 2016–17 financial years, growing 11.8 per cent over this period (see Figure 2-15). Following a similar trend, the proportion of cases pending completion that are more than 12 months old increased from 11.2 per cent in 2011–12 to 16.7 per cent in 2016–17. Both backlog indicators showed a decrease between the 2010–11 and 2011–12 financial years.

Figure 2-15: Proportion of backlog cases in the Magistrates Courts, Queensland, 2010-11 to 2016-17

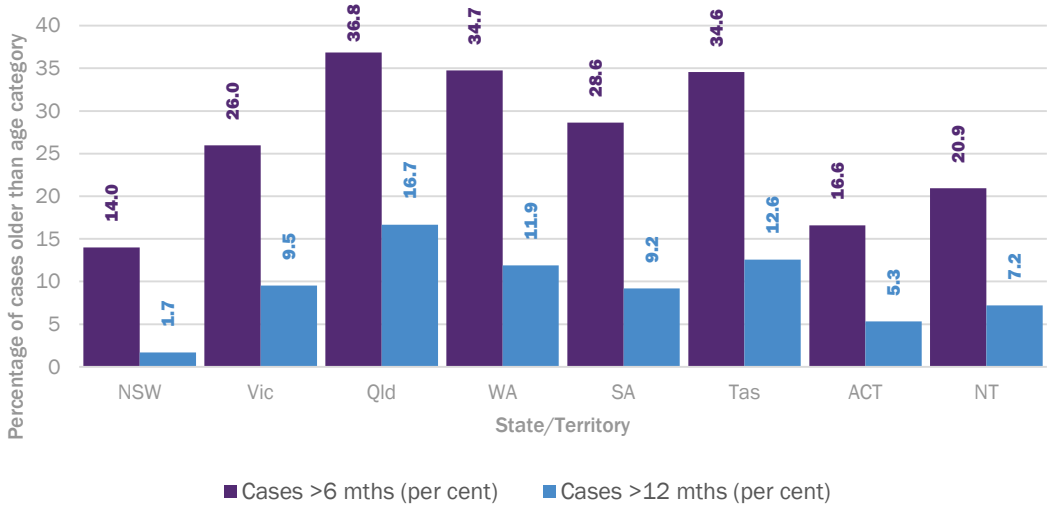


Source: Australian Government. Productivity Commission, *Report on Government Services 2018*
Note: Backlog indicator applies to criminal cases in the Magistrates Courts (excluding the Childrens Court)

During the 2016–17 financial year, the Magistrates Courts in Queensland had the highest proportion of pending cases more than six months old from date of lodgement (36.8%) and 12 months old from date of lodgement (16.7%) of any Australian jurisdiction (see Figure 2-16).

[15] Although backlog is used as an indicator of a court's ability to process matters in an expeditious and timely matter, time taken to process cases is not necessarily due to court delay and are impacted by factors outside the workload of the court.

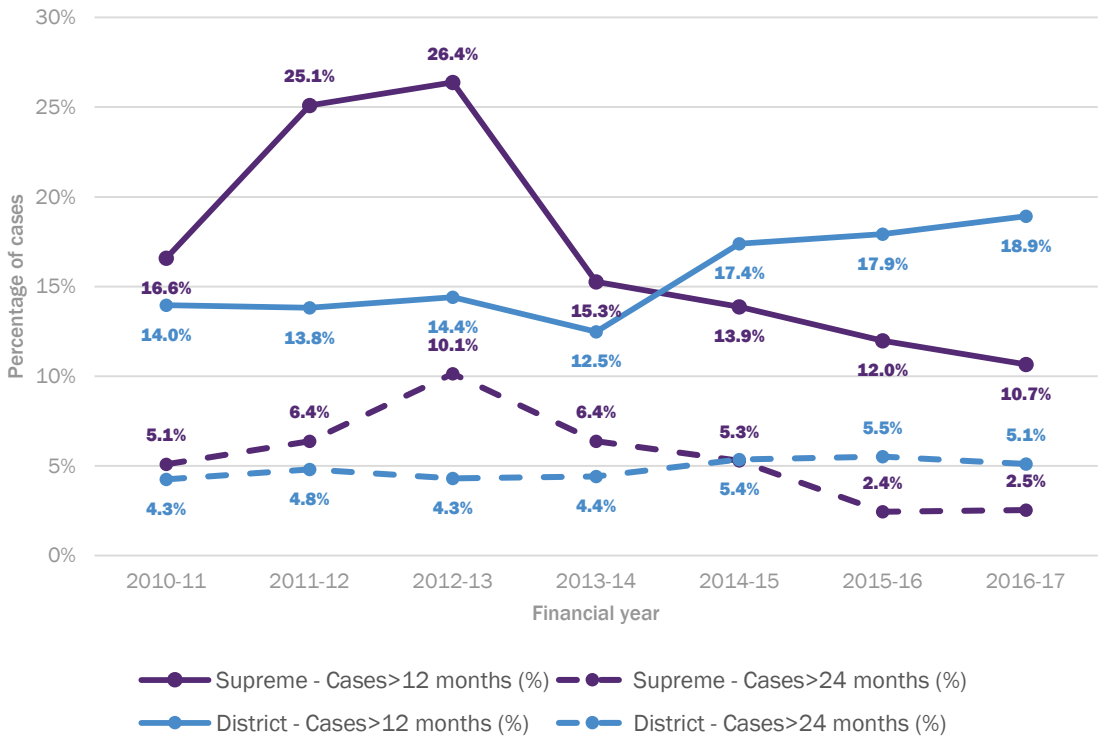
Figure 2-16: Proportion of backlog cases in the Magistrates Courts, states and territories, 2016–17



Source: Australian Government. Productivity Commission, *Report on Government Services 2018*
Note: Backlog indicator applies to criminal cases in the Magistrates Court (excluding the Childrens Court)

Figure 2-17 shows the proportion of backlog cases older than 12 and 24 months in the Supreme and District Courts of Queensland.

Figure 2-17: Proportion of backlog cases in the in the Supreme and District Courts, Queensland, 2010-11 to 2016-17



Source: Australian Government. Productivity Commission, *Report on Government Services 2018*
Note: Backlog indicator applies to criminal cases in the Supreme and District Courts (excluding appeal)

In the Supreme Court, backlog peaked in 2012–13 (26.4% of pending cases more than 12 months old from date of lodgement and 10.1% of pending cases more than 24 months old from date of lodgement). Between the 2012–13 and 2013–14 financial years the proportion of backlog cases dropped sharply and then continued to decrease until the 2016–17 financial year.

The proportion of pending cases more than 12 months old from the date of lodgement in the District Court remained relatively steady between 2010–11 and 2012–13 (between 13.8% and 14.4%), and dropped in the 2013–14 financial year (to 12.5%). From that point until the 2016–17 financial year, the proportion of backlog cases more than 12 months old increased to peak at 18.9 per cent.

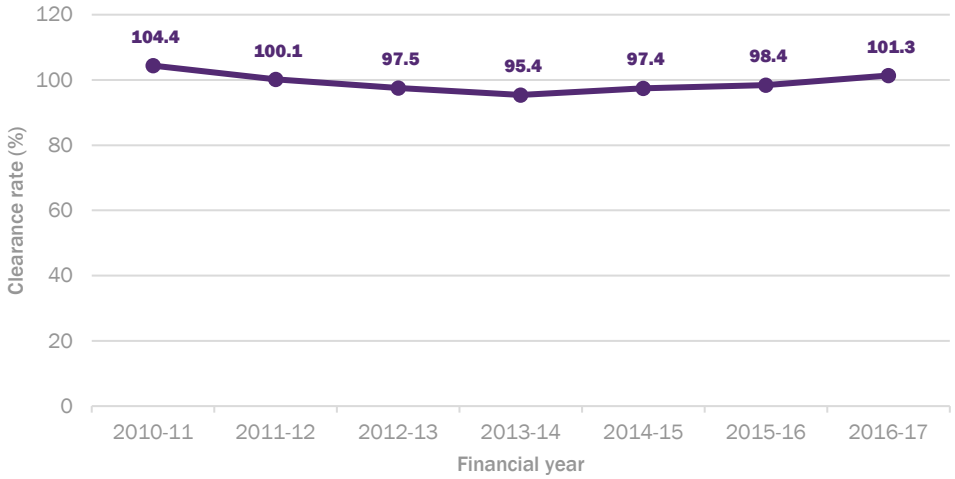
There was less fluctuation in the proportion of pending cases more than 24 months old from the date of lodgement, which remained fairly steady (between 4.3% and 4.8%) from 2010–11 to 2013–14. The backlog of cases more than 24 months old then increased to peak at 5.5 per cent in the 2015–16 financial year before dropping to 5.1 per cent in the 2016–17 financial year.

Clearance rates

Clearance rates indicate whether a court's pending case load has increased or decreased by comparing the volume of case finalisations and case lodgements.

In the Magistrates Courts the clearance rate declined steadily from 104.4 per cent in 2010–11 to 95.4 per cent in 2013–14, before climbing each year to reach 101.3 per cent in 2016–17 (see Figure 2-18).

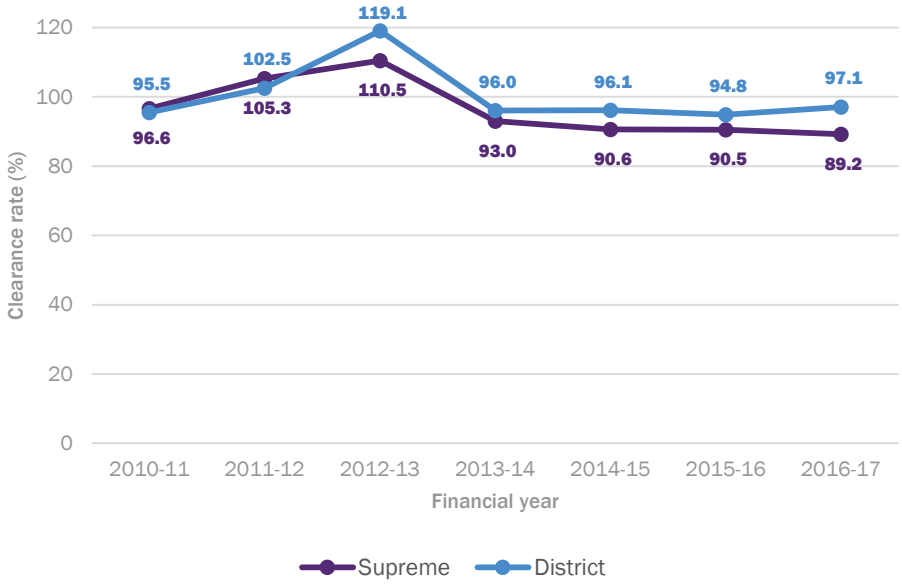
Figure 2-18: Clearance rate in the Queensland Magistrates Courts 2010-11 to 2016-17



Source: Australian Government. Productivity Commission, *Report on Government Services 2018*
Note: Backlog indicator applies to criminal cases in the Magistrates Courts (excluding the Childrens Court)

As Figure 2-19 shows, clearance rates for the higher courts show a different pattern, with both the Supreme and District Court clearance rates increasing between the 2010–11 and 2012–13. Both courts displayed a drop in clearance rates between the 2012–13 and 2013–14 financial years (from 119.1% to 96.0% in the District Court and from 110.5% to 93.0% in the Supreme Court). From this point onward, up to the 2016–17 financial year, clearance rates in the District Court have fluctuated slightly (ranging between 94.8% and 97.1%) whereas rates in the Supreme Court have decreased slightly (from 93.0% in 2013–14 to 89.2% in 2016–17).

Figure 2-19: Clearance rates, Queensland Supreme and District Courts, 2010-11 to 2016-17



Source: Australian Government. Productivity Commission, *Report on Government Services 2018*
Note: Clearance rate applies to all criminal cases in the Supreme and District Courts

2.3.3 Service delivery in the context of a dispersed population

There is no doubt that service delivery in Queensland is hampered by the geographic challenges faced in this jurisdiction. Table 2-7 shows that, other than the jurisdictions of Tasmania and the Northern Territory, Queensland is the jurisdiction with the largest proportion of the population living outside a major city, with just over one per cent of the population living in very remote locations.

Table 2-7: Estimated resident population by remoteness, 2017-18.

Remoteness	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Major city	75.4	78.0	64.1	73.6	78.3	0.0	0.0	99.8
Inner regional	18.6	18.1	19.6	12.9	8.7	67.9	0.0	0.2
Outer regional	5.6	3.8	13.8	10.2	7.1	30.1	60.1	0.0
Remote	0.4	0.0	1.4	2.6	3.3	1.5	19.5	0.0
Very remote	0.1	0.0	1.1	0.8	2.7	0.5	20.4	0.0

Source: Australian Bureau of Statistics, 2017-18, *Regional Population Growth, Australia*, cat. no. 3218.0.
Note:
The measure of remoteness is based on the Accessibility and Remoteness Index of Australia, which measures the remoteness of a point based on the physical road distance to the nearest urban centre
Due to rounding error, percentages may not sum to 100%

The proportion of Aboriginal and Torres Strait Islander people living in rural and remote areas is considerable, with about one in five Aboriginal and Torres Strait Islander Queenslanders living in remote or discrete communities – about 40,000 people (Queensland Productivity Commission 2017). Given the substantial over representation of Aboriginal and Torres Strait Islanders in the criminal justice system, and therefore under the supervision of Queensland Corrective Services, the demand for access to appropriate programs and services while being supervised on community based orders is likely to be considerable.

Delivering any type of service across such a dispersed population is challenging. Issues include:

- getting transportation to a regional centre to attend appointments or to report to a Probation and Parole Officer;
- having suitable programs in all locations throughout the state, to address criminogenic needs such as drug and alcohol issues or domestic and family violence;
- having a place available on a program. Even where programs are in place, they are often highly sought after and waiting lists for access may be six months or more;
- the cost of delivering services to remote locations;

- the difficulty in attracting and retaining suitably qualified staff to rural and remote locations; and
- access to some locations during the wet season, when roads may be flooded and travelling by vehicle may not be possible.

These issues are particularly so for discrete Aboriginal and Torres Strait Islander communities. A recent Queensland Productivity Commission report found that the Queensland Government spends about $1.2 billion a year on services to remote and discrete Aboriginal and Torres Strait Islander communities. Despite this expenditure, Aboriginal and Torres Strait Islanders living in these areas continue to experience very high rates of disadvantage compared to the rest of the Queensland population.

2.4 Conclusion

This chapter has outlined the broad context which the Council must consider in understanding what may be impacting on sentencing trends in Queensland. The Council has considered:

- There are difference offence patterns being sentenced in the Magistrates Courts (where vehicle offences are the largest category of offences being sentenced in the Magistrates Courts, followed by justice and government offences and public order offences) compared to those being sentenced in the higher courts (where drug offences and acts intended to cause injury were the largest category of offences being sentenced).
- Offence patterns coming before the courts have changed over time. In the Magistrates Courts, abduction and harassment offences, weapons offences, drug offences and sexual assault have demonstrated the largest average annual percentage increases over the period. In the higher courts, drug offences have risen sharply since 2010-11, and together with weapons offences they demonstrate the highest average annual percentage increases over the period.
- Over the period of consideration, there have also been a considerable number of legislative changes effecting sentencing, including the Moynihan reforms (effective 1 November 2010), which had an accelerating effect on sentencing following the implementation of those changes, amendments to the *Police Powers and Responsibilities Act 2000* (Qld), which added additional vehicle-related offences, amendments in 2014 which required certain offences committed in public places to be punishable with a community service order, changes to the way imprisonment was to be regarded by judicial officers (as a sentence of last resort, or not), and changes to sentences imposed on drug traffickers.
- The Council also notes that different demographic cohorts demonstrate different offending and sentencing patterns. The most notable differences in offence categories show that male offenders are significantly over represented in the sexual assault offence category, and female offenders are substantially over represented in the fraud offence category. When considering Aboriginal and Torres Strait Islander offenders, they are considerably more likely to commit acts intending to cause injury, whereas non-Indigenous offenders are more likely to commit drug offences than Aboriginal and Torres Strait Islander offenders.
- Unsurprisingly, sentencing practices have also changed over time. The use of custodial penalties has increased over time in both the Magistrates Courts and the higher courts, and the use of non-custodial orders has decreased. Changes in the use of particular order types has changed, with the use of ICOs falling substantially in both Magistrates Courts and higher courts since their introduction, notable decreases in the use of community service orders and fines in the higher courts, and increases in the penalty of convicted and not further punished again in both Magistrates Courts and higher courts.
- There are many challenges facing the Queensland criminal justice system, and the Council has particularly highlighted in this chapter the rise in prisoner numbers, which has prompted the Queensland Productivity Commission to undertake a review of this issue, increasing demand on Queensland Courts which has led to increased backlogs and declining clearance rates, and the physical dispersal of the Queensland population, making service delivery a particular challenge.

Chapter 3 What works in sentencing?

With an understanding of the current sentencing environment outlined in Chapter 2, this chapter turns to the research to explore the evidence about what impact different sentencing outcomes might have on offenders.

For an order to have a positive impact on offending behaviour, the first aim is to have an offender comply with the conditions and complete the order (an order completion is defined as an order that has not been revoked, terminated or cancelled by the Court). Only then can we consider what the impact of completing the order has on offending behaviour.

The Council has been very fortunate in having access to two major pieces of work to help it answer the following two research questions:

- What are the breach and completion rates for different types of community based orders in Queensland, and what are the factors that impact these outcomes? The Queensland Government Statisticians Office (QGSO) has undertaken research on order completion in Queensland, entitled *Factors associated with the outcomes of community based orders* (2019 in press), and the Council has drawn on findings in that research to address this first question.
- What is the evidence about the impact of different penalties on future offending? To assist in answering this second question, the Council commissioned the Queensland University of Technology (QUT) to undertake a literature review focusing on the effectiveness of community based sentencing orders (Gelb et al 2019). The literature review is available on the Council's website.

Finally, the Council performed its own analysis of recidivism in Queensland by assessing the proportions of offenders re-appearing in court to be re-sentenced in a two-year window following imprisonment sentenced in 2010–11 and 2011–12.

3.1 Sources

3.1.1 Queensland Government Statistician's Office research

The QGSO has collected information on the factors associated with community based order outcomes. The research has involved:

- Statistical analysis of administrative data maintained by Queensland Corrective Services (QCS) on the characteristics of adults serving community based orders that commenced between 2010–11 and 2016–17. Data was analysed in relation to orders (order-based analysis), and also in relation to people on orders (people-based analysis). Their analysis included the orders of probation, community service, court-imposed fine option, intensive correction and graffiti removal.
- Focus groups and one face-to-face interview with 32 Probation and Parole officers who supervise adults on community based orders in three discrete locations. Participants were asked to comment on the range of factors that can impact order outcomes. Data collected using this component of the methodology supplements the QCS administrative data.

Initial research findings are presented in this chapter to describe characteristics associated with community based order completion. The limitations associated with using qualitative research strategies means that the officer views expressed during the focus group sessions and one interview are not necessarily representative of all Probation and Parole staff or QCS as an organisation.

3.1.2 The QUT literature review

The QUT report *Community Based Sentencing Orders: Literature Review* (2019) assessed both the academic and 'grey' literature to understand the effectiveness of:

- Imprisonment;
- imprisonment with probation;
- imprisonment with court ordered and separately with board ordered parole;
- partially, wholly and conditional suspended sentences;

- intensive correction orders;
- home detention;
- community service orders;
- probation orders;
- community correction orders.

The review selected only those studies that were judged robust enough to support reliable and meaningful findings, with priority given to studies using methodologies such as randomised controlled trials or quasi-experimental designs using propensity score matching with a control group. Literature from Australia was prioritised, but research conducted in the United Kingdom, Canada, the United States, New Zealand and Europe was also included.

The review defined 'order effectiveness' largely in terms of three key considerations:

- data on the use of the order;
- reconviction and breach analyses; and
- cost-benefit analyses.

Despite there being different approaches taken to measuring reoffending within the broader literature, recidivism has nevertheless been the central focus of effectiveness for researchers, and has therefore formed a central part of the QUT review. It is important to note that the QUT review has attempted to investigate, where possible, the impact of specific orders on three different measures of recidivism, being:

- rates of reconviction;
- time to reconviction; and
- quantum of reoffending (nature and seriousness).

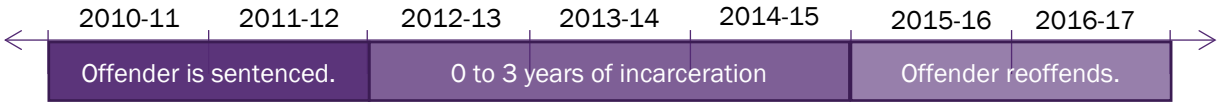
3.1.3 Recidivism data

Early in the life of this project, the Council identified the need to understand recidivism as part of this Terms of Reference, particularly to enable the Council to comment on which orders are associated with what levels and quantum of reoffending. Ultimately, all sentencing aims to prevent offenders from engaging in further criminal activity, to protect the community either through incapacitation (incarcerating individuals), or rehabilitating them so the causes of the offending are addressed and ideally removed.

There are considerable challenges in measuring recidivism. For the purposes of the present exercise, the Council operationalised recidivism as any sentencing event that was followed by another sentencing event within two years of an offender's expected release from custody[16] (excluding offences in the ASOC division: offences against justice procedures).

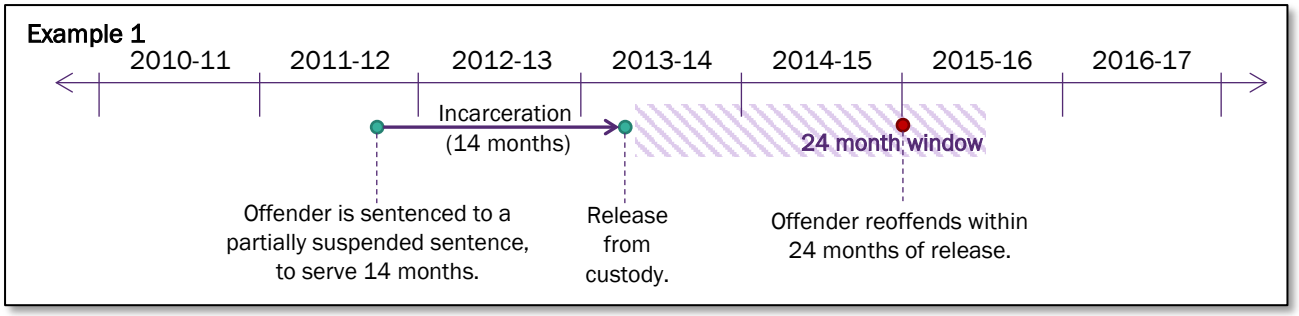
Figure 3-1 illustrates the time periods associated with this approach. Offenders sentenced in 2010-11 and 2011-12 form the basis of the analysis. For offenders sentenced to up to three years of imprisonment, three years of data were set aside to account for the period of incarceration. A two year window of data following the expected release from custody was analysed for occurrences of reoffending.

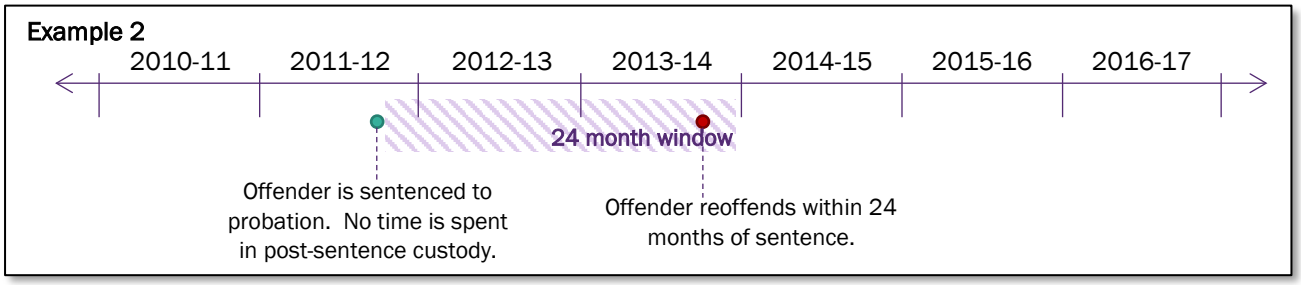
Figure 3-1: Measuring the reoffending of individuals sentenced in 2010–11 and 2011–12



The following diagrams illustrate two examples of how this methodology might be applied:

16 The expected release date is the date the penalty was given for community based sentencing orders and wholly suspended sentences. For partially suspended sentences, the expected release date is the date of sentence, plus any days of actual imprisonment to be served, less any days of declared pre-sentence custody. For sentences of imprisonment, the expected release date is the date an offender becomes eligible for parole. If no parole date is specified at sentencing, parole eligibility is estimated at 50 per cent of the sentence (less any pre-sentence custody), or 80 per cent for cases where a serious violent offence declaration is made.





3.2 Community based order completion in Queensland

Community based order completion in Queensland

- There are high rates of order completion for community based orders.
- Completion rates for community based orders have increased in recent years.
- When looking at completion by order type, graffiti removal orders and probation were indicated to have the highest rates of completion, with fine option orders and community service orders having the lowest.
- Non-Indigenous, women and older offenders have consistently higher completion rates compared to other demographic groups (although the magnitude of difference for gender was relatively small).
- Offenders living in remote or very remote locations have lower completion rates, although this difference disappears when other explanatory factors are controlled for.
- Lower completion rates are evident for offenders assessed as having high substance abuse, employment need and accommodation issues.
- Variation in the availability of support services, programs and community service projects were spoken about in interviews as challenges for order completion.

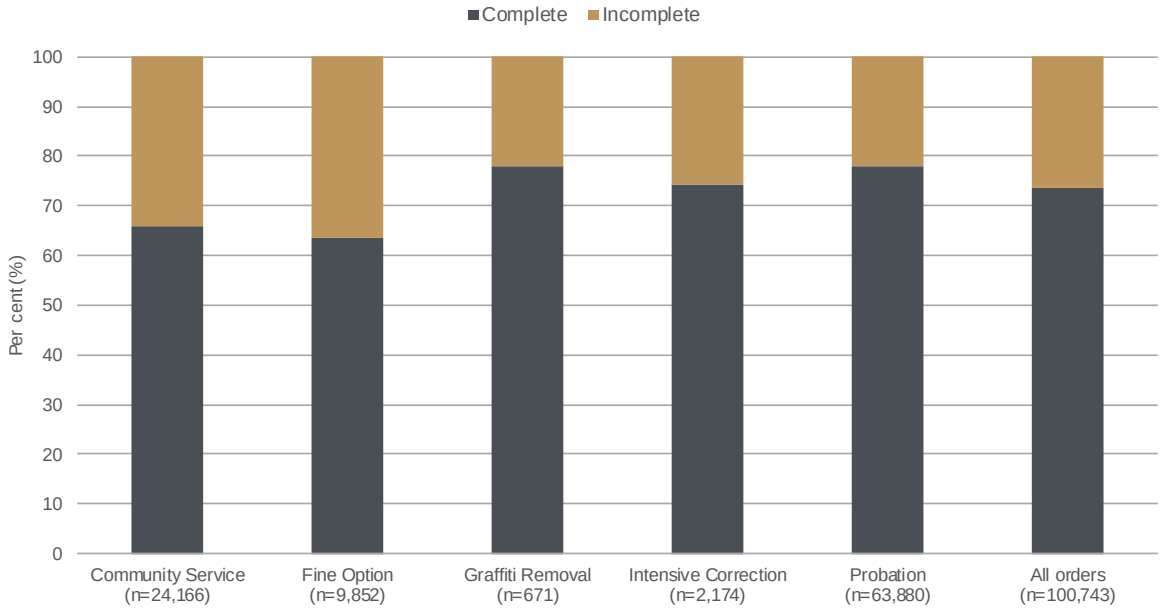
Understanding order completion provides an important context to understanding the environment which the Council needs to consider. Information collected by QGSO includes analyses of QCS administrative data about completion rates for the community based orders of community service, fine option, graffiti removal, intensive correction and probation. It is important to note that while intensive correction orders (ICOs) are actually a term of imprisonment, they have been included in the QGSO analysis because these orders are served entirely in the community. Some community based orders were excluded from the scope of the QGSO research given their relatively small numbers.

In this context, it is important to understand that different orders vary in average length and in relation to the conditions placed on them. Presumably, orders that take longer to complete, or those that have multiple conditions, will be inherently more challenging for individuals to complete. Another factor to consider is that some types of community based order, the ICO being the prime example, are imposed on offenders who have been convicted of more serious offences. Order outcomes may be associated with the nature and extent of the conditions included in the order, and the characteristics of the individuals serving them, rather than anything inherent in the structure or framework of the order itself.

3.2.1 Order completion data

Figure 3-2 provides a breakdown of completion rates by order type for orders commenced between 2010–11 and 2016–17, showing that across the spectrum, there are relatively high rates of order completion (an average of 73.5% of offenders complete their community based penalty), which vary somewhat across orders. Graffiti removal orders and probation have the highest rates of completion, with fine option orders and community service orders having the lowest. An order completion is defined as being an order that has not been revoked, terminated or cancelled by the court.

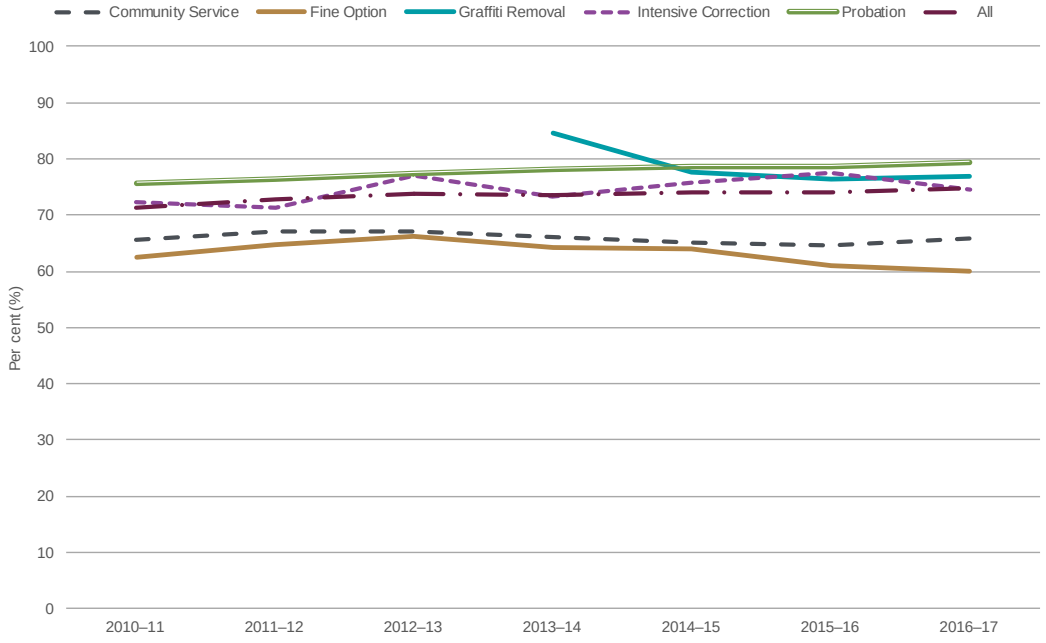
Figure 3-2: Order completion rates by order type, 2010–11 to 2016–17



Source: QGSO analysis of QCS administrative data

Figure 3-3 demonstrates that completion rates have changed over time, with the highest completion rates associated with probation, where completion has improved from 75.6 per cent in 2010–11 compared with 79.3 per cent in 2016–17. Given probation is the highest use order (refer to Figure 3-2), this has led to an overall increase in order completion across all community based orders.

Figure 3-3: Time-series order completion rates by order type



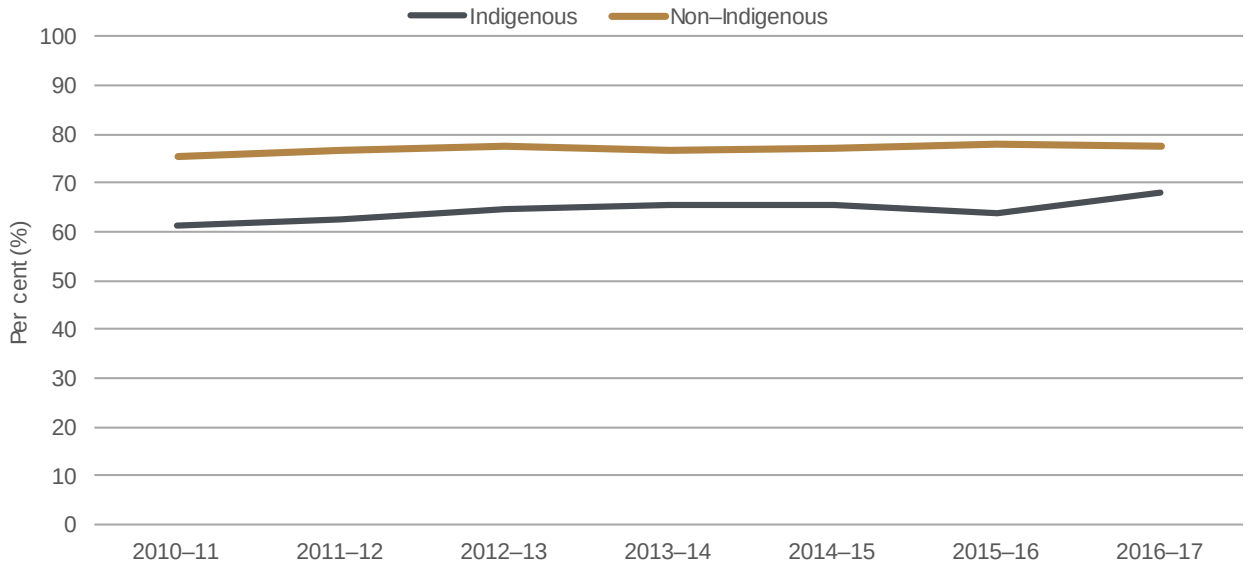
Source: QGSO analysis of QCS administrative data

Figure 3-4 to Figure 3-6 show that between 2010-11 and 2016-17, rates of completion are consistently higher for orders served by non-Indigenous and female offenders. Conversely, community based orders served by Aboriginal and Torres Strait Islander offenders, male offenders and young offenders, are consistently less successfully completed. Generally speaking, there were slight increases in order completion across the period for all demographic groups.

Initial analyses undertaken by QGSO also indicated that order completion is associated with location; offenders living in remote and very remote locations demonstrated lower order completion (70.5% and 69.0% respectively) than offenders in major cities (76.0%) and regional areas (around 73.0%). However, logistic regression modelling work suggests these differences fade when controlling for other explanatory factors such as Indigenous status, age and gender.

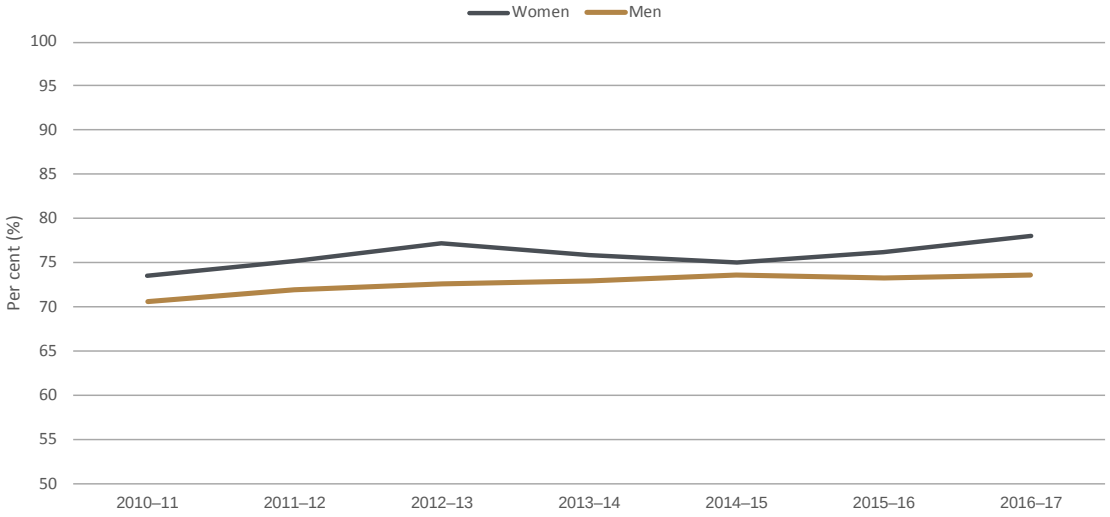
In the accompanying qualitative work undertaken by QGSO, Probation and Parole Officers interviewed about their reflections on order completion commented on the lack of support services, programs and community service projects being a particular challenge in rural and remote areas. Officers spoke about limited options for drug treatment, accommodation support and domestic and family violence programs as being a particular challenge in some areas outside large cities. This was particularly the case for offenders who have been convicted of a violent or sexual offence, who are often excluded as candidates for many community based service projects and programs.

Figure 3-4: Order completion rates by Aboriginals and Torres Strait Islanders



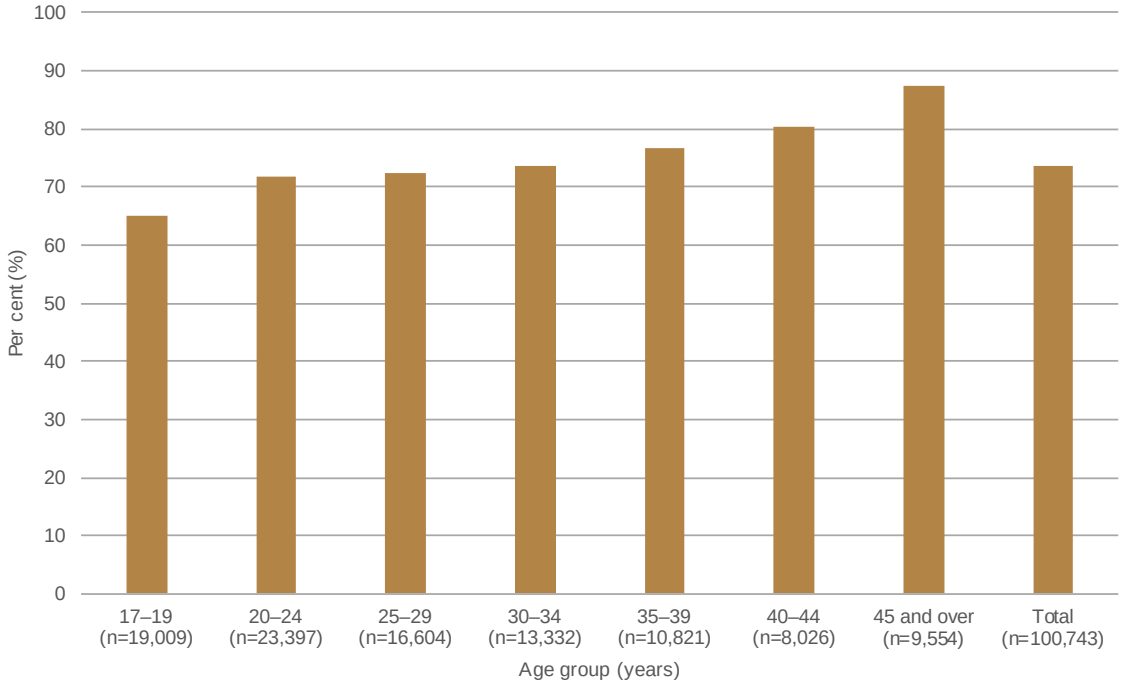
Source: QGSO analysis of QCS administrative data

Figure 3-5: Order completion rates by gender



Source: QGSO analysis of QCS administrative data

Figure 3-6: Order completion rates by age, 2010–11 to 2016–17



Source: QGSO analysis of QCS administrative data

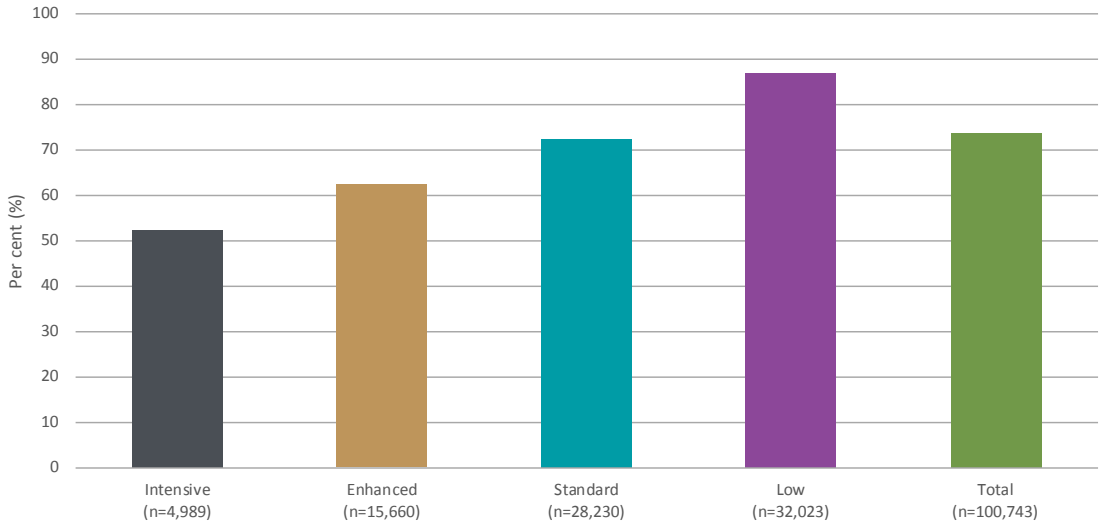
QGSO analysis of QCS data also provided some insight into the presenting issues of offenders serving probation and ICOs. The data on presenting issues indicated an increasing prevalence of substance misuse, mental health and employment issues and showed lower rates of order completion for offenders serving probation and ICOs and assessed as having high substance misuse, employment need and accommodation issues.

Some Probation and Parole officers interviewed by QGSO spoke about offenders presenting with multiple issues and challenges that increased the complexity of their management, especially among those with untreated mental health issues that may not have the capacity to understand the requirements of the order

imposed on them. The importance of stable accommodation was also raised by Probation and Parole interviewees, who made the link between unstable housing and maintaining employment.[17]

The data shows a relation between level of service and order completion.[18] While just over 85 per cent of orders where the offender was assessed at a low level of service were completed, just over half of orders undertaken by offenders assessed at an intensive level of service completed theirs (see Figure 3-7). This may indicate that offenders assessed as having a higher risk of reoffending and a more serious offending profile are less likely to complete their order.[19] Prior research has also shown that increased supervision requirements, for example, twice weekly reporting requirements, have been found to be associated with a greater likelihood of revocation due to technical violations.[20]

Figure 3-7: Order completion rates by level of service, 2010–11 to 2016–17



Source: QGSO analysis of QCS administrative data
Notes:
1. A total of 19.7% of orders (n = 19,841) do not have level of service assessment information available (not shown).

Finally, Figure 3-8 demonstrates that offenders who breach their orders can, and do, still complete them, although to a much lower level than individuals who never breach their order. What appears to be the case, as shown in Figure 3-9, is that offenders who have breaches referred to court are much less likely to result in completion than offenders who are not referred back to the court for breach.

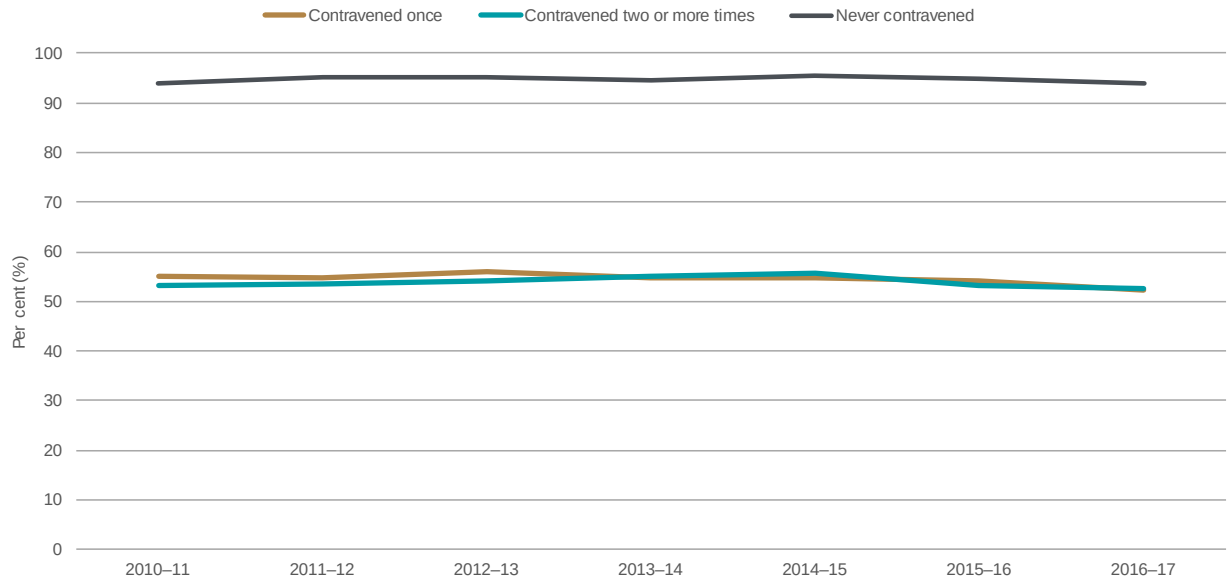
17 While this was a common factor discussed by research participants, the QGSO notes that the descriptive statistics analysed did not show a relationship between accommodation and order outcome.

18 The level of service required for an individual offender is assessed by QCS when they come into supervision. A number of factors are considered as part of this assessment, including the offender's risk of reoffending, the type of order they are serving and their offending profile. The level of service assessment informs reporting requirements and level of supervision provided by Probation and Parole.

19 QCS uses the Risk of Re-Offending (Ror-PPV) assessment to determine an offender's risk of general reoffending based on known predictors of reoffending. An offender will be assigned a score of between 1 and 20. Research used to develop the RoR assessment, indicates offenders deemed high risk (RoR score between 12-20) and assigned an enhanced or intensive level of service will generally reoffend at a rate between 58 per cent and 78 per cent, compared to offenders with a RoR score under 6 who will generally reoffend at rates under 30 per cent (low level of service). The RoR assessment was revalidated in 2015 by Griffith Criminology Institute.

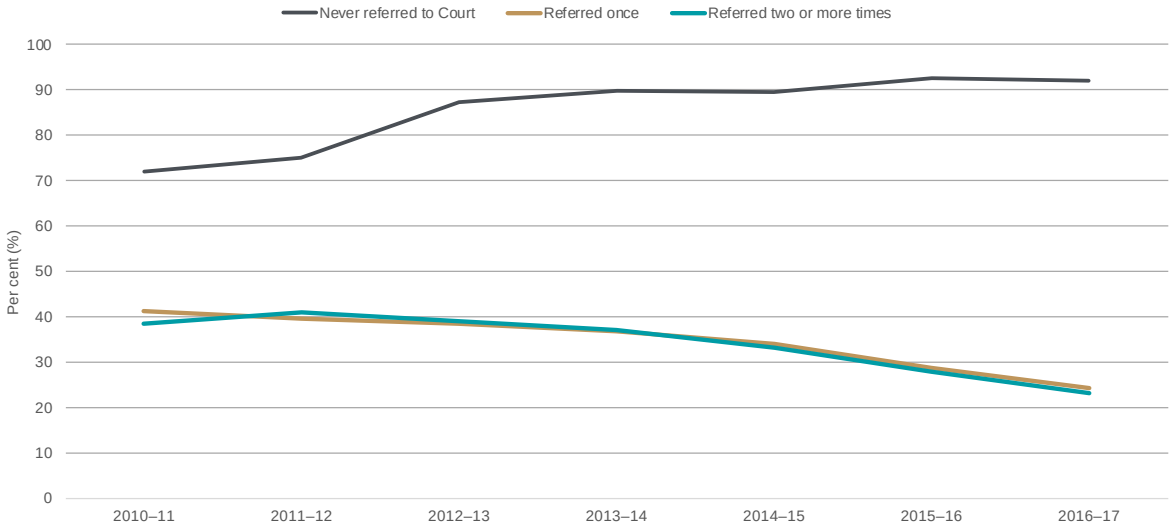
20 Charlotte E. Gill, 'The Effects of Sanction Intensity on Criminal Conduct: A Randomized Low-intensity Probation Experiment' (2010), Degree of Doctor of Philosophy thesis, University of Pennsylvania; Charlotte E. Gill, Jordan Hyatt, & Lawrence W. Sherman, *Probation Intensity Effects on Probationers' Criminal Conduct*, (Campbell Systematic Reviews, 2009); Jordan M. Hyatt, and Geoffrey C. Barnes, 'An Experimental Evaluation of the Impact of Intensive Supervision on the Recidivism of High-risk Probationers' (2014) 63(1) *Crime and Delinquency*, 3–38; Queensland Parole Review, *Queensland Parole System Review: Final Report* (2016); Jennifer L. Schulenberg & Sam Houston, 'Predicting noncompliant behavior: Disparities in the social locations of male and female probationers' (2007), 9(1) *Justice Research and Policy*, 25–57; Australian Government, Productivity Commission, *Report on Government Services 2019* (2019).

Figure 3-8: Order completion rates by contravention status



Source: QCS, as cited in QGSO (2019 in press)

Figure 3-9: Order completion rates of orders referred back to court



Source: QGSO analysis of QCS administrative data

3.2.2 Factors that may impact order completion

Probation and Parole officers participating in QGSO's research emphasised the importance of implementing best-practice case management strategies to support the completion of community based orders. This involves having the resources available to engage in motivational interviewing, conduct home visits, arrange referrals and maintain stakeholder networks and professional development activities. Officers spoke of high caseloads, exacerbated by continual increases in the number of offenders under community based supervision, and how this could affect the amount of time spent with offenders and potentially impact order completion.

It is noted that the Queensland Parole System Review recommended that Probation and Parole staffing levels be progressively increased, and publicly available information shows that Queensland officer caseloads have been consistently higher than those reported for total Australia.[21] For example, in 2017–18,

[21] Queensland Parole System Review, *Queensland Parole System Review: Final Report* (2016).

the officer caseload for Queensland was 22.8 compared with 15.3 for Australia.[22]Interviewees also spoke about the shift towards a more therapeutic approach to supervision of offenders on community based orders and away from a compliance focus, which facilitates greater professional discretion when responding to the challenges faced by offenders in completing their orders and emphasises the treatment of presenting issues. This was largely viewed as very positive by officers, and aligns with the evidence about the potential for supervision to deliver effective order outcomes (see section 3.3 below). However, the gaps in community based support services referred to above were sometimes seen to represent a challenge to achieving this in practice, and could also create difficulties for offenders who are required to undertake a specific program as part of their order.

When they are well designed and well matched to the particular offender, Probation and Parole officers felt that community service projects can in themselves lead to positive outcomes in reducing reoffending and motivating offenders to complete their order. However, the availability of community service projects was seen to vary across the state.

Finally, Probation and Parole Officers spoke about the positive impact of pro-social peers and family members in supporting offenders to complete their order. The converse, however, was also commented on – non-supportive people in an offender's immediate networks were identified as a significant risk factor for breaching orders and re-engaging in criminality.

3.3 Evidence of order effectiveness

Evidence of order effectiveness

A review of academic research regarding comparative order effectiveness showed that:

- Probation is more effective at reducing recidivism than imprisonment.
- In terms of imprisonment, periods of imprisonment less than 12 months are least effective and sentences under six months have the highest reoffending rates.
- Community service orders are more effective at reducing recidivism than a term of imprisonment or a bond (although less successful than a fine).
- There is conflicting evidence about the effectiveness of home detention.
- There is less evidence of the effectiveness of partially and wholly suspended sentences and ICOs.
- The research indicates good evidence for positive impacts on recidivism achieved by electronic monitoring, treatment programs and supervision that focuses on rehabilitation rather than compliance.
- There were positive findings for the use of cognitive behavioural therapy and drug treatment programs, and promising findings about the effectiveness of sex offender programs and violent offender programs.
- There was inconclusive evidence about the effectiveness of domestic violence offender programs.
- There is a lack of research into the effectiveness of orders for vulnerable offender cohorts and this is an area where further investigation would be useful.

There are particular challenges inherent in attempting to assess the effectiveness of different orders. The first of these is the circular nature of the exercise: those who have committed more serious offences and have lengthier criminal histories will inevitably attract sentences at the higher end of the spectrum; that is, sentences of imprisonment. Expecting an impact on reoffending by these higher-end offenders, who often have entrenched lifestyles involving drug misuse and established criminal networks, is potentially an unreasonable expectation.

On the other end of the spectrum, offenders who are experiencing their first or second-time court appearance are likely to be less established in the criminal cycle, meaning they are likely to never return to court.

Assessing the evidence about the impact of sentencing outcomes on offending behaviour, therefore, is particularly difficult. It is important to place weight only on the findings of those studies that have used more robust methodological approaches. For example, studies that have matched offenders on key characteristics

22 Australian Government, Productivity Commission, *Report on Government Services 2019* (2019).

such as offence type, criminal history, age and gender, and then assessed the impact of the penalty on future offending for both groups, will lead to more reliable findings.

This is not to under-value the reflections and advice of professionals that work closely with offenders on a day-to-day basis. These professionals often have many years of experience, matched with appropriate professional training, that enable them to reach conclusions about what works, for whom and under what circumstances.

The Council has had the benefit of considering the QUT study on sentencing orders, which outlines the most recent research evidence on order effectiveness (summarised in Table 1, Appendix 3). The Council notes the advice in the report about the many gaps in the research on order effectiveness, particularly in understanding the impact of orders on vulnerable offender cohorts such as Aboriginal and Torres Strait Islanders, women and offenders with a mental illness. It is particularly disappointing to note the sparsity of robust studies on effective order types or interventions for Aboriginal and Torres Strait Islander offenders. Given their significant over representation in the criminal justice system, this would appear to be a gap that should be addressed as a matter of urgency.

Not surprisingly, the penalty options that have been in place over the longest period of time – imprisonment, parole and community service orders – have the best research available about their impact on recidivism. For more recent order types, such as ICOs and community correction orders, the evidence is not yet able to provide definitive findings about their impact or effectiveness. This section sets out the best robust evidence that has been identified regarding the impact on reoffending of serving particular orders. This principally relates to rates of reconviction of offenders on particular orders, as well as time to reconviction and the quantum of reoffending (based on nature and seriousness), where these findings are available.

The sentencing orders with the strongest level of robust evidence about impacts on recidivism are:

- **Imprisonment.** Here there are mixed results – some research suggests imprisonment has a marginal impact on recidivism, but other research shows an increased likelihood of reoffending. The research notes the effectiveness of imprisonment in relation to short-term incapacitation of offenders, but also demonstrates that it does not successfully deter offenders, because individual deterrence is based on an assumption that offenders make rational decisions when they commit offences. Research suggests that periods of imprisonment under 12 months are the least effective, with sentences of under six months characterised by the highest reoffending rates. The QUT review points out there are a number of additional negative impacts of imprisonment to consider, including on family members and in particular the impact on children of having an absent parent.
- **Probation.** Evidence suggests that probation is more effective at reducing recidivism than imprisonment, and performs particularly well in comparison to short terms of imprisonment. It appears to be particularly successful for female offenders and those with a mental illness, and possibly also for sex offenders. One study found that prior convictions substantially increased the propensity of probationers to be rearrested and to have their probation revoked.[23] The other key risk factor for succeeding on probation relates to drug misuse issues – offenders without a substance misuse issue being much more likely to succeed on probation.[24]
- **Parole.** The literature shows that parole is more successful in reducing reoffending than release without supervision, although the impact appears much less certain for populations such as Aboriginal and Torres Strait Islander offenders, male offenders and those with a mental illness. There is insufficient evidence to distinguish the effects of board ordered parole from court ordered parole.

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23 David Olson and Arthur Lurigio, 'Predicting Probation Outcomes: Factors Associated with Probation Rearrest, Revocations, and Tehcnical Violations during Supervision' Predicting Probation Outcomes: Factors Associated with Probation Rearrest, Revocations, and Tehcnical Violations during Supervision' (2000) 2(1) Justice Research and Policy 73.

24 John Hepburn and Marie Griffin, *An Analysis of Risk Factors Contributing to the Recidivism of Sex Offenders on Probation* (US Department of Justice, 2004).

While not as considerable as the evidence about imprisonment, probation and parole, there is reasonable evidence about the impacts on recidivism of home detention and community service orders.

- **Home detention**. There is conflicting evidence about the impact on recidivism for offenders sentenced to home detention, although some studies suggest the advantages outweigh the disadvantages. While the potentially negative impact of home detention on the family members of offenders must be considered, it nevertheless appears to help offenders to reintegrate into the community and deter future offending.
- **Community service orders**. The studies examined by the QUT review found that community service is more effective at reducing recidivism than either a term of imprisonment or a bond, but less successful than a fine. The authors note that lack of uniform availability of work placements in communities outside metropolitan areas limits the effectiveness of these orders for offenders living in rural and remote areas. Given there is a higher proportion of Aboriginal and Torres Strait Islander offenders living in these areas, this gives rise to differential access to these orders for Aboriginal and Torres Strait Islander offenders.

There is less adequate research available on the effectiveness of suspended sentences and ICOs.

- **Wholly suspended sentences**. There appears to be a small but statistically significant positive effect on recidivism by offenders serving wholly suspended sentences compared to offenders who serve a period of imprisonment. This is thought to be linked to the fact that offenders on wholly suspended sentences are able to maintain family connections, employment and accommodation.
- **Partially suspended sentences**. Recidivism rates of offenders who served a partially suspended sentence appear to be higher than those who served a wholly suspended sentence, and this is particularly so for young offenders and those with a criminal history.
- **Intensive correction orders**. While there are only two robust studies reviewed in the QUT review, it appears there is no real difference in effectiveness between ICOs and supervised suspended sentences, but that they are more effective at impacting on recidivism than periodic detention and short terms of imprisonment.

There was insufficient robust research to make any comment about the impact on recidivism of **conditional suspended sentences** and **community correction orders**, although time will tell in relation to community correction orders, given they have only been introduced in some Australian jurisdictions in recent years and have not been sufficiently evaluated yet.

The QUT review also assessed the evidence relating to specific conditions that might be placed on orders (summarised in Table 2, Appendix 3). The authors largely found good evidence for positive impacts on recidivism achieved through electronic monitoring, treatment programs and supervision that focuses on rehabilitation rather than surveillance or monitoring alone. This latter finding is consistent with the comments made by Probation and Parole officers in the QGSO focus groups, who were very favourable about this approach.

There appear to be positive findings reported for the use of cognitive-behavioural therapy, drug treatment programs (particularly for young offenders and males), and promising findings in relation to the impact of targeted sex offender and violent offender programs. The review found inconclusive evidence about the effectiveness of domestic violence offender programs.

There appear to be common findings relating to demographic profiles across different orders, where older offenders are consistently more successful than younger offenders, and where female offenders succeed when subject to any intervention that is targeted at their specific treatment needs.[25] Again, these findings are consistent with those of the QGSO in their analysis of QCS data.

Across all the work that has been done, there are clear gaps in research in relation to the impact of different orders on vulnerable offender cohorts, including offenders with a mental illness and Aboriginal and Torres Strait Islander offenders. These groups clearly require more consideration and planning to ensure they have access to successful interventions.

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[25] Renée Gobeil, Kelley Blanchette and Lynn Stewart, 'A Meta-Analytic Review of Correctional Interventions for Women Offenders: Gender-Neutral Versus Gender-Informed Approaches' (2016) 43(3) *Criminal Justice and Behavior* 301.

3.4 Recidivism in Queensland

Recidivism in Queensland

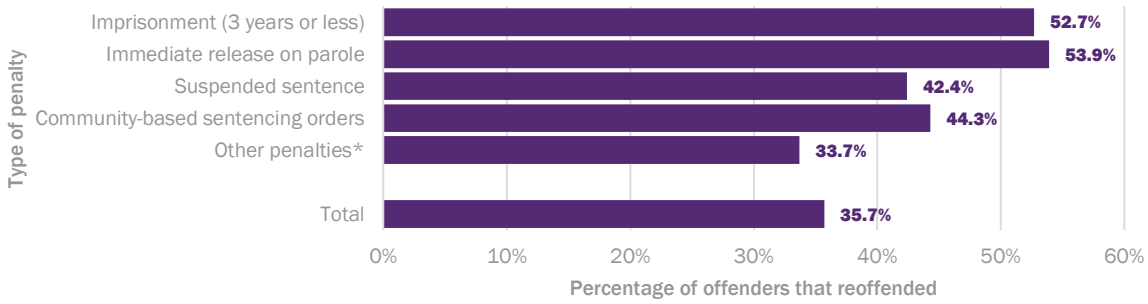
- The Council's review of court data showed that more than half of the offenders who were sentenced to imprisonment reoffended within two years of their release from custody.
- Analysing reoffending by type of order found that offenders sentenced to a suspended sentence with a community based order were least likely to reoffend whereas those on a wholly suspended sentence were most likely to reoffend.
- Comparing reoffending by sentenced offence type indicates the highest likelihood of reoffending is unlawful entry, followed by robbery and extortion, then theft.

This section presents the Council's own analysis of court data on the reoffending of a specific cohort of offenders who were sentenced to a term of imprisonment of up to three years in 2010–11 and 2011–12.

3.4.1 Reoffending by penalty type

Figure 3-10 shows that overall, 35.7 per cent of all offenders committed a new offence within two years of their release from custody (N=292,023). More than half of offenders who were sentenced to imprisonment had reoffended within two years of their release from custody; there was little difference in the likelihood of reoffending between those sentenced to imprisonment with immediate release on parole (53.9%) and those sentenced to actual time in custody (52.7%). Suspended sentences and CBSOs had similar, but lower levels of reoffending at 42.4% and 44.3% respectively.

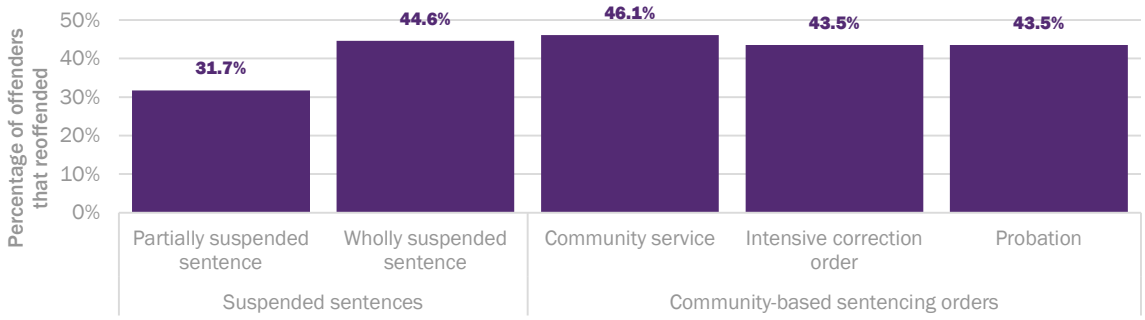
Figure 3-10: Offenders who reoffended within two years of release by type of penalty



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Includes offenders originally sentenced between 2010-11 and 2011-12 who reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.
* Other penalties are comprised of fines (88.9%), recognisances (6.4%), convicted not further punished (3.3%), other monetary (1.0%), licence disqualification (0.3%) and rising of the court (0.05%).

Offenders sentenced to a wholly suspended sentence are more likely to reoffend (44.6%) compared to offenders sentenced to a partially suspended sentence (31.7%), see Figure 3-11.There is little difference in reoffending between the different types of CBSOs (community service = 46.1%, ICOs = 43.5%, probation = 43.5%).

Figure 3-11: Offenders who reoffended within two years of release by type of penalty – suspended sentences and community based sentencing orders

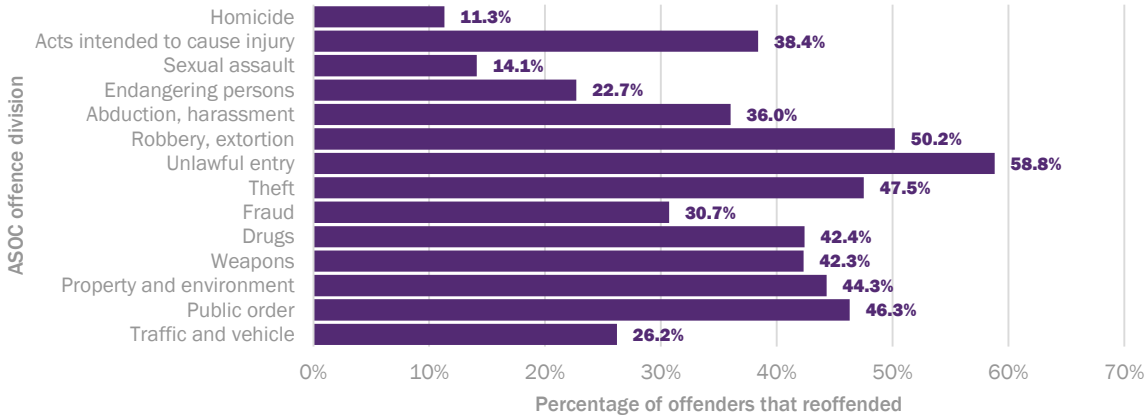


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Includes offenders originally sentenced between 2010-11 and 2011-12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

3.4.2 Reoffending by offence type

Offenders sentenced for unlawful entry were the most likely to reoffend, with 58.8 per cent of offenders committing a new offence within two years of their release from custody (see Figure 3-12). Robbery and extortion (50.2%) and theft (47.5%) were the second and third most likely offence categories to lead to reoffending. Offenders who committed homicide, sexual assaults or acts endangering persons were the least likely to reoffend.

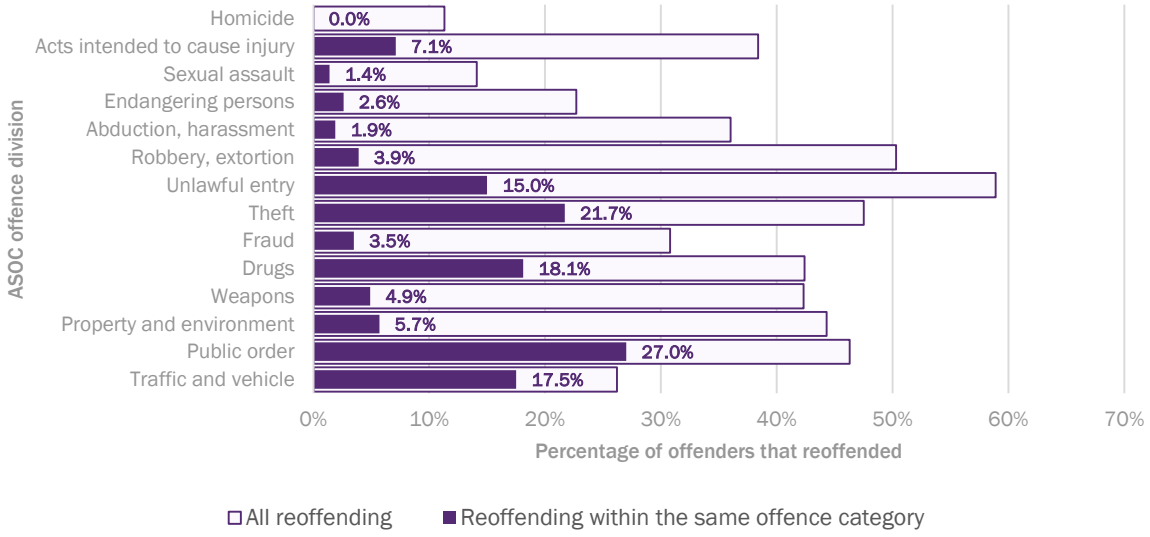
Figure 3-12: Offenders who reoffend within two years of release, by offence category



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Includes offenders originally sentenced between 2010-11 and 2011-12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

When we consider the offences for which offenders were convicted following their return to court, the dark bars in Figure 3-13 (below) represent offenders who reoffended within the same offence category. The faded bars provide a comparison of all reoffending (and match the data in the previous figure). Public order offences had the highest proportion of offenders reoffending by committing a similar offence (27.0%). After public order offences, theft, drug and traffic offences were the most likely offence categories to have offenders reoffend by committing similar offences. Offenders who committed sexual assaults, abduction, harassment or acts endangering persons were the least likely to reoffend by committing a similar offence.

Figure 3-13: Offenders who reoffend within the same offence category



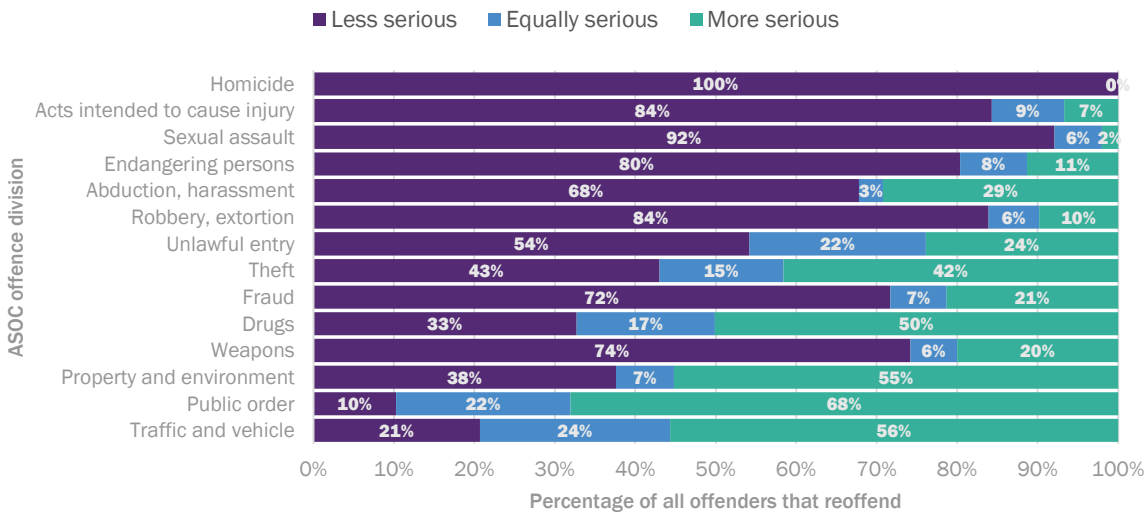
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Includes offenders originally sentenced between 2010-11 and 2011-12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

3.4.3 Seriousness of reoffending

The Council has considered whether those who reoffend are committing more or less serious offences when they return to court following a period of incarceration, as shown in Figure 3-14.

Those that reoffend after committing homicide, acts intended to cause injury or sexual assaults are the most likely to commit a less serious offence. Of the offenders who reoffended after committing a sexual offence, the vast majority (92%) committed a less serious offence. The majority of offenders who reoffended after committing robbery and extortion, fraud, and weapons offences also committed less serious offences (robbery and extortion=84%, fraud=72%, weapons=74%). More than half of offenders who reoffended committed a more serious offence after committing a drug (50%), property and environment (55%), public order (68%) or traffic offence (56%). Abduction and harassment offences, which are already high on the scale of seriousness, had 29 per cent of offenders who reoffended with a more serious offence. Theft was relatively balanced, with 43 per cent of reoffenders committing a less serious offence, and 42 per cent of reoffenders committing a more serious offence.

Figure 3-14: Reoffenders by seriousness of reoffending and offence category

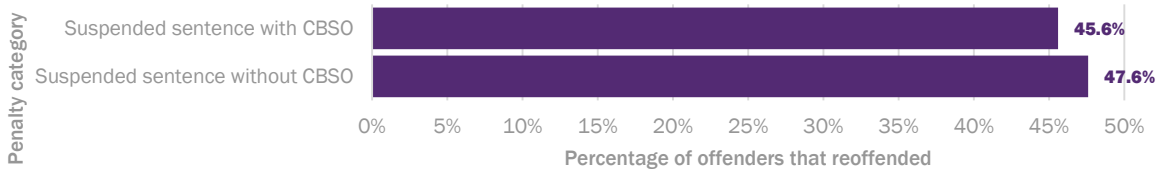


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Includes offenders originally sentenced between 2010-11 and 2011-12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

3.4.4 Reoffending where a suspended sentence is combined with a community based order

Offenders who are sentenced to a suspended sentence with a community based order imposed at the same sentencing event are slightly less likely to reoffend (45.6%) compared to offenders who do not have a CBSO imposed (47.6%) (see Figure 3-15).

Figure 3-15: Offenders who reoffend by committing more serious or less serious offences by penalty category.

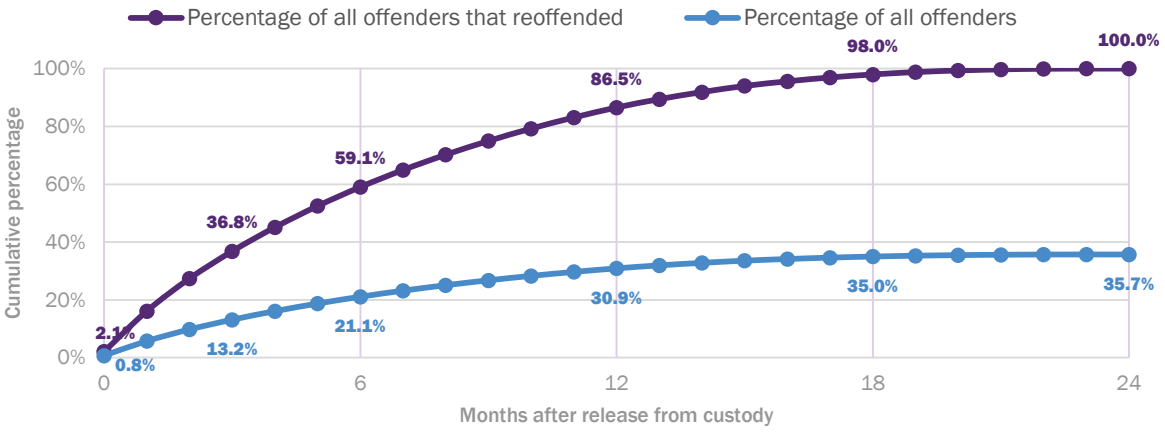


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Includes offenders originally sentenced between 2010-11 and 2011-12 who reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

3.4.5 Time to reoffending

Figure 3-16 reveals that 35.7 per cent of all offenders reoffended within two years of being released from custody. Figure 3-16 shows that the first six months after release is the most critical in terms of reoffending. Over a third (36.8%) of reoffenders had reoffended within three months of release, and over half (59.1%) of offenders who reoffended did so within six months.

Figure 3-16: Months taken for offenders to reoffend after release from custody.



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Notes:
1. Includes offenders originally sentenced between 2010-11 and 2011-12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.
2. The 0.8% of offenders who offended within 0 months of their expected release from custody is comprised of offenders who may have reoffended while in custody, or may have been released from custody earlier than estimated.

3.5 Conclusion

This chapter has presented the best evidence available to the Council about what works in sentencing. We know that older offenders, non-Indigenous offenders and women complete their CBSOs at higher rates than young offenders, Aboriginal and Torres Strait Islander offenders and men. We also know that offenders with presenting issues such as mental illness, substance misuse, employment and housing needs are more challenging to manage, and less likely to complete their orders, and that offenders assessed as requiring an enhanced or intensive service level are least likely to complete their orders.

Probation and Parole Officers interviewed by QGSO identified the importance of pro-social family members in assisting offenders to comply with orders, the need for a therapeutic approach to supervision rather than a focus on compliance alone, and the need for an effective service system to enable individuals to address their criminogenic needs. Officers spoke about the need to have sufficient time, by reducing caseloads, to invest the time needed with offenders to conduct motivational interviewing, conduct home visits and arrange referrals.

The academic literature on order effectiveness shows good evidence that probation is more effective at reducing recidivism than imprisonment, particularly short terms of imprisonment (less than 12 months in prison is less effective, with under six months demonstrating the least success). Community service orders are also more effective at reducing recidivism than a term of imprisonment or a bond (although less successful than a fine). There is conflicting evidence about the effectiveness of home detention, although the potentially negative effects of home detention on family members must be considered.

There is less evidence of the effectiveness of partially and wholly suspended sentences and ICOs (although ICOs were found to be more effective than periodic detention and short terms of imprisonment).

As yet, there is not enough evidence about the effectiveness of conditional suspended sentences and community correction orders.

There is good evidence about the effectiveness of parole on reoffending. It is clear that release to supervision reduces reoffending, although the outcomes are less certain for offender cohorts such as Aboriginal and Torres Strait Islanders, males and those with a mental illness.

The research indicates good evidence for positive impacts on recidivism achieved by electronic monitoring, treatment programs and supervision that focuses on rehabilitation rather than compliance. There were positive findings for the use of cognitive behavioural therapy and drug treatment programs, and promising findings about the effectiveness of targeted sex offender programs and violent offender programs. There was inconclusive evidence about the effectiveness of domestic violence offender programs.

The Council's own analysis of reoffending has shown the highest level of reoffending followed a period of imprisonment (52.7% of offenders sentenced to a period of imprisonment had committed a further offence in the two years following release from custody). By way of contrast, 44.3 per cent offenders sentenced to a community based sentence reoffended within two years and 42.4 per cent of offenders sentenced to a suspended sentence reoffended within two years.

There were different patterns of reoffending relating to the type of offence originally sentenced, and offenders sentenced for particular offence types differed in the level of seriousness of their reoffending. The data showed that the first six months of an offender's release from custody is the period most associated with reoffending – more than half of offenders (59.1%) who reoffended did so within six months of release, and over a third (36.8%) reoffended within the first three months of release. This suggests the post-sentence supervision in this risk period is critical if reoffending is to be addressed.

Chapter 4 Fundamental Principles

The Council's review has been informed by fundamental principles developed in the early stages of the review that have guided the Council's work and areas of focus.

The Council has drawn these principles from a range of sources including the Terms of Reference for the review, the Parole System Review Report ('the Review') and submissions made to that review, the Australian Law Reform Commission's report *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133) released in March 2018,[26] and views expressed by stakeholders during early consultation.

This chapter sets out those principles and additional considerations that have guided the Council's work on the reference.

4.1 Principle 1: Court ordered parole should be retained[27]

The purpose of parole is to allow an offender to serve part of their imprisonment in the community, to achieve reintegration and minimise the likelihood of an offender reoffending.

The Queensland Parole System Review recommended the retention of court ordered parole noting the intention of this system as being: 'to divert low-risk offenders from custody whilst ensuring post release supervision'.[28]

The Review attributed the stabilisation of prisoner numbers from August 2006 until mid-2012 to the introduction of court ordered parole.[29] At the same time, it referred to the decline in the use of alternative sentencing options such as suspended sentences and combined prison/probation orders following the order's introduction.[30] While it is possible some net-widening from other orders also occurred as a result (for example, the use of court ordered parole where a sentence of probation or community service would previously have been ordered), this trend is not specifically discussed in the Parole System Review Report. The Report, however, notes the exclusion of sex offenders from court ordered parole appears to have resulted in their placement on alternative sentencing orders. As at 30 September 2016, of sex offenders under supervision in the community sentenced to imprisonment or probation of three years or less, 237 were on probation, 40 on a combined prison and probation order, and only eight on a board ordered parole order.[31] This issue is discussed further below and in Chapter 10 of this paper.

The Review supported court ordered parole being retained on the basis that:[32]

- a system involving the Parole Board is resource-intensive and time consuming;
- without court ordered parole, the prison population would rapidly expand;
- early release systems that do not involve a Parole Board are used without problems in other jurisdictions; and
- any concern about motivating prisoners to address their criminogenic needs in prison could be addressed by adopting a system whereby the Parole Board could, in certain exceptional circumstances, pre-emptively cancel the issuing of a parole order by the Chief Executive that would otherwise have taken effect pursuant to court ordered parole.

The Review noted that while there were submissions calling for the removal of court ordered parole, the majority of stakeholders strongly supported its retention.

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26 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133* (2017).

27 This was Recommendation 2 of the 2016 *Queensland Parole System Review: Final Report* (2016), was supported by the Queensland Government and is expressly referred to in the Terms of Reference.

28 Queensland Parole System Review, above n 9, 57 [263].

29 Ibid 57 [264].

30 Ibid 81 [372].

31 Ibid 86 [407].

32 Ibid 85 [397].

This position was supported by the Queensland Government in its response to the Review recommendations released in February 2017.[33]

The retention of court ordered parole was supported by stakeholders providing feedback to the Council during the initial phase of the review, with no stakeholders calling for court ordered parole to be removed in Queensland. However, some concerns have been expressed about the potential for offenders subject to automatic release to be set up to fail on their release if there are not appropriate supports in place. This issue is considered further in Chapter 9 of this paper.

4.2 Principle 2: Suspended sentences should be retained

There has been limited indication from stakeholders of any need to, or support for removing suspended sentences as a sentencing option in Queensland. To the contrary, most stakeholders consulted have supported there being a greater number of sentencing options available to courts in sentencing and/or more flexibility in the use of existing orders to meet the purposes of sentencing, respond to offenders' individual circumstances and to take into account the individual circumstances of the case.

In its recent report, the ALRC recognises that suspended sentences can be 'a useful sentencing option, as a "last chance" for Aboriginal and Torres Strait Islander offenders to avoid full-time custody'.[34] They are also useful for offenders who are not in need of supervision.

The ALRC also identifies that suspended sentences can be problematic, but recommended their retention, noting that they:

> do not always address the purposes of sentencing and can have significant negative consequences for the offender. Nevertheless, unless access to community based sentences is improved, the removal of short and suspended sentences of imprisonment as sentencing options may lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to jail.[35]

The Council's preliminary view is that suspended sentences should be retained.

Potential reforms to suspended sentences to improve their operation and remove current barriers to allow them to be combined with other sentencing orders when sentencing for a single offence are discussed in Chapter 8 of this paper.

4.3 Principle 3: Legislative sentencing anomalies and complexities should be minimised

The Terms of Reference refer to the need for anomalies in sentencing or parole laws that create inconsistency or constrain sentencing options to be removed or minimised.[36]

The Terms of Reference also require the Council to identify and address any inherent complexities in the legislative framework, including recognition of pre-sentence custody, that contribute to or cause complexity in calculating an offender's overall period of incarceration, with a view to simplifying the calculation process and preventing discharge and detention error.[37]

As discussed in Chapter 1 of this paper, there are a number of benefits to be gained in removing anomalies and minimising the complexity of sentencing and parole laws, including promoting greater certainty and clarity about how the law is to be applied, reducing the risk of error, and any appeals required to correct such errors, and the length of sentencing proceedings. Such an approach also supports the fair and consistent application of the law, and ensures courts are not unnecessarily constrained by legislation in making orders that respond to the individual circumstances of the case.

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33 This was Recommendation 2 of the *Queensland Parole System Review: Final Report* (2016), was supported by the Queensland Government and is expressly referred to in the Terms of Reference.

34 Australian Law Reform Commission, above n 26, 266 [7.144].

35 Ibid 230 [7.5].

36 See Terms of Reference, 2 (Appendix 1).

37 See Terms of Reference, 2 (Appendix 1).

4.4 Principle 4: Any changes to existing CBSOs or new sentencing options should aim to reduce Queensland's prison population,[38] while maintaining community safety

The Queensland Parole System Review concluded that:

> The restrictions on community based orders is likely having adverse impacts upon the prison population and recommended that a suitable entity, such as the Sentencing Advisory Council, should undertake a review into sentencing options and, in particular, community based orders, to advise the Government of any necessary changes.[39]

This recommendation was accepted by the Queensland Government and led to the current Terms of Reference being issued to the Council.

As discussed in Chapter 2 of this paper, Queensland currently faces a number of challenges in ensuring its criminal justice system can respond to offending in a way that prioritises community safety, and meets the needs of the community, while preventing unsustainable and costly increases in prisoner numbers.

Adult offenders are more likely to receive a sentence involving immediate imprisonment (either a partially suspended sentence or imprisonment) as their most serious sentencing outcome than they were in previous years (see Figures 2-7 and 2-9).[40]

The Australian Bureau of Statistics table extract below, based on 2016–2018 data, shows that Queensland had the third highest imprisonment rate of all states and territories for sentenced prisoners (behind the Northern Territory and Western Australia respectively), which was also above the national average.

Table 4-1: Imprisonment rate per 100,000 adult population, sentenced prisoners 2016–2018

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2016	140.8	98.5	147.2	131.0	217.3	100.8	648.5	91.4	142.2
2017	142.7	98.8	152.5	139.0	236.9	103.5	632.8	89.9	146.0
2018	142.3	98.2	154.8	137.1	245.4	104.8	648.6	93.3	146.8

Source: Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2018*, Cat No 4512.0 (2018) Table 9.

While imprisonment rates in Queensland are rising, the number of offenders proceeded against by police has decreased (down 3,115 offenders, or 3% between 2016–2017 and 2017–18)[41] as have the number of offenders sentenced across all Queensland court levels (157,260 in 2015–16, dropping to 150,042 in 2016–17 and 133,496 in 2017–18).[42]

Together, the data suggests that imprisonment rates are rising independently of the numbers of offenders being charged or dealt with by courts. That is, the increasing numbers of sentenced prisoners is not just a product of a higher number of offenders being sentenced, but rather reflects a shift in sentencing practices (whether due to a change in the profile of offences coming before the courts, or other factors).

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38 See Terms of Reference, 1 (Appendix 1).

39 Queensland Parole System Review, above n 9, 101 [499] and Recommendation 4.

40 Based on data published by the Australian Bureau of Statistics: *Australian Bureau of Statistics, Criminal Courts, Australia, 2012–13,* Cat No 4513.0 (2014) and Australian Bureau of Statistics, *Criminal Courts Australia 2017–18*, Cat No 4513.0 (2019) Tables 25 and 26 (Summary outcomes by selected principal offence, higher courts and Magistrates Courts – Queensland). The proportion was calculated by summing the total count of orders involving custody in a correctional institution imposed by principal offence for each court level and dividing this by the total number of defendants proven guilty in these courts.

41 Australian Bureau of Statistics, *Recorded Crime – Offenders 2017–18*, Cat No 4517.0 (2019) Summary – Key Findings.

42 Australian Bureau of Statistics, *Criminal Courts Australia 2017–18*, Cat No 4513.0 (2019) Table 24.

Prison overcrowding is a problem in Queensland. QCS data shows:[43]

- Queensland's prison population has increased by over 57 per cent since January 2012.
- Male prisoner numbers have grown by 53 per cent in south Queensland from January 2012 to January 2018 (3,661 to 5,610).
- Female prisoner numbers in south Queensland have grown by 82 per cent over the same time (311 to 568). A third (35%) of female prisoners identify as Aboriginal or Torres Strait Islander.
- The imprisonment rate of women in Queensland was the third highest in Australia as at 30 June 2018.[44]

As at 30 June 2018, Queensland's built cell capacity was:

- Low security:[45] 815 built beds;
- High security: [46] 6,382 built beds;
- Total: 7,197 built cell capacity.

As at 30 June 2018, Queensland's prison population was:

- Low security population: 649;
- Secure population (prisoners at a high security facility): 8,195.

This means that as at 30 June 2018:

- The secure population was 1813 prisoners above capacity, resulting in 3626 prisoners sharing a cell designed for one prisoner;[47]
- The low security population of 649 was accommodated by 815 beds.

The real net operating expenditure per prisoner per day in 2017–18 was $182.[48] In contrast, the real net operating expenditure per offender per day for supervising an offender in the community in 2017–18 was $13.79.[49]

The net operating expenditure in Queensland of managing offenders in the community is below that of all other Australian jurisdictions, which may indicate a need for further investment in Queensland in community correctional services. The highest net operating costs per offender per day in 2017–18 were recorded for

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43 Queensland Corrective Services, Submission No 27 to Queensland Crime and Corruption Commission, Taskforce Flaxton, *An Examination of Corruption Risks in Corrective Services Facilities*, 20 April 2018, 6-7 updated and expanded upon by feedback from QCS.

44 As at 30 June 2017, Queensland's female population was second highest when compared to the rest of Australia, and Queensland's female imprisonment rate was third highest compared to the rest of Australia: Australian Government, Productivity Commission, *Report on Government Services 2019* (2019), tables 8A.4 and 8A.5. This held true into December 2018 in figures published by the ABS: Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2018*, Cat No 4512.0 (2018) Tables 1, 4 and 5.

45 Low security facilities do not have a razor wire perimeter fence and are a progression point for prisoners through the correctional system. To progress to a low security facility, prisoners must demonstrate good institutional behaviour, not have been sentenced to a sex offence and be assessed as a low risk of escape, in addition to other assessment factors. In Queensland those facilities are the Helana Jones Centre, Numinbah Women's Correctional Centre, Palen Creek Correctional Centre and the Capricornia, Lotus Glen, Townsville Women's, Townsville Men's Correctional Centre Farms and 10 work camps.

46 High security facilities are characterised by a two-tier razor wire perimeter fence and heightened security. In Queensland, those facilities are the Arthur Gorrie, Brisbane, Capricornia, Lotus Glen, Maryborough, Southern Queensland, Wolston and Woodford Correctional Centres, as well as Borallon Training and Correctional Centre, Brisbane Women's Correctional Centre and the Townville Correctional Centre Complex (includes separate male and female facilities).

47 QCS advised that some cells may be retro fitted with bunk beds, however the cell was only designed to accommodate one person.

48 Australian Government Productivity Commission, above n 44, Table 8A.17, 'Prisoner' is defined as: 'A person held in full time custody under the jurisdiction of an adult corrective services agency. This includes sentenced prisoners serving a term of imprisonment and unsentenced prisoners held on remand': 8.24.

49 Ibid. 'Offender' is defined as: 'An adult person subject to a non-custodial order administered by corrective services, which includes bail orders if those orders are subject to supervision by community corrections': 8.24.

the Northern Territory ($49.12) followed by the ACT ($38.38), WA ($32.81) and Victoria ($32.40). The lowest, excluding Queensland, were for Tasmania ($16.04) followed by NSW ($22.38).[50]

4.5 Principle 5: Any reforms should aim to reduce the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system

The Terms of Reference expressly refers to the need to take into account the impact of any recommendations on the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system.[51]

The ALRC noted in its 2017 Pathways to Justice report that 'evidence suggests that Aboriginal and Torres Strait Islander offenders are less likely to receive a community based sentence than non-Indigenous offenders'.[52] They 'may be more likely to end up in prison for the same offence'.[53] Even when given a community based sentence, they may be more likely to be imprisoned due to breach of conditions.[54]

'Improving compliance with conditions is integral to reducing the incarceration rate of Aboriginal and Torres Strait Islander peoples'.[55] According to research, 'compliance with community based orders would increase if programs and conditions were relevant to Aboriginal and Torres Strait Islander offenders and if offenders were given greater support'.[56] Imprisonment rates 'could be reduced by expanding the availability of community based sentences to individuals with complex needs'[57] who are 'often found ineligible for a community based sentence. As a result they are likely to be given a sentence of imprisonment or a sentence that increases the risk of imprisonment in the longer term'.[58] Compliance with conditions may be enhanced by publicly available, clear and transparent guidelines about the administration of community based sentencing orders (CBSOs).

Regimes which exclude CBSO options via schedules of disqualifying offences have been identified as a potential factor contributing to 'Aboriginal and Torres Strait Islander offenders being under-represented as recipients of community based sentences compared to imprisonment…[they] may be sentenced to short terms of imprisonment when they commit low-to-mid range violent offences'.[59]

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50 Ibid.

51 See Terms of Reference, 1 (Appendix 1).

52 Australian Law Reform Commission above n 26, 234 [7.13].

53 Ibid 230 [7.4], citing Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2017,* Cat No 4512.0 (2017) Table 19.

54 Australian Law Reform Commission, above n 26, 230 [7.4], citing Australian Bureau of Statistics, above n 21, Table 19.

55 Australian Law Reform Commission, above n 26, 254 [7.95].

56 Ibid 254 [7.97], citing Fiona Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) 32 *Sydney Law Review* 645.

57 Australian Law Reform Commission, above n 26, 240 [7.38], citing Boris Beranger, Don Weatherburn and Steve Moffatt, 'Reducing Indigenous Contact with the Court System' (Issue Paper No 54, NSW Bureau of Crime Statistics and Research, December 2010).

58 Australian Law Reform Commission, above n 26, 240 [7.39], citing Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 45, 117–8; Victorian Alcohol and Drug Association, Submission No 92 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4 and further citing, fn 63: See, e.g, Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.1]–[5.38]; Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [2.34]–[2.39], [2.47]–[2.52]; House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) [1.4]–[1.16], [1.26]–[1.47], [1.67]–[1.86], [1.97–1.111]; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) [4.24]–[4.26]. See also Australian Law Reform Commission, above n 26, 241 [7.40].

59 Ibid 242 [7.44]. The report cites legislative examples from NSW, NT, Victoria and SA.

ADVICE FROM THE COUNCIL'S ABORIGINAL AND TORRES STRAIT ISLANDER ADVISORY PANEL

In November 2018 the Attorney-General and Minister for Justice announced the establishment of the Council's new Aboriginal and Torres Strait Islander Advisory Panel. The purpose of the nine-person panel is to provide advice to the Council as it works to understand and address the over representation of Aboriginal and Torres Strait Islander people in Queensland's criminal justice system. The Attorney-General stated "the Council will now be able to give a stronger voice to Aboriginal and Torres Strait Islanders in regards to how sentencing operates, along with a better sense of how Indigenous communities are affected by current responses, and insight into what changes might be made to improve outcomes." The Chair of the Advisory Panel is also a member of the Council.

At its meeting in February 2019 the Advisory Panel considered Australian Law Reform Commission (ALRC) recommendations on Community based Sentences, published in *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017). The Advisory Panel gave in-principle endorsement of the recommendations considered, which are summarised below:

- Governments to work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to improve access to community based sentencing options for Aboriginal and Torres Strait Islander offenders (*Recommendation 7–1*).
- Implement community based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions (*Recommendation 7–2*).
- Governments and agencies to work together to provide programs and supports for offenders to successfully complete orders (*Recommendation 7–3*).

In considering the ALRC recommendations the Advisory Panel advocated for a focus on supporting the offender through to successful completion of their sentence. This focus should involve taking advice, from relevant community representatives in particular, when assessing offenders and preparing pre-sentence advice for the court. Such advice should assist in recognising individual and community-specific issues, and culturally safe responses which are appropriate for the offender. Common issues include pressures relating to ongoing family or community tensions, alcohol or drug abuse which may be a symptom of underlying stressors, and the capacity of the offender to understand and comply with the conditions of a community based order.

The Panel supported community based sentencing options that allow for greater flexibility. The Panel noted the importance of early identification of the issues facing an offender and whether some conditions of an order could trigger breaches. This could be due to the offender's circumstances, such as poverty, a lack of transport, impaired capacity/developmental disorders, family or cultural obligations, or work or schooling responsibilities. More flexibility should assist the court and those supervising the person subject to the order to try to mitigate identified risks.

The Panel noted the benefit of governments, agencies and others working together to support offenders through their order. For example, a strengths-based, community-specific approach has shown positive results. This involves local police, probation and parole supervisors, Elders, Community Justice Groups and family members working together and with the offender to avoid problems and actively engage them in addressing the drivers of their offending. The Panel also supported building incentives into the way orders are administered and managed to promote greater engagement and successful completion of community based sentencing orders.

The Panel called for community-designed and community-run programs to be tailored to the individual context of each community in Queensland. Aboriginal and Torres Strait Islander organisations should be recognised and remunerated as leaders in this area.

4.6 Principle 6: CBSOs have significant advantages over imprisonment where the offender does not pose a demonstrated risk to the community[60]

The Council supports the position that CBSOs have significant advantages over imprisonment where the offender does not pose a demonstrated risk to the community. For example, CBSOs cost less,[61] avoid the 'contaminating effects from imprisonment with other offenders'[62] and are more effective in reducing reoffending than a short term of imprisonment.[63] A CBSO offers 'the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender'.[64]

CBSOs maximise opportunities for community based rehabilitation and integration of offenders, in the least intrusive manner appropriate. They allow for an offender to be managed in their community and also recognise the potential for families, employers, and other community groups and others to contribute to an offenders' rehabilitation.

4.7 Principle 7: Judicial discretion in the sentencing process is fundamentally important[65]

The Terms of Reference explicitly recognise 'the importance of judicial discretion in the sentencing process'.[66]

The Council supports community based options being available for a wide range of offending, including where imprisonment may also have been justified.[67]

In the context of people of different socioeconomic backgrounds, 'the issue of unequal impact of conditions has been raised as elevating the importance of providing judicial officers with wide discretion in response to minor breaches' of CBSOs.[68]

Some of the impacts of restricting judicial discretion through legislative reform are discussed in Chapter 5 of this paper (section 5.4). Many of these reforms restrict the options available to a court in sentencing and are, in this respect, contrary to the intention of the Terms of Reference to increase sentencing flexibility.

The Council's general position is that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing outlined in the PSA, or in reducing recidivism.[69] This is

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60 Ibid 230 [7.3].

61 Ibid.

62 Ibid citing NSW Law Reform Commission, *Sentencing, Report No 139* (2013) [9.16]–[9.17].

63 According to research: Australian Law Reform Commission, above n 26, 233 [7.10], quoting Joanna Wang and Suzanne Poynton, 'Intensive Correction Orders versus Short Prison Sentence: A Comparison of Re-Offending' (*Contemporary Issues in Crime and Justice* No 207, NSW Bureau of Crime Statistics and Research, October 2017). Studies have shown that intensive community supervision coupled with targeted treatment is one of the most effective ways of addressing the underlying causes of criminal behaviour: above n 34, 233 [7.12], citing Wai-Yin Wan et al, 'Parole Supervision and Re-Offending: A Propensity Score Matching Analysis' (NSW Bureau of Crime Statistics and Research, 2014); 'Parole Supervision and Reoffending' (*Trends & Issues in Crime and Criminal Justice No 485*, Australian Institute of Criminology, 2014); Steve Aos, Marna Miller and Elizabeth Drake, 'Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates Individual State Developments' (2006) 19 *Federal Sentencing Reporter* 275; Elizabeth Drake, Steve Aos and Marna Miller, 'Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State' (2009) 4 *Victims and Offenders* 170.

64 *Boulton v The Queen* (2014) 46 VR 308, 335 [114]–[115] (Maxwell P, Nettle, Neave Redlich and Osborn JJA), quoted in Australian Law Reform Commission, above n 26, 230 [7.3].

65 See Terms of Reference, 1 (Appendix 1).

66 Ibid.

67 See also Sentencing Advisory Council (Tasmania), *Phasing Out Suspended Sentences*, Final Report No.6 (2016) 36; Sentencing Advisory Council (Victoria), *Suspended Sentences - Interim Report* (2005) 27 which reflect this same view.

68 Australian Law Reform Commission, above n 26, 256 [7.105] n 157, citing Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) [4.126], in that context relating to breach of suspended sentences.

69 See, for instance, Queensland Law Society, *Mandatory Sentencing Laws Policy Position*, 4 April 2014, 2: 'The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat

because, as a matter of principle, it assumes that every offence and every offender are the same which is patently not the case.

These provisions demonstrate how restricting judicial discretion can impact in ways not intended or anticipated. Overly narrow eligibility criteria, and/or exclusionary criteria, can have a similar effect to mandatory sentencing provisions, resulting in outcomes that are not foreseen at the time the provisions were introduced and/or impacts that subvert the legislative intention.

One example is the exclusion of sexual offences from the court ordered parole scheme. The Council has found the exclusion of these offences from this scheme has resulted in the increased use of alternative forms of orders, such as partially suspended sentences and imprisonment and probation orders. These forms of alternative sentencing orders do not provide the same level of supervision of offenders, and nor do they provide QCS with the same ability to respond quickly to concerns about issues of safety and escalating risk as parole orders offer. In this way, a reform ostensibly intended to ensure community safety by requiring sexual offenders to apply to the Parole Board for release on parole, rather than being subject to automatic release, has had the reverse impact of resulting in more offenders being left unsupervised in the community or, for those subject to supervision on probation, QCS has more limited powers. This is discussed further below (in section 4.4 and Chapter 10).

4.8 Principle 8: It is important to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing set out in the *Penalties and Sentences Act 1992* (Qld)[70]

The Council supports courts having maximum flexibility to tailor a sentence to the offence and the offender.[71] Reform of CBSO sentence regimes should be aimed at making them 'more accessible and flexible, to provide greater support and to mitigate against breach'.[72]

Inflexible community based sentencing regimes are likely to exclude complex-needs offenders or encourage high rates of breach and revocation,[73] and may prevent the 'imposition of treatment conditions that address the underlying causes of reoffending'.[74] In fact, as the ALRC has observed, 'issues of accessibility and flexibility are interrelated, particularly in relation to offenders with complex needs'.[75]

The ALRC, citing the Queensland Parole System Review Report, has made comment that 'the perceived lack of flexibility of community based orders in Queensland has potentially adverse consequences, including increasing the size of the prison population, as well as increasing the usage of parole in situations where an offender has spent no time in prison and thus has no need for prison-to-community reintegration'.[76]

The increasing use of imprisonment as a sentencing option in Queensland has been highlighted in section 4.4 of this paper (above).

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of imprisonment generates a small general deterrent effect but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of re-offending and often results in a greater rate of recidivism' (citing Sentencing Advisory Council (Victoria), *Does Imprisonment Deter? A Review of the Evidence* (2011) 2). See also Law Council of Australia, *Mandatory Sentencing Discussion Paper* (2014) 13-15.

70 See Terms of Reference, 1 (Appendix 1).

71 Sentencing Advisory Council (Tasmania), above n 67, 36; Sentencing Advisory Council (Victoria), above n 67, 27.

72 Australian Law Reform Commission, above n 26, 229 [7.1].

73 Ibid 234 [7.16], citing NSW Law Reform Commission, above n 62, [10.37]–[10.39].

74 Australian Law Reform Commission, above n 26, 235 [7.16] citing NSW Law Reform Commission, above n 62, [11.10], [11.43], [11.51].

75 Australian Law Reform Commission, above n 26, 234-5 [7.16], citing NSW Law Reform Commission, above n 62, [10.37]–[10.39].

76 Australian Law Reform Commission, above n 26, 246 [7.63], citing Queensland Parole System Review, above n 9, [499], rec 4 and [454]–[455]; Tamara Walsh, 'Defendants' and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93, 107–8. See also Associate Professor T Walsh, Submission 51.

While the Council is aware that some of the existing sentencing purposes under section 9(1) of the Act have attracted some criticism by stakeholders and academic commentators,[77] consideration of potential reforms to these purposes falls outside the scope of this review.

4.9 Principle 9: Limited executive power to deal with minor breaches may enhance CBSO flexibility

Ensuring there are appropriate responses to breach of CBSOs is important to maintain confidence in the use of these orders and to ensure they are viewed as credible alternatives to immediate imprisonment.

This principle recognises that sentence flexibility may be enhanced by delegating more authority to probation and parole officers to respond to non-compliance, but within parameters defined by legislation. Sometimes, more flexible responses, short of returning a case to court, may be required to enable a more appropriate and efficient response to breaches of conditions.[78]

4.10 Principle 10: CBSOs, and the services delivered under them, must be adequately funded and properly administered

Sentencing orders of courts must be properly administered, to satisfy the intended purposes of the order and facilitate a fair and just sentencing regime that protects community safety.[79]

While not a focus of this review, the Council acknowledges that to work efficiently and enjoy judicial confidence, CBSOs must be properly funded, including for mechanisms such as pre-sentence reports, judicial monitoring, supervision of offenders and treatment in the community (where these are relevant).[80]

The ALRC has recognised that extra resources will be required to expand the availability of community based sentencing options in rural and remote areas.[81] The ALRC also acknowledged, however, that 'resourcing alone will not be sufficient', with remote settings requiring consultation with local representatives 'to expand the range of programs and services'.[82]

Community based sentencing options should be managed in a way that builds effective partnerships with Aboriginal and Torres Strait Islander communities and organisations in the development of policies, and in the delivery of programs and services for Aboriginal and Torres Strait Islander offenders.

The ALRC acknowledged that practical matters can impact on the accessibility of intermediate sentence options, especially in regional and remote areas, including:

- occupational health and safety/public liability concerns;
- community reluctance to participate;
- difficulty attracting qualified staff;
- supporting greater integration and information sharing between Aboriginal and Torres Strait Islander communities and community corrections staff; and
- providing accessible and legal transport.[83]

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77 See, for example, criticisms of deterrence as a sentencing purpose: Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart, 3rd ed, 2009) 43; Mirko Bagaric and Theo Alexander, "(Marginal) Deterrence Doesn't Work — and What it Means for Sentencing" (2011) 35 *Criminal Law Journal* 269. See also Sentencing Advisory Council (Victoria), above n 69.

78 Arie Freiberg, *Pathways to Justice Sentencing Review 2002* (Victoria, Department of Justice, 2002) 3. For instance, Victoria's *Sentencing Act 1991* contains power for the Secretary of the Department of Justice to deal administratively with a breach of community correction order in relation to unpaid community work or a curfew condition, if the breach is not sufficiently serious to file a charge for the offence (ss 83AU, 83AV).

79 See Terms of Reference, 1 (Appendix 1).

80 Sentencing Advisory Council (Tasmania), above n 67, 36, 98.

81 Australian Law Reform Commission, above n 26, 237 [7.28].

82 Ibid 237 [7.29]–[7.30], quoting Public Defenders NSW, Submission No 10 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (11 March 2005) 4.

83 Australian Law Reform Commission, above n 26, 239–240 [7.36] citing Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged*

With respect to community correction orders (CCOs) in Victoria, the ALRC suggests that given 'there are no remote communities in Victoria', other jurisdictions 'that move towards a Victorian CCO approach are likely to have additional resourcing issues that are amplified by remoteness'.[84]

Judicial monitoring conditions are part of some CCO schemes. The Victorian Court of Appeal has acknowledged these conditions:

> may impose a heavy burden on courts which are not equipped or funded to supervise offenders… although more research is needed on the long term effects of the imposition of judicial monitoring… careful use of this condition has the potential to enhance the rehabilitation of young offenders and of those who offend because they are drug addicted.[85]

4.11 Principle 11: Sentencing options and their administration should reflect the individual needs of all parties involved, including offenders, victims and the broader community

Under this principle, offenders are to be managed based on their assessed risk of reoffending, tailored to address their individual criminogenic and other needs and in the context of their culpability for their sentenced offending and assessed risk.

This principle recognises the most appropriate sentencing options are those that not only reflect the seriousness of the offending (including any harm to a victim) and that allow the court to satisfy all the relevant purposes of sentencing, but are structured and administered in a way that actively seeks to minimise the risks of reoffending and subsequent costs of that offending to victims and the broader community.

The management of offenders in accordance with risks and needs is often referred to as the 'Risk-Need-Responsivity' (RNR) framework. RNR consists of three key principles, as described by the authors of the Queensland Drug and Specialist Courts Review report:

- the risk principle – that the level of program intensity be matched to offender risk level (defined as the risk of reoffending, absent intervention or treatment), and that intensive levels of intervention and treatment be reserved for offenders with the highest level of risk;
- the need principle – that criminogenic needs (i.e. those functionally related to persistence in offending) require commensurate and concurrent redress; and
- the responsivity principle – that the style and modes of intervention be matched or tailored to each individual offender's learning style and abilities and be responsive to individual strengths and levels of motivation.[86]

Based on this framework informed by research evidence, the management of offenders in accordance with RNR principles involves avoiding the over-treating of low-risk and low-need offenders, which may actually serve to increase risks of reoffending, and reserve the highest level of supervision and intensity of treatment services for offenders with high criminogenic need.[87]

The ALRC's report, in this context, acknowledges that: 'Research has consistently shown that the level of intervention under a sentence served in the community should be proportionate to the risk level of the offender.'[88]

The application of the RNR framework is informed by an assessment of offender needs. The effective management of offenders and design of services delivered to people on CBSOs therefore is one that takes individual needs into account, such as those that may arise from their gender, age, cultural background,

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Populations (2006) xiv; Dr T Anthony, *Submission 115*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid ACT, *Submission 107*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75;* Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*.

84 Australian Law Reform Commission, above n 26, 252 [7.91] citing Council of Australian Governments, *Prison to Work Report* (2016) 138.

85 *Boulton v The Queen* (2014) 46 VR 308, 351 [193], [195] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

86 Arie Freiberg et al, *Queensland Drug and Specialist Courts Review: Final Report* (2016) 133 (references omitted).

87 Ibid.

88 Australian Law Reform Commission, above n 26, 246 [7.59].

physical or mental impairment, and health status. Importantly, the management of offenders must take into account the particular needs of Aboriginal and Torres Strait Islander offenders. It is recognised that culturally responsive strength based interventions have potential to contribute to reducing the risk of reoffending by building an offenders' strengths and capabilities.[89]

However, courts have recognised that while it 'may be perfectly proper to increase the sentence in order to enable a cure to be undertaken whilst the accused is in prison… it is not correct to increase the sentence above that within the appropriate range for the offence itself merely in order to provide an opportunity to cure'.[90] Proportionality acts as a limiting principle, requiring that the length of the sentence imposed (and also, the interventions delivered under them[91]) should not be disproportionate to the seriousness of the offending.

Accordingly, conditions attached to CBSOs should be realistic in length (proportionate) and be of the minimum number necessary to fulfil the purposes of sentencing. Conditional orders which are too long are not only a disproportionate penalty, but increase the chances of breach (of conditions or by further offending).[92]

An offender's circumstances, health, disposition and maturity, and accordingly their risk to society, are likely to change over the period of any sentence. Such changes are more likely to occur in cases of offenders on CBSOs because of the opportunities thereby created for the offender and responsibility imposed to address the causes of offending and work towards rehabilitation and reintegration.[93]

Accepting that a person's circumstances may change over time, it is important there are mechanisms that allow conditions to be amended or discontinued if these are no longer appropriate or necessary to meet the intended objectives of the order. The process for review and amendment of conditions should, as far as practicable, allow for any required changes to be made in a responsive and timely way.

The impacts on victims of crime and the broader community, while not determinative on sentence, are an important consideration. Where the use of a particular type of CBSO or condition might compromise community or victim safety, alternative forms of orders or conditions that better protect their interests should be considered, provided they are proportionate to the offending, and consistent with the broader purposes of sentencing.

4.12 Principle 12: Public confidence in the criminal justice system should be encouraged and maintained; sentencing practices should consider community expectations[94] and take into account the impact on victims of crime

The ALRC has recognised that community based sentences 'are designed to be punitive while fulfilling other sentencing purposes, such as rehabilitation and deterrence'.[95]

Forms of CBSOs, such as community correction orders, can be intrinsically punitive and even highly punitive, depending on order length and the nature and extent of conditions. However, as distinct from prison terms, courts have recognised that such orders are not 'self-evidently punitive'.

The punitive features of CBSOs require explanation to the public. The Victorian Court of Appeal has commented that the process of communication may begin with the sentencing court, but the responsibility for communicating 'the message' about such orders rests overwhelmingly with government.[96]

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89 See, for instance, <https://www.goodlivesmodel.com/information> and <http://herzog-evans.com/wp-content/uploads/2014/09/willis-ward.pdf> 3/765.

90 *Channon v The Queen* (1978) 20 ALR 1, 9 (Brennan J), 28, 29 (Toohey J) citing *R v Moylan* [1969] 3 All ER 783, 785-6 (Widgery LJ), applying *R v Ford* [1969] 3 All ER 782.

91 On this point, see Freiberg et al, above 86, 69.

92 Sentencing Advisory Council (Tasmania), above n 67, 36; Sentencing Advisory Council (Victoria), above n 67, 27.

93 *Boulton v The Queen* (2014) 46 VR 308, 343-344 [161] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

94 See Terms of Reference, 1 (Appendix 1).

95 Australian Law Reform Commission, above n 26, 233 [7.9].

96 *Boulton v The Queen* (2014) 46 VR 308, 337-338 [124]-[125] (Maxwell P, Nettle, Neave Redlich and Osborn JJA).

One of the key functions of the Queensland Sentencing Advisory Council (QSAC) is: 'to give information to the community to enhance knowledge and understanding of matters relating to sentencing'.[97] The Council carries out this function in a number of ways, including running face-to-face educational sessions for students and the broader community ('Judge for Yourself'), publishing information about sentencing on its website, and using other media channels, such as radio and television, to explain key principles and factors a court takes into account in sentencing.

In 2018 QSAC ran a pilot program in Cunnamulla to examine community understanding about sentencing. Key findings included that there was:

- limited understanding of sentencing and confusion about the court process and the penalties imposed; and
- varied reasons provided for the breaching of sentencing conditions, such as not understanding the implications of the penalty, or cultural, social or other commitments taking precedence.[98]

This project and its outcomes are described below.

Qualitative research from the QGSO, referenced in Chapter 3 of this paper, confirms these findings, and emphasises the importance of offenders having the conditions and requirements of CBSOs explained in a way that they can easily understand.[99] These concerns were raised particularly in relation to Aboriginal and Torres Strait Islander offenders.[100]

As highlighted by the UK Law Commission, in releasing a proposal for a new Sentencing Code in 2018, 'public confidence is diminished when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible'.[101] The complexity of sentencing laws, and number of different order types, with different names, condition types and different consequences on breach can thereby also contribute to limited understanding of sentencing and confusion over terminology, which itself risks reducing community confidence in these orders.

The UK Ministry of Justice commissioned research into how sentences might be better expressed, to improve understanding.[102] Key language barriers included terms such as 'suspended', 'custody', 'minimum' and 'parole'. Minimum, for example, was broadly understood by the community to mean 'the least possible' rather than 'at least', which triggered a negative emotional response.[103]

Naming conventions for CBSOs in Queensland may at first seem a low-level consideration, but can make an all-important difference to whether these changes will be accepted and understood by the broader community. Everyday language leaves little doubt — for the offender or community —about the nature of a sentence.

These labels given to sentencing orders must clearly communicate how these forms of orders meet victims' and the broader community's need for crimes to have consequences. Conversely, to ignore the need for simple language is to run multiple risks – of a revolving door of offenders who continue to breach their orders because they do not understand them; and of undermining public faith in the court system.

Ensuring the impact of offences on victims of crime is taken into account, together with broader community expectations, is another key consideration in determining the appropriate use of CBSOs. As a general principle, CBSOs should only be available as an alternative to actual custody where the use of these orders does not compromise victim or community safety.[104] In this sense, community safety should be the overriding consideration.

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97 *Penalties and Sentences Act 1992* (Qld) s 199(1)(c)).

98 Queensland Sentencing Advisory Council, *Annual Report 2017–18* (2018).

99 Queensland Government Statistician's Office, above n 3, Section 4.1.6).

100 Ibid Section 4.3.2.

101 Law Commission (England and Wales), *The Sentencing Code: Summary of Report* (2018) 13 [1.32].

102 Philip Wilson and Rob Ellis, 'Communicating Sentencing: Exploring New Ways to Explain Adult Sentences', *UK Ministry of Justice Analytical Series*, 2013.

103 Ibid.

104 This principle is already embedded in section 9 of the *Penalties and Sentences Act 1992* (Qld) and principles that apply in the sentencing of offences involving the use of, counselling or procuring the use of, or attempting or conspiring to use,

ENHANCING ENGAGEMENT WITH COMMUNITIES ON SENTENCING ISSUES—CUNNAMULLA PILOT

Since it was established in 2016, the Council has committed to understanding how sentencing may contribute to the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system. Evidence suggests breach of orders is one key driver of this issue. To gain insight into the issues behind the data, the Council ran a pilot project in Cunnamulla.

Cunnamulla has a population of 40 per cent Aboriginal and Torres Strait Islander people. It mirrors a common pattern of over representation of Aboriginal and Torres Strait Islander people in criminal justice processes and sentencing outcomes. Sentencing data for Cunnamulla reveals more than 70 per cent of offenders are Aboriginal and Torres Strait Islander, with their most common offences being breach of community based orders and offensive behaviour. The most common offence receiving imprisonment is breach of bail.

The aim of the pilot was to examine the levels of understanding about sentencing and factors influencing the level of understanding. The people of Cunnamulla fully embraced the pilot project — and were very generous with their time and patience with our project. Among the key findings were that there was:

- limited understanding of sentencing, confusion about the court process and the penalties imposed;
- varied reasons for breaching sentencing conditions, such as not understanding the implications of the penalty, or cultural, social or other commitments taking precedence; and
- limited community based legal representation due to the 'drive in – drive out' nature of legal assistance.
- Community members made it very clear that raising awareness of the consequences of penalties among young people is a community priority. For example, they were keen for young people to realise the impacts of a criminal history on their future employment prospects.

Working alongside community members and other government agencies, the Council developed the Queensland Sentencing Guide to explain how Queensland courts sentence adults found guilty of an offence.

Other agencies also joined the Council for a visit in 2017, to demonstrate how justice agencies can assist people on the ground with criminal justice issues:

- Blue Card Services provided advice on obtaining a Blue Card;
- Birth, Deaths and Marriages provided assistance to gain a birth certificate; and
- Caxton Legal Centre provided advice on options for legal assistance.

4.13 Principle 13: Equal justice means sentencing options should, as far as practicable, not vary according to location

The principle of equality before the law is a founding principle of the rule of law: the type of sentence a person receives should not be determined by where they live.[105] As a general principle, realistic sentencing options for an offender should, where possible, not be compromised by geography or the fact that the offender is sentenced or resides in a regional area.[106]

violence against another person, as well as any offence of a sexual nature committed against a child under 16 years, or a child exploitation material offence. In some jurisdictions, it has been further identified as a principle in the making of specific types of sentencing orders – see, for example, section 66 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides: '(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender' and '(2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending'.

105 Australian Law Reform Commission, above n 26, 237 [7.28], citing *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) Preamble.

106 Australian Law Reform Commission, above n 26, Recommendation 7-1, 14, cf 234.

Chapter 2 highlights the number of challenges faced in meeting the needs of offenders living in rural and remote regions of Queensland. Increasing the flexibility of orders and associated conditions is one means by which CBSOs may be made more broadly available.

4.14 Principle 14: Sex offenders serving sentences in the community should have appropriate supervision

The Parole System Review Report noted an anomaly: the absence of a power to order a parole release date for sex offenders, even where the sentence is under three years, is inconsistent with the option to wholly suspend their imprisonment. Where imprisonment with release before the full term is served is warranted, the likely outcome is a suspended sentence even though 'court-ordered parole, if available, would instead have been ordered'.[107]

The Report also noted that sex offenders 'are released without the supervision that they might have otherwise received. Obviously this can have serious consequences'. This is because conditions cannot be applied to a suspended sentence and, for example, a sex offender cannot be required to avoid places children frequent, avoid unsupervised contact with them 'or be prevented from grooming a victim' for the rest of the sentence.[108]

Monthly QCS data for the preceding five years (to November 2016) showed that 'more sex offenders, with terms of imprisonment of three years or less, are discharged from prison to freedom on a partially suspended sentence (without any supervision) than they are to a period of community supervision such as parole or probation'.[109]

However, 'an evaluation of QCS sexual offender treatment programs found that if sex offenders were subject to supervision after release from prison, on parole or under the *Dangerous Prisoners (Sexual Offenders) Act 2003*, they were less likely to reoffend. The reduction in risk of reoffending under supervision was present regardless of whether the offender participated in a sexual offender treatment program'.[110]

4.15 Principle 15: Reforms to sentencing and parole should be based on the best available evidence

The Council has a strong commitment to evidence based reform, and is drawing on a range of sources of evidence to inform its work on this reference including reports of other law reform bodies, consultation with criminal justice stakeholders and academic research.

As discussed in Chapter 3 of this paper, the Council commissioned a separate review of the research literature to provide a basis for some of the conclusions it has drawn, and has also drawn on other sources of evidence, including work undertaken by the QGSO on factors associated with the outcomes of community based orders and its own analysis of administrative data.

The availability of proper evidence about how well sentencing and parole orders are operating and their effectiveness is of direct relevance to the Council in determining what reform options should be supported, and what options may require further evidence and research to be gathered prior to considering potential implementation.

Some of the data limitations identified during the initial stages of the review are discussed in Chapter 12 of this report. The strength of evidence in support of the use of particular forms of sentencing and parole orders, and forms of interventions under them, is summarised in Chapter 3. More information is contained in the literature review undertaken by QUT, which is available on the Council's website.

4.16 Conclusion

In this chapter, we have explored a number of the fundamental principles that have guided the Council in its approach to the review.

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107 Queensland Parole System Review, above n above n 9, 6 [39].

108 Ibid 6 [40]; cf 95 [462], 97 [472].

109 Ibid 102 [502].

110 Ibid 102 [504].

The following chapters consider these issues in the context of the current sentencing framework, and how they might inform future areas for reform.

Chapter 5 Sentencing process and framework

The Terms of Reference ask the Council to review current sentencing and parole legislation with a view to:

- removing or minimising any anomalies in the operation of these laws that create inconsistency or constrain available sentencing options;
- advising whether any restrictions on the ability of a court to impose a term of imprisonment with a community based order should be removed; and
- advising on the appropriate adoption of flexible CBSOs in Queensland that have been introduced in other jurisdictions (such as CCOs, now introduced in Victoria, NSW and Tasmania).

This chapter provides a high level overview of the current approach to sentencing and sentencing framework that supports the sentencing of adult offenders in Queensland. The operation of parole laws are discussed in Chapter 9 of this paper.

It also considers the operation of mandatory sentencing provisions in Queensland, the uncertainty these provisions sometimes create in their interpretation and application, and how this impacts sentencing.

5.1 Sentencing principles – PSA section 9

5.1.1 Purposes of the PSA

The PSA is the key piece of legislation that guides sentencing for offences in Queensland. Five of the purposes of the PSA are particularly relevant to this review:

- providing a sufficient range of sentences for appropriate punishment and rehabilitation of offenders, and ensuring that protection of the community is a paramount consideration where appropriate (section 3(b));
- promoting consistency of approach in the sentencing of offenders (section 3(d));
- providing fair procedures for imposing sentences and for dealing with offenders who contravene the conditions of their sentence (section 3(e));
- providing sentencing principles that are to be applied by courts (section 3(f)); and
- promoting public understanding of sentencing practices and procedures (s 3(h).

Consistency in sentencing in this context refers to the application of a consistent approach (i.e. using the same purposes and principles) for sentencing similar offences, rather than the application of the same sentence.[111]

5.1.2 Sentencing purposes

Section 9 of the PSA sets out sentencing guidelines. It limits the purposes of sentencing to five (and combinations of them):

- to punish the offender to an extent or in a way that is just in all the circumstances;
- to provide conditions to support the offender to be rehabilitated;
- to deter the offender or other persons from committing the same or a similar offence;
- to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; and
- to protect the Queensland community from the offender.[112]

The Act does not suggest that one purpose should be more, or less, important than any other purpose, and in practice, their relative weight must be assessed taking into account the individual circumstances involved. The purposes overlap and none of them can be considered in isolation; they are guideposts to the appropriate sentence, sometimes pointing in different directions.[113]

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111 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76 *Law and Contemporary Problems* 265, 270-271.

112 *Penalties and Sentences Act 1992* (Qld) s 9(1).

113 *Veen v The Queen (No* 2) (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson, Toohey JJ).

The concept of 'just punishment' reflects the principle of proportionality — a fundamental principle of sentencing in Australia. Sentencing courts must ensure the sentence imposed: 'should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances'.[114] While a sentence must not be 'extended beyond what is appropriate to a crime merely to protect society', the propensity of an offender to commit future acts of violence, and the need to protect the community is a legitimate sentencing consideration.[115]

The principle of proportionality, as discussed in Chapter 4, is of direct relevance to sentencing courts in setting the duration and intensity of conditions ordered under a community based sentencing disposition. Courts cannot impose an order that is longer, or attach more onerous conditions (even those directed at the offender's treatment or rehabilitation) 'if the resulting order would be disproportionate to the gravity of the offending'.[116]

Deterrence has a forward-looking, crime prevention focus and aims, as a consequence of the penalty imposed, to discourage the offender and other potential offenders from committing the same or a similar offence.[117]

Denunciation in a sentencing context is concerned with communicating 'society's condemnation of the particular offender's conduct'.[118] The sentence imposed represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.[119]

5.1.3 Principle of imprisonment as a sentence of last resort

The PSA states imprisonment must generally only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable.[120] However, these two principles do not apply to certain offences, including:

- offences involving the use of, or attempted use of, violence against another person, or that resulted in physical harm to another person;[121]
- offences of a sexual nature committed in relation to a child under 16 years;[122]
- child exploitation material offences;[123] and
- certain listed offences committed with a serious organised crime circumstance of aggravation.[124]

Instead, the PSA sets out factors in relation to which courts must have primary regard in sentencing for these offences.[125] The Act also states:

- in the case of sexual offences committed against children, the offender must serve an actual term of imprisonment unless there are exceptional circumstances;[126] and

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114 *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey, McHugh JJ).

115 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473, 475 (Mason CJ, Brennan, Dawson, Toohey JJ).

116 *Boulton v The Queen* (2014) 46 VR 308, 328 [75] (Maxwell P, Nettle, Neave Redlich and Osborn JJA). The Court went on to comment that this position was not displaced by the offender's need to consent to the making of the order, with the Court finding: 'the willingness of the offender to consent to treatment proposed as part of a CCO does not relieve the court of the obligation to ensure that the order remains within the bounds of proportionality': 328 [76].

117 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014) 251.

118 *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).

119 Ibid citing *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ).

120 *Penalties and Sentences Act 1992* (Qld) s 9(2)(a).

121 Ibid s 9(2A).

122 Ibid s 9(4)(a).

123 Ibid s 9(6A).

124 Ibid s 9(7A). See further s 161Q which defines a 'serious organised crime circumstance of aggravation'.

125 Ibid ss 9(3), (6) and (7). The approach to be taken in sentencing for an offender for an offence with a serious organised crime circumstance of aggravation is set out in Pt 9D, Div 2.

126 Ibid s 9(4)(b).

- for offences with a serious organised crime circumstance of aggravation, that a term of imprisonment must be served with a 'base component' of seven years, or the maximum penalty for the offence (whichever is less).[127]

Mandatory penalties also apply under the PSA for repeat serious child sexual offences,[128] and under other Queensland legislation for other types of offences. These provisions are discussed further at section 5.4 of this paper.

Issues and stakeholder views

During preliminary consultation, legal stakeholders raised some concerns about what was considered to be the eroding of imprisonment as a sentence of last resort as a result of legislative reform, and cautioned that this may reduce the ultimate effectiveness of any reforms intended to reduce the use of imprisonment.

In addition to section 9 of the PSA providing this principles does not apply when sentencing for certain offence types, in 2014 this principle was removed from the Act altogether.[129] It was subsequently re-inserted into the Act in 2016 following a change of Government.[130]

Earlier changes in 1997 removed section 9(3) of the PSA,[131] as it currently was, which provided:

> (3) a court may impose a sentence only if the court, after having considered all available sentencing options, is satisfied that the sentence—
>
> (a) is appropriate in all the circumstances of the case; and
>
> (b) is no more severe than is necessary to achieve the purposes for which the sentence is imposed.

Paragraph (b) of subsection (3) gave legislative expression to the common law principle of parsimony in a different form to that which still exists in Queensland under section 9(2)(a) which provides that imprisonment should only be used as a sentence of last resort. The Victorian *Sentencing Act 1991* still gives separate recognition to the principle of parsimony in much the same terms as the former Queensland provision.[132]

In his Second Reading Speech the then Attorney-General pointed to statements a report of the Litigation Reform Commission on a review of the PSA which concluded, with reference made to the matters identified in section 9(3):

> Surely that is the very essence of the exercise of judicial discretion in sentencing. Courts are not entitled to impose sentences which are considered by the court to be inappropriate in the circumstances and more severe than is necessary. This provision is meaningless and ought to be deleted.[133]

Unlike the principle of imprisonment as a sentence of last resort, this provision has not been re-instated.

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127 Ibid ss 161R(1)–(2).

128 Ibid Pt 9B.

129 Section 9(2)(a) omitted by s 34(1) *Youth Justice and Other Legislation Amendment Act 2014* (Qld), which came into effect on 28 March 2014.

130 Section 9(2)(a) reinserted by s 61(2) *Youth Justice and Other Legislation Amendment Act (No 1) 2016* (Qld) commencing 1 July 2016 (see s 2).

131 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld).

132 *Sentencing Act 1991* (Vic) s 5(3): 'Subject to subsections (2G), (2GA) and (2H), a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'. Subsections (2G), (2GA) and (2H) limit the types of orders a court can make for an offence classified as 'category 1 offence' or a 'category 2 offence' (custodial orders – but excluding ability to combine imprisonment with a community correction order) unless specific criteria are met. Category 1 offences include murder, intentionally or recklessly causing serious injury in circumstances of gross violence or if the victim was an emergency worker, custodial officer or youth justice custodial worker on duty, rape, sexual penetration of a child, aggravated home invasion, aggravated carjacking and drug trafficking and drug cultivation — large commercial quantity. Category 2 offences include: intentionally causing serious injury (other than where a category 1 offence), kidnapping, armed robbery where offender had a firearm, the victim suffered an injury, or was committed in company, home invasion, carjacking, arson causing death, culpable driving causing death and dangerous driving causing death.

133 Queensland, *Parliamentary Debate*s, Legislative Assembly, 'Second Reading Speech — Penalties and Sentences (Serious Violent Offences) Amendment Act Bill', 19 March 1997, 595 (Denver Beanland, Attorney-General and Minister for Justice).

The ALRC has described the principle of parsimony as follows:

> The principle of parsimony recognises the inherent dignity and worth of offenders by mandating concern for their welfare. It acknowledges that some sentences can have devastating consequences for both the individual offender and the wider community, and it operates to ensure that judicial officers exercise restraint when wielding the formidable power of the state to punish those who violate its laws.[134]

In the UK, the principle of imprisonment as a last resort is expressed in different terms, and provides (with some exceptions) that:

> The court *must not* pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.[135]

The NSW legislation similarly provides that a court *must not* sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.[136] The relevant section goes on to set out the following additional requirements that apply to a court when imposing a sentence of six months or less:

> (2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:
>
> (a) its reasons for deciding that no penalty other than imprisonment is appropriate, and
>
> (b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).

While a Queensland court, when imposing a sentence of imprisonment (including a suspended sentence of imprisonment), is required under section 10 of the PSA to state its reasons for the sentence and to ensure these are recorded in writing, this provision does not go so far as the NSW legislation in requiring the court, where it imposes a short sentence of imprisonment, to state its reasons for deciding that imprisonment was the only appropriate penalty.

UK commentators have noted that while the use of such provisions 'represents a common approach to ensuring that imprisonment is reserved for the most serious offences', in practice, they have proven ineffective in restricting the use of prison to the most serious offences.[137] They suggest two main reasons for this: (1) the sentencing of some offenders to prison in circumstances where the court has over-estimated the gravity of the offence and imposed a custodial sentence when a community order would have been sufficient; and (2) sentencing practices for offenders convicted of minor crimes who have lengthy records of recent, related prior offending, including 'because the court, having repeatedly imposed non-custodial sentences, sees no reasonable alternative except escalating the severity of the court's response by changing the nature of the sanction'.[138]

As a remedy for the second scenario, they suggest a new principle be considered for adoption along the following lines:

> An offender's prior convictions are normally relevant only to the quantum of punishment imposed, and may not alone justify committal to custody. Only when the offender has a very extensive record of prior convictions and the court has exhausted all non-custodial sentencing options may a term of custody be imposed to reflect this.[139]

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134 Australian Law Reform Commission, *Same Crime: Same Time: Sentencing of Federal Offenders Report 103* (2006) [5.10] (citation omitted).

135 *Criminal Justice Act 2003* (UK) s 152(2) (emphasis added).

136 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

137 Julian V Roberts, Lyndon Harris, 'Reconceptualising the Custody Threshold in England and Wales' (2017) 28 *Criminal Law Forum* 477, 478–479.

138 Ibid 492–493.

139 Ibid 495.

Under their preferred option, where a high level community order would be appropriate but for the offender's prior criminal history, the existing conditions of the community order would be extended — such as by allowing the court to impose a certain number of hours, or additional hours, of unpaid work, or to extend the period of an electronically monitored curfew (which would also be separately recorded by the court at time of sentencing).[140]

Council views

The Council has identified as a fundamental principle for the review that any changes to existing CBSOs or new sentencing options should aim to reduce Queensland's prison population, while maintaining community safety.

To the extent that the sentencing principles set out under the PSA are relevant to the use of CBSOs and other intermediate dispositions, they are considered in this paper. However, as discussed in section 4.8, consideration of potential reforms to current sentencing purposes under section 9(1) of the PSA is outside the scope of this review.

The Council invites views about whether the current principles that apply to the use of imprisonment are appropriate, and any changes that may be required to allow for the greater use of alternative sentencing orders in appropriate cases.

The application of these principles to the making of a new form of order — a CCO — is discussed in section 7.11.5 of this paper.

QUESTION 1: SENTENCING PRINCIPLES

What changes (if any) are required to existing sentencing principles under section 9 of the *Penalties and Sentences Act 1992* (Qld) to allow for the greater use of community based sentencing orders in appropriate cases (that is, where the safety of victims and other community members will not be compromised)?

5.2 Sentencing options

The types of sentencing orders a court can make when sentencing an adult offender for an offence are set out in the PSA and can be broadly classified into two distinct categories:

- non-custodial orders, which are orders that do not involve a term of imprisonment being imposed (such as a fine, good behaviour bond, community service or probation) and can be made with or without a conviction being recorded ; and
- custodial sentencing orders, that involve a term of imprisonment being imposed, but which can be ordered to be served either in a correctional services facility/prison or in the community, and which can be suspended in whole or in part.

As discussed in Chapter 1, orders can also be classified as being either 'substitutional' or 'non-substitutional', with the main difference being that substitutional sanctions, on a term of imprisonment being imposed, allow the form to be altered (e.g. such as ordering that it be served by way of intensive correction in the community), whereas non-substitutional sanctions are not alternative forms of imprisonment, but rather sentencing orders in their own right.[141]

This review is focused on intermediate sentencing orders (both custodial and non-custodial) which can be served in the community, and excludes lower level sentencing orders such as absolute discharges, release without a conviction being recorded, good behaviour bonds/recognisance orders and fines.

The key features of intermediate sentencing orders available in Australia and select international jurisdictions considered as part of this review are summarised in the document *Community based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council's website.

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140 Ibid 494.

141 Freiberg and Ross, above n 1, 108 as cited in Sentencing Advisory Council (Victoria), above n 1, 49.

The following sections of this chapter provide an overview of the legal framework that supports the use of these orders in Queensland.

5.2.1 Probation orders

A probation order can be made by a court if it convicts an offender of an offence punishable by imprisonment or a regulatory offence.[142]

When sentencing an offender for a single offence, probation may be imposed in conjunction with a fine,[143] or a term of imprisonment (provided the period imposed does not exceed 12 months and is not suspended).[144] Probation may also be ordered alongside a community service order.[145]

Where ordered on its own, rather than part of a prison plus probation order under section 92(1)(b) of the PSA, a probation order may be made with or without a conviction being recorded[146] for a maximum period of three years.[147] The minimum period of the order varies depending on whether the order is made on its own (in which case, a minimum of six months applies) or as part of a combined prison plus probation order (in which case, the order must be for a minimum of nine months).[148] Probation orders commence on the day the order is made, although if made as part of a combined imprisonment plus probation order, the requirements do not commence until the offender's release from prison.[149]

Probation is served in the community with monitoring and supervision provided by an authorised corrective services officer (that is, a Probation and Parole Officer). The person must agree to the order being made and to comply with the requirements under the order.[150] A probation order must contain mandatory/general requirements[151] and can also include additional requirements.[152]

Mandatory requirements are that the person who is subject to the order:

- not commit another offence during the period of the order;
- report to, and receiving visits from, a correctional services officer as directed by that officer;
- participate in programs or counselling as directed by the court or corrective services officer;
- tell a corrective services officer about any changes of address or employment within two business days;
- not leave or stay out of Queensland without permission; and
- comply with every reasonable direction of an authorised corrective services officer.

Additional conditions that can be imposed are:

- to submit to medical, psychiatric or psychological treatment; or
- any conditions the court considers are necessary to stop the offender committing another offence, or to behave in a way that is acceptable to the community.

142 *Penalties and Sentences Act 1992* (Qld) s 91.

143 Ibid s 45(2).

144 Ibid ss 92(1)(b), (5).

145 Ibid s 109.

146 Ibid ss 90, 91(a).

147 Ibid s 92(2)(a).

148 Ibid s 92(2).

149 Ibid ss 92(2)–(4). Sections 160B to 160D of the PSA relating to the setting of a parole release or parole eligibility date do not apply to the term of imprisonment imposed under this form of order: s 160A(6)(b).

150 Ibid s 96.

151 Ibid s 93.

152 Ibid s 94.

Failure to comply with a requirement of probation, without reasonable excuse, is an offence punishable by 10 penalty units[153] (approximately $1,306[154]).

5.2.2 Community service orders

Community service orders are orders, with or without a conviction being recorded,[155] that require an offender to perform unpaid community service for the number of hours (between 40 and 240 hours[156]) stated in the order.[157] The order must be completed within 12 months, or another time allowed by the court.[158]

During the period of the order, the person must also comply with reporting and other conditions, including:

- not to commit another offence during the period of the order;
- to report to and receive visits from a corrective services officer as directed;
- to tell a corrective services officer about any change of address or employment within two business days; and
- not to leave Queensland without permission.

The person being sentenced must agree to the order being made.[159]

As for probation orders, contravention of the conditions of a community service order is an offence.[160]

The making of a community service order is mandatory in circumstances where a court convicts an offender of certain prescribed offences committed in a public place while the offender was intoxicated.[161] These reforms were introduced in 2014,[162] as part of the Queensland Government's 'Safe Night Out Strategy'[163] and are discussed below in section 0 of this chapter.

A separate form of order, known as a 'graffiti removal order' also exists (also discussed further below in section 0 of this chapter), which is an order of up to 40 hours requiring an offender to remove graffiti, usually within 12 months, with or without a conviction being recorded.[164] The same types of requirements that apply to probation orders and community service orders also apply to people subject to a graffiti removal order.

The making of this order is mandatory where the person is convicted of causing wilful damage to property that is in a public place or visible from a public place by graffitiing it, or is in possession of an instrument that has, is or is reasonably suspected of being about to be used for graffiti (e.g. a spray can) unless the person is not able to comply with the order because of a physical, intellectual or psychiatric disability.[165]

This order is also a relatively recent addition to the PSA, with the relevant provisions having been inserted in 2013.[166]

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153 Ibid s 123(1).

154 From 1 July 2018, the value of a penalty unit is $130.55: *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2018* (Qld) s 4 amending s 3 of the *Penalties and Sentences Regulation 2015* (Qld). This will increase on 1 July 2019 to $133.45. See *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2019* (Qld) s 4.

155 *Penalties and Sentences Act 1992* (Qld) s 100.

156 Ibid 103(2)(a).

157 Ibid s 102.

158 Ibid s 103(2)(b).

159 Ibid s 106.

160 Ibid s 123(1).

161 Ibid pt 5, div 2, subdiv 2.

162 *Safe Night Out Legislation Amendment Act 2014* (Qld) s 92, which commenced on 1 December 2014.

163 Queensland Government 'Safe Night Out Strategy' (July 2014).

164 *Penalties and Sentences Act 1992* (Qld) pt 5A.

165 Ibid ss 110A(2), (3).

166 *Criminal Law and Other Legislation Amendment Act 2013* (Qld) s 47, which commenced on 27 September 2013 (2013 SL No 187).

5.2.3 Intensive correction orders

ICOs are a sentence of imprisonment of one year or less ordered to be served in the community under supervision with a conviction recorded.[167] The offender must comply with a number of conditions, including reporting twice weekly to an authorised corrective services officer, taking part in counselling and other programs as directed and performing community service.[168] The offender must agree to the order being made and to comply with the requirements under the order.[169]

If the person does not comply with the conditions of the order, a court may revoke the order and order the person to serve the remaining period of the sentence in prison.[170]

ICOs and options relating to their retention and reform, are discussed in Chapter 6 of this paper.

5.2.4 Suspended sentences of imprisonment

A suspended sentence is a term of imprisonment of five years or less suspended in full (called a wholly suspended sentence) or in part (called a partially suspended sentence) for a period of time (called the operational period) up to five years.[171] When a court makes a suspended sentence a conviction must be recorded.[172]

In Queensland, there are no conditions that attach to a suspended sentence order, other than that the person does not commit another offence punishable by imprisonment. While a suspended sentence can be combined with other forms of orders, such as probation or community service, this option is only available to courts when sentencing a person for more than one offence.[173]

If a person subject to a suspended sentence commits further offences punishable by imprisonment during the operational period of the order, the court must order the offender to serve the whole of the suspended period in prison (unless unjust to do so),[174] plus any other penalties imposed for the new offence.

Potential reforms to suspended sentences, including changes to enable courts to make conditional forms of suspended sentence orders, are discussed in Chapter 8 of this paper.

5.2.5 Imprisonment

A sentence of imprisonment is, as the name of this order suggests, an order that must be served in a correctional services facility. If a court sentences a person to three years or less in prison, and does not convict the person of a sexual or serious violent offence,[175] the court must set a parole release date at sentencing[176] (called 'court ordered parole'). This can include releasing the person directly from court on parole.[177] There are some circumstances in which this does not apply (for example, if the person has had their court ordered parole cancelled).[178]

If the sentence is for more than three years imprisonment, or for a sexual offence, or if the person has had their parole cancelled, then the court may only fix a parole eligibility date.[179] In the case of offenders declared convicted of a serious violent offence, the person's parole eligibility date is automatically set at the day after

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167 *Penalties and Sentences Act 1992* (Qld) ss 111, 112 and 113(1).

168 Ibid s 114.

169 Ibid s 117.

170 Ibid s 127(1).

171 Ibid ss 144(1), (2), (5), (6).

172 Ibid 143.

173 *R v Hood* [2005] 2 Qd R 54, 65 [40], 67 [48] (Jerrard JA, Helman J agreeing).

174 *Penalties and Sentences Act 1992* (Qld) s 147.

175 For circumstances in which a person can, or must be declared as convicted of a serious violent offence, see *Penalties and Sentences Act 1992* (Qld) pt 9A.

176 *Penalties and Sentences Act 1992* (Qld) s 160B.

177 Ibid s 160G(1).

178 Ibid s 160B(2). Another exception to this is if an offender is sentenced to a term of imprisonment under s 161R(2) of the Act (which relates to the sentencing of an offender convicted of a prescribed offence with a serious organised crime circumstance of aggravation): s 160B(5).

179 Ibid ss 160B and 160D.

the person has served 80 per cent of their sentence for the offence, or 15 years (whichever is less).[180] The Parole Board Queensland decides whether to grant the prisoner parole when they apply. If no eligibility date is set, QCS determines the date based on the relevant legislation (e.g. generally a prisoner is eligible for parole the day after reaching 50 per cent of the period of imprisonment).[181]

The operation of court ordered parole, and its potential expansion, including to sexual offences as recommended in the Parole System Review Report, is discussed in Chapter 9 of this paper.

5.2.6 Combination orders

Current legal framework

The PSA allows for a number of sentencing orders to be combined, although options for combining sentencing orders are more limited in circumstances where a court is sentencing an offender for a single offence.

The most expansive of the court's powers to combine orders under the Act is the ability for a court to impose a fine in addition to any other sentence imposed under section 45(2) of the Act.

As discussed at section 5.2.1 (above), a court may also sentence an offender to a combined imprisonment and probation order provided the term of imprisonment imposed is not more than 12 months and is not suspended in whole or in part, and to probation with a community service order.

It is not possible, under the current provisions of the Act, to combine the following orders when sentencing an offender for a single offence:

- A sentence of up to 12 months' imprisonment served by way of an ICO, with a probation order of any length (*R v M; ex parte Attorney-General* [2000] 2 Qd R 543; [1999] QCA 442).
- An order of suspended imprisonment with probation, a community service order or ICO.
- Imprisonment of longer than 12 months with probation.

Greater flexibility is provided when sentencing an offender for two or more offences. In *R v Hood*,[182] the Queensland Court of Appeal reconsidered previous authorities, determining that in circumstances where an offender is sentenced for more than one offence, certain orders can be made together, with the primary consideration being whether the orders are compatible or rather not inconsistent with each other. For example:

- concurrent sentences of up to 12 months' actual imprisonment at the same time as orders for immediate probation (*Sysel v Dinon* [2003] 1 Qd R 212; [2002] QCA 149).
- a wholly suspended sentence at the same time as probation for other offences.

Some combinations of orders are still not permitted in such circumstances.

Permitted and prohibited order combinations as these apply to the use of ICOs and suspended sentences in Queensland are discussed in sections 6.1.4 and 8.2 of this paper.

Current use of combination orders in Queensland

The use of combination orders, while quite common, usually involves the same penalty type being combined with the same penalty type (for example, imprisonment with imprisonment, or a wholly suspended sentence with a wholly suspended sentence).

Common sentence combinations in the higher courts over the period 2005–06 to 2016–17, and excluding orders involving the same type of penalty being imposed or an outcome of 'convicted, not further punished', were:

- community service with probation (50.1% of community service orders were made alongside probation at the same court event; and 19.2% of probation orders were combined with community service);

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180 *Corrective Services Act 2006* (Qld) s 182.

181 Ibid s 184.

182 *R v Hood* [2005] 2 Qd R 54.

- a recognisance order/good behaviour bond with a partially or wholly suspended sentences (26.8% of recognisance orders combined with a partially suspended sentence orders and 17.2% combined with wholly suspended sentences; 7.2% of partially suspended sentences were combined with a recognisance order, and 4.6% of wholly suspended sentences);
- recognisance order with probation (18.0% of recognisances, and 4.7% of probation orders);
- probation with a partially or wholly suspended sentence (15.3% of probation orders were combined with a wholly suspended sentences, and 14.4% with a partially suspended sentence; 15.5% of wholly suspended sentences were combined with probation, and 14.9% of partially suspended sentences);
- a community service order with a wholly suspended sentence (7.1% of community service orders; 2.8% of wholly suspended sentences); and
- partially suspended sentences with imprisonment (27.8% of partially suspended sentences, and 8.3% of prison sentences).

In the Magistrates Courts, data over the same period shows different, although some consistent trends, with the most common combinations being:

- community service with probation (26.2% of community service orders were combined with probation, and 10.6% of probation orders were made alongside a community service order);
- a partially suspended sentence with imprisonment (20.2% of partially suspended sentences, but representing only 1.3% of prison sentences);
- a partially suspended sentence or wholly suspended sentence with probation (8.5% of partially suspended sentences and 9.1% of wholly suspended sentences were made in combination with a probation order; of probation orders, 0.4% were made alongside a partially suspended sentence, and 5.0% a wholly suspended sentence);
- a partially suspended sentence with a wholly suspended sentence (5.6% of partially suspended sentences, but only 0.5% of wholly suspended sentences); and
- imprisonment and suspended sentences were commonly ordered alongside a fine (20.3% of prison sentences, 22.1% of partially suspended sentences, and 29.0% of wholly suspended sentences).

Relevance to the current review

The ability of courts in sentencing to combine orders is of direct relevance to the current review and the Council's consideration of the best mix of CBSOs for Queensland. This is because, as has been recognised by other sentencing councils and law reform bodies tasked with undertaking similar reviews, the purposes and functions of some sentencing orders may be able to be met through the use of combination orders.[183]

As an example, any changes that might allow courts in Queensland to combine a suspended sentence with probation, community service or a new form of community order, such as a CCO, when sentencing an offender for a single offence could raise questions about the value of retaining ICOs. This is because a combined order, as for an ICO, would allow for a term of imprisonment to be imposed (in this case, suspended in whole or in part, in contrast to an ICO which is served by way of intensive correction in the community), and for conditions to be made for both punitive and rehabilitative purposes. The key differences between these two forms of orders are:

- the maximum length of the orders: limited to 12 months for an ICO, but is three years for probation orders, and five years for a suspended sentence;
- a court's powers on breach: unlike a suspended sentence, which involves the whole or part of the prison sentence imposed being suspended, a person who is subject to an ICO is taken to be serving their prison sentence in the community. This means on breach, the person is only liable to serve the period remaining on the sentence at the time of the breach;
- how the order is structured: to achieve the same conditions as an ICO, a court would need to combine elements of supervision, program participation, community service and potentially a

183 In Tasmania, for example, the ability of a court to combine imprisonment with a new community correction order (CCO) was used as a basis for the Tasmanian Sentencing Council to argue that there was no longer a need to retain partially suspended sentences in that jurisdiction: Sentencing Advisory Council (Tasmania), above n 67, x, xviii (Recommendations 47 and 48).

residential facility requirement in the community order or orders made, compared with ICOs where these conditions are already packaged within a single form of order.

The Council has heard from some legal stakeholders that the focus should be on providing courts with as many sentencing options as possible, and that ICOs, while limited in use, should be retained for the small number of cases where this order is appropriate. Potential reforms to ICOs are discussed in Chapter 6 of this options paper. Options to introduce a conditional form of suspended sentence are explored in Chapter 8.

5.3 Sentencing process

Sentencing in Queensland, as in other Australian states and territories, is not a mechanical or mathematical exercise.[184] Queensland courts sentence by applying an 'instinctive synthesis' approach:

> the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which … balances many different and conflicting features.[185]

The High Court, in considering the proper approach to sentencing, has recognised 'there is no single correct sentence' and sentencing judges are to be allowed as much flexibility in sentencing as is in keeping with consistency of approach and applicable legislation.[186]

The Terms of Reference for this review expressly recognise the benefits of having flexible sentencing options, and the importance of judicial discretion in supporting sentences to be imposed that are consistent with the principles and purposes of sentencing set out under the *Penalties and Sentences Act 1992* (Qld).

Unless legislation fixes a mandatory penalty (as it does for certain offences, discussed below at 5.4), 'the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances'.[187] Sentencing courts have a wide discretion yet must take into account all relevant considerations (and only relevant considerations) including legislation and case law.[188]

The discretion can 'miscarry' when the sentence is clearly unjust — either being 'manifestly excessive' or 'manifestly inadequate'.[189] Such sentences, which an appeal court can set aside, fall 'outside the range of sentences which could have been imposed if proper principles had been applied'.[190]

Consistency in sentencing requires like cases to be treated alike and different cases, differently.[191] Queensland's Court of Appeal has stated that 'community confidence in the sentencing process depends … on a wide variety of judges imposing sentences which are consistent, and which are formulated by reference to relevant discretionary factors and by having regard to the relevant legislation, comparable sentences, and the guidance of appellate court decisions'.[192]

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184 *Markarian v The Queen* (2005) 228 CLR 357, 372–375 [30]–[39] (Gleeson CJ, Gummow, Hayne and Callinan JJ) as cited in *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 46 [45] (Kiefel CJ, Bell and Keane JJ). See also *Barbaro v The Queen* (2014) 253 CLR 58, 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

185 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 39–40 [4]–[7] (Kiefel CJ, Bell and Keane JJ) citing *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ).

186 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

187 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).

188 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ) and *Barbaro v The Queen* (2014) 253 CLR 58, 70 [25] (French CJ, Hayne, Kiefel and Bell JJ).

189 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).

190 *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26]–[27] (French CJ, Hayne, Kiefel and Bell JJ).

191 *R v Pham* (2015) 256 CLR 550, 559 (French CJ, Keane and Nettle JJ), citing *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ), 608 [65] (Gaudron, Gummow and Hayne JJ) and *Hili v The Queen* (2010) 242 CLR 520, 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).

192 *R v Jones* [2011] QCA 147 (24 June 2011) 8 [27] (Daubney J, Muir and White JJA agreeing).

The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.[193]

However, if cases show a range of sentences for similar offending that are 'demonstrably contrary to principle', they do not have to be followed in future.[194]

'Consistency' does not require exact replication. The ultimate sentencing discretion lies somewhere between a non-punishment (like an unconditional discharge) and the maximum penalty set in the legislation.[195] The so-called range is 'merely a summary of the effect of a series of previous decisions'; it reflects parliament's recognition that 'the range of circumstances surrounding each offence will also be great'.[196] The history of a range of sentences for similar offending does not guarantee the range, including its upper and lower limits, is correct.[197] Previous sentences have been described as a guide only,[198] and stating them as a 'range' does not establish a sentencing pattern.[199] It is 'consistency in the application of relevant legal principles' that is sought, 'not numerical equivalence'.[200] Of more use are cases where the Court of Appeal has 'laid down some relevant principle, delineated the yardsticks for particular offending, or re-sentenced'.[201]

Recording sentences for comparison is only useful if the 'unifying principles' revealed by those sentences are explained. The reasons why the sentences were fixed as they were must be clear[202] and it is important to properly characterise the offending conduct.[203]

The introduction of new forms of sentencing orders can make achieving consistency of approach even more challenging for sentencing courts. In discussing the then recently introduced CCOs in Victoria, the Victorian Court of Appeal in *Boulton v The Queen* identified this challenge, noting:

> The potential for inconsistency which derives from this complexity of purpose and from the breadth of relevant factual considerations is particularly acute when a radically new sentencing option such as the CCO becomes available. The addition of CCOs makes the sentencing task, in this sense, even more complex.[204]

In this case, a guideline judgment was issued as a means of giving courts guidance in the use of this new order (which at that time, did not contain any limits on its maximum duration, other than the maximum penalty for the offence being sentenced). Unlike other sentencing orders, there was found to be 'no sufficient body of sentencing practice' capable of providing a framework to promote consistency of approach.[205] The failure of sentencing courts to provide sufficient reasons in setting the duration of the orders also meant the bases upon which this decision was being reached lacked transparency.[206]

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193 *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

194 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 48 [50] (Kiefel CJ, Bell and Keane JJ).

195 *R v Streatfield* (1991) 53 A Crim R 320, 325 (Thomas J, Cooper J agreeing).

196 *R v Ryan and Vosmaer*; *Ex parte Attorney-General* [1989] 1 Qd R 188, 192–193 (Dowsett J).

197 *Hili v The Queen* (2010) 242 CLR 520, 537 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28, 98 [303]–[305] (Simpson J).

198 *R v Hoerler* (2004) 147 A Crim R 520, 532 [49] (Spigelman CJ), citing *R v Whyte* (2002) 55 NSWLR 252 at [168]–[189] and *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

199 *R v Hoerler* (2004) 147 A Crim R 520, 531 [47] (Spigelman CJ). See also *R v Ross* [1996] QCA 411 (25 October 1996) 3, 5 (Moynihan, Mackenzie and Cullinane JJ), citing *R v Auberson* [1996] QCA 321 (3 September 1996) 7 (Fitzgerald P and de Jersey J, Pincus JA agreeing) and *R v Walsh* (Unreported, Court of Criminal Appeal Queensland, Connolly, Williams and Ambrose J, 12 June 1986). See also *Green v The Queen* [1999] NSWCCA 97 (18 May 1999) [24] (Barr J; Greg James J and Carruthers AJ agreeing).

200 *Barbaro v The Queen* (2014) 253 CLR 58, 72 [34], 74 [40] (French CJ, Hayne, Kiefel and Bell JJ), citing *Hili v The Queen* (2010) 242 CLR 520, 535 [48]–[49] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).

201 *R v Bush (No 2)* [2018] QCA 46 (23 March 2018) 12 [76]–[77] (Sofronoff P, Morrison JA and Douglas J).

202 *Wong v The Queen* (2001) 207 CLR 584, 606 [59] as reproduced in *Hili v The Queen* (2010) 242 CLR 520, 537 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

203 *R v Bush (No 2)* [2018] QCA 46 (23 March 2018), 12 [77] (Sofronoff P, Morrison JA and Douglas J).

204 *Boulton v The Queen* (2014) 46 VR 308, 319 [36] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA)

205 Ibid [43].

206 Ibid [44]. This point was raised in submissions made by the Director of Public Prosecutions and by Victoria Legal Aid and was accepted by the Court.

Consistency of approach in the use of new options was recognised by the Victorian Court of Appeal as desirable for two reasons:

> First, the promotion of consistency of approach is necessary to avoid the perception of injustice which may result from differences in the treatment of individual cases. Secondly, there is a need to promote public understanding of, and confidence in, the use of the new sentencing option by promoting the principled application of it.[207]

The avoidance of 'unjustifiable discrepancy in sentencing' has been recognised by the High Court as 'a matter of abiding importance to the administration of justice and to the community', so that public confidence in the administration of justice is not eroded.[208]

5.4 Mandatory sentencing

5.4.1 What is a mandatory sentence?

A mandatory sentence is a fixed penalty prescribed by Parliament for committing a criminal offence.[209] In Queensland, mandatory sentencing can take various forms, such as mandating non-parole periods, prescribing maximum and minimum penalties to be imposed, driving disqualification periods, directing that community service must be served as well as any punishment and mandating the circumstances where a court can set only a parole release or eligibility date. Current offences and mandatory penalties to which these apply are summarised in Appendix 4.

The ALRC has identified, '[m]andatory sentencing can take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing'.[210]

The Parole System Review Report considered mandatory non-parole periods that apply in sentencing in Queensland under Part 9A of the *Penalties and Sentences Act* (commonly referred to as the 'serious violent offence (SVO)' scheme) and recommended that 'where a sentence is to be imposed for an offence that presently carried a mandatory non-parole period, the sentencing judge should have the discretion to depart from that mandatory period' (Recommendation 7).[211]

This recommendation was not supported by the Queensland Government at that point in time on the basis that 'the potential risk to community safety by implementing Recommendation 7 outweighs the benefits it could bring to the new parole system'.[212]

The Council has subsequently raised concerns about the impact of the SVO scheme on sentencing practices for manslaughter where the death of a child has been caused, which are outlined in its *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report* released by the Council last year.[213]

While a review of mandatory sentences was not specifically requested under the current Terms of Reference, mandatory provisions are relevant in the context of the Council's task of reviewing sentencing and parole legislation 'to identify any anomalies in sentencing or parole laws that create inconsistency or constrain the available sentencing options available to a court and advise how these anomalies could be removed or minimised'.[214]

In some instances, mandatory sentences can constrain available sentencing options, lead to anomalies and unintended consequences in the sentencing process and can cause inconsistency in sentencing.

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207 Ibid [37] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

208 *Lowe v The Queen* (1984) 154 CLR 606, 610–611 (Mason J).

209 Australian Law Reform Commission, above n 134, 538-9 [21.54] (citations omitted).

210 Ibid.

211 Queensland Parole System Review, above n 9.

212 Queensland Government, above n 10, 3.

213 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child – Final Report* (2018).

214 Terms of Reference, 2 (Appendix 1).

For example, section 91 of the PSA states that a court can make a probation order if it convicts an offender of an offence punishable by imprisonment or a regulatory offence. In some cases, there has been confusion regarding whether specific offences exclude probation as a sentencing option or not.[215]

The mandatory sentences that apply under the SVO regime, mandatory cumulative imprisonment for prescribed offences committed on a parole order and specific offences of failing to stop and weapon offences are examined in sections 5.4.3 and 0 below. Mandatory community service and graffiti orders are also discussed as examples of mandatory sentencing under the PSA which require specific orders to be made for prescribed offences.

5.4.2 Arguments for and against mandatory sentencing

Arguments in favour of mandatory sentencing include that mandatory sentences:

- promote sentencing consistency and increase transparency in sentencing;
- provide more certainty about the sentencing outcome as judicial officers generally have very limited or no ability to depart from the mandatory sentence;
- deter individuals from offending; and
- where the mandatory penalty is imprisonment, reduce repeat offending due to the person being imprisoned.[216]

Arguments against mandatory sentencing include that mandatory sentences:

- increase the severity of sentences imposed, with no real benefit;
- do not allow the court to take into account the individual circumstances of the case, which can result in injustice;
- give discretion to police and prosecuting authorities to decide which charge to apply, which unlike the sentencing process, is less transparent and open to external scrutiny – such as through the appeals process;
- are often not effective in deterring offenders from offending;
- can lead to inconsistencies in sentences;
- can disproportionately affect particular groups in society; and
- contravene sentencing principles and international human rights standards.[217]

The former Queensland Sentencing Advisory Council undertook a review of minimum standard non-parole periods in 2011 and noted:

> There are concerns that mandatory sentencing schemes may also raise constitutional issues. In particular whether 'the scope and severity of [such schemes are] such that the sentencing discretion effectively [has] passed from the judiciary to the legislative arm of government'.[218]

The ALRC has recommended against the imposition of mandatory sentences in relation to federal offenders,[219] and recommended against mandatory imprisonment for federal and state offenders which has a disproportionate impact on Aboriginal and Torres Strait Islander people.[220]

The ALRC has cautioned:

> Prescribing mandatory terms of imprisonment for a federal offence is generally incompatible with sound practice and principle in this area. Mandatory sentencing has the potential to offend against the principles

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215 For a discussions of the operation of this provision in the context of mandatory sentencing provisions, see 'Evasion offence and the PSA framework' at 5.4.4 of this paper.

216 Australian Law Reform Commission, above n 134, 539–540 [21.58] (citations omitted).

217 Ibid 540 [21.59].

218 Queensland Sentencing Advisory Council, *Minimum Standard Non-Parole Periods: Final Report* (2011): The former Sentencing Advisory Council recommended that should a standard non-parole period scheme be introduced in Queensland, a defined percentage standard non-parole period scheme, rather than a defined term standard non-parole period scheme, should be introduced.

219 Australian Law Reform Commission, above n 134, 49, Recommendation 21–3.

220 Australian Law Reform Commission, above n 26, 15, Recommendation 8–1.

> of proportionality, parsimony and individualised justice. In particular, the ALRC considers that the judiciary should retain its traditional sentencing discretion to enable justice to be done in individual cases.
>
> While the imposition of substantial penalties may be appropriate in relation to offences like people smuggling, it is important that the legislature not prejudge the appropriate minimum penalty in legislation without regard to the facts of individual cases.
>
> The maintenance of individualised justice and broad judicial discretion are essential attributes of our criminal justice system, outweighing the potential deterrent effect that mandatory sentencing might have. The ALRC thus recommends that the Australian Government take steps to ensure that federal criminal offence provisions do not prescribe mandatory minimum terms of imprisonment. [221]

The Law Council of Australia, in considering mandatory sentencing, has similarly raised concerns that:

> …[t]here is a lack of convincing evidence to suggest that the justifications often given for mandatory sentences – retribution, effective deterrence, incapacitation, denunciation and consistency – achieve the set aim. Instead, mandatory sentencing regimes can produce unjust results with significant economic and social costs without a clear and directly attributable corresponding benefit in crime reduction. Further, mandatory sentencing scheme undermine community confidence in judges to administer justice and deliver appropriate sentencing outcomes. This is not supported by evidence which shows that when members of the public are fully informed about the particular circumstances of the case, they support judges' sentences as appropriate.[222]

5.4.3 Serious Violent Offence (SVO) scheme

Why the regime was introduced

The mandatory non-parole period that applies to a serious violent offence (SVO) as listed in Schedule 1 of the PSA in certain defined circumstances, was introduced in 1997 with an intention to ensure sentences reflected community expectations.[223] The Attorney-General explained that the approach was based upon 'a reasonable community expectation that the sentence imposed will reflect the true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it'.[224]

Under the SVO regime, there is no discretion to reduce the non-parole period if the sentence imposed is 10 years or more for an offence listed in Schedule 1. The offender must serve 80 per cent or 15 years of the sentence (whichever is less) before applying for parole. There is a discretion to make a SVO declaration if the sentence is less than 10 years. However, the PSA does not provide guidance on what factors should be considered by a judge in relation to exercising the discretion to make a declaration.[225] The exception to this is in the case of an offence involving the use or attempted use of violence against a child under 12 years, or that caused the death of a child under 12 years, where section 161B(5) provides the sentencing court must treat the age of the child as an aggravating factor.

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221 Australian Law Reform Commission, above n 134, 541–542 [21.63]–[21.65] (citations omitted).

222 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) 46 [192] (citations omitted).

223 Queensland Parole System Review, above n 9, 103.

224 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice) cited in Queensland Parole System Review, above n 9, 103.

225 The Court of Appeal has provided guidance: *R v McDougall and Collas* [2007] 2 Qd R 87; *R v Smith* [2019] QCA 33 (1 March 2019); *R v Bojovic* [2000] 2 Qd R 183; *R v Collins* [2000] 1 Qd R 45; *R v Eveleigh* [2003] 1 Qd R 398.

Unintended consequences

A review of cases where an offender has been declared to be convicted of a SVO indicates that head sentences are being reduced to take into account a plea of guilty and other matters in mitigation.[226] For example, in *R v Castner*[227] the Court of Appeal observed:

> The difficulty for the applicant is that her Honour considered both the applicant's rehabilitation and remorse in her reasons and indeed considered that a sentence in the realm of 12 to 13 years' imprisonment could have been appropriate if it were not for the mitigating circumstances. Her Honour accepted the mitigating circumstances and moderated the sentence imposed to ten years.[228]

Reducing a head sentence to take into account mitigating factors that cannot otherwise be taken into account in the setting of a parole eligibility date due to the mandatory nature of these provisions can result in a head sentence being imposed which does not reflect the true criminality of the offending. The Council has previously commented on the potential impact of SVO's in respect of child manslaughter and identified this as an important area for future investigation.[229] The Council considers the operation of the SVO regime merits a separate review and for this reason, does not intend to canvass options in relation to its operation as part of the current review.

A mandatory non-parole period can also have consequences for the community as offenders subject to these regimes will spend less of their sentence being supervised in the community and therefore have less time to receive supervision while they reintegrate into the community.[230]

Not only are SVO-declared offenders eligible to receive less time supervised as they reintegrate into the community after serving a substantial period in custody, the corrective services policy does not permit offenders sentenced to life imprisonment or an SVO to transition to low security.[231] The Parole System Review Report observed this can be counterproductive 'as nearly all prisoners will be discharged to the community at some point' and that '[i]t is important that prisoners are managed through a careful program of reintegration'.[232]

This recommendation was not accepted by the Queensland Government which cited safety concerns and the previous escape from a low security facility of a convicted murderer.[233] The most recent Annual Report released by QCS notes there were seven escapes from low security prisons in the financial year 2017–2018.[234]

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226 For example, a sentencing court at first instance reduced the sentence from 12-13 years imprisonment to 10 years imprisonment: *R v Castner* [2018] QCA 265 (12 October 2018) 5 [15] (Brown J); a sentencing court considered the range was from eight to 10 years imprisonment and imposed eight years imprisonment taking into account the SVO: in *R v McGuire* [2017] QCA 250 (27 October 2017) 14 [82] (Boddice J); a sentencing court reduced the sentence from 16 years imprisonment to 14 years imprisonment to take into account the plea of guilty: *R v George* [2001] QCA 135 (6 April 2001), 9 (White J).

227 *R v Castner* [2018] QCA 265 (12 October 2018).

228 Ibid, 5 [15] (Brown J).

229 Queensland Sentencing Advisory Council, above n 213, xxxiv.

230 On this point, see *R v Clark* [2016] QCA 173 (24 June 2016), 3-4 [6] (McMurdo P). The 2013 amendments referred to have since been repealed and the 80% non-parole period no longer applies to offenders sentenced to a term of imprisonment for trafficking. However, the offence is still listed in Schedule 1 of the *Penalties and Sentences Act 1992* (Qld).

231 Queensland Parole System Review, above n 9, 184 [916].

232 Ibid 184 [919].

233 Queensland Government, above n 7, 11 [58].

234 Queensland Corrective Services, *Annual Report: 2017–18* (2018) 43, Note 2: "There were seven escapes from low security correctional facilities in 2017–18. Low security correctional centres do not have razor wire security fences like high security facilities. Escape risks from low security facilities are managed through a thorough assessment of prisoners to determine suitability before transfer to these facilities. QCS continues to enforce strict requirements to be assessed as suitable for low custody. Prisoners who escape from lawful custody face additional criminal sanctions, such as being charged with the offence of escape from lawful custody, and are returned to a high security facility for the remainder of their sentence.'

5.4.4 Mandatory penalties

Cumulative order of imprisonment and the PSA framework

Similarly to head sentence reductions where courts declare SVOs, there has been criticism that section 156A of the PSA is producing a similar anomaly. Section 156A of the PSA operates where an offender is convicted of an offence (or of counselling or procuring the commission of, or attempting or conspiring to commit, an offence) against a provision mentioned in Schedule 1 of the PSA. If the offence is committed while the prisoner is serving a term of imprisonment[235] the sentence imposed must be served cumulatively with any other term of imprisonment.

Whilst the sentence must be cumulative, under section 9 of the PSA a court 'must' have regard to 'sentences already imposed on the offender that have not been served' and 'sentences that the offender is liable to serve because of the revocation of orders made'.[236]

The Court of Appeal has observed that the provision has 'the effect of distorting standard sentencing tariffs by encouraging lower head sentences with a view to avoiding their stringent consequences'.[237] However, the need to avoid a crushing sentence is important to both the offender and the community, as discussed in *R v Hill*:[238]

> …An excessive sentence which is "crushing" upon the applicant risks his ceasing attempts to improve his education, address the underlying causes of his criminality and generally rehabilitate himself. It risks producing a prisoner who, upon his release, poses a greater danger to the community than a prisoner who is not completely institutionalised.[239]

Cases dealing with section 156A in the context of court ordered parole and the effect of its operation with other provisions regarding parole cancellation are discussed in section 9.6.4.

Evasion offence and the PSA framework

If an offender is convicted of an evasion offence under section 754 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) the mandatory minimum penalty which applies is 50 penalty units (which currently equates to $6,527)[240] or 50 days' imprisonment. This can constrain sentencing discretion.

First, the provision departs from the general sentencing principle that if an offence does not result in physical harm to another person, a period of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable.[241]

The only available option for an offender to remain in the community is to impose the mandatory minimum fine. Where a fine is imposed, a court 'must' take into account the financial circumstances of the offender and the nature of the burden that the payment of the fine will be on the offender.[242] A court cannot give practical consideration to this when imposing a fine for a section 754 offence as it is constrained by imposing the mandatory minimum amount. In addition, there can be serious flow-on consequences for an offender for non-payment, including imprisonment.[243]

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235 Other circumstances include being released on post-prison community based release; a leave of absence from a term of imprisonment or at large after escaping: *Penalties and Sentences Act 1992* (Qld) s 156A(1)(b).

236 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(l) and (m).

237 *R v Moore* (2002) 128 A Crim R 527, 527 [2] (McPherson JA).

238 *R v Hill* [2017] QCA 177 (22 August 2017).

239 Ibid 9–10 [47] (Applegarth J).

240 *Penalties and Sentences (Penalties Unit Value) Amendment Regulation 2018* (Qld): A penalty unit is currently $130.55 per unit. 50 x 130.55 = $6,527 (rounded down). From 1 July 2019, this will increase to $133.45.

241 *Penalties and Sentences Act 1992* (Qld) s 9(2).

242 Ibid s 48.

243 If the fine is referred to the State Penalties Enforcement Registry (SPER) under the *State Penalties Enforcement Act 1999* (Qld) (SPEA). Under SPEA, there can be consequences for non-payment such as: suspension of the person's driver licence (ss 104–108); seizure of, or imposing a charge on a person's property (s 63(2); seizure or immobilising of a person's vehicles (ss 108A–108B); or enforcement by imprisonment (s 119).

Therefore by imposing a fine in an amount for which a court has no discretion to reduce, an offender may be subject to severe consequences or imprisoned without any intervention by the sentencing court as a consequence of poverty, despite the court considering that imprisonment was not warranted when the fine was imposed.

Secondly, a review of Supreme and District Court decisions illustrates there is uncertainty about the intended interaction of this provision with other general provisions that exist under the PSA. Under section 91 of the PSA, a court can make a probation order 'if a court convicts an offender of an offence punishable by imprisonment'. As an offence under section 754 of the PPRA is punishable by either a fine or imprisonment, a number of District Court decisions have ruled that probation is an available sentencing option.[244] In contrast, one District Court decision has ruled that it is not.[245]

The different interpretations about whether section 91 of the PSA applies when sentencing an offender under section 754 of the PPRA means that Magistrates (who deal most often with this offence[246]) have conflicting decisions on the sentencing options available to them when sentencing for this offence under the PPRA.[247] This uncertainty can lead to inconsistent sentences and anomalies.

A review of data for evasion offence shows:

- Between 2006–07 and 2017–18 there were 8,171 sentenced cases involving an evasion offence;
- Of these, 1,574 offenders identified as Aboriginal and Torres Strait Islander (19.4%) and 6,528 identified as non-Indigenous (80.6%);[248]
- Only 1,439 cases reported an evasion offence as the MSO, indicating that the offence is more often sentenced with another offence which receives a higher penalty;
- The number of evasion offences sentenced each financial year has increased almost every year, increasing by 331 per cent from 314 sentenced offences in 2006–07 to 1,352 in 2017–18 (and peaking at 1,410 in 2016-17).

Figure 5-1 shows that for offenders sentenced for an evasion offence as the MSO committed on or after 17 October 2013 (n=852), 45.9 per cent received a fine, 29.1 per cent received an imprisonment sentence, 15.7 per cent received probation and 5.8 per cent received community service.

244 The most recent decision is *Campbell v Galea* [2019] QDC 53 (18 April 2019). See also *Commissioner of Police Service v Magistrate Spencer and Ors* [2014] 2 Qd R 23; *Forbes v Jingle* [2014] QDC 204 (17 September 2014); *Cronin v Commissioner of Police* [2016] QDC 63 (24 March 2016); *Sbresni v Commissioner of Police* [2016] QDC 18 (29 January 2016); *Skinner v The Commissioner of Police* [2016] QDC 138 (10 June 2016).

245 *Doig v The Commissioner of Police* [2016] QDC 320 (9 December 2016).

246 Data collected shows that where the evasion offence is the Most Serious Offence (MSO) Magistrates Courts will sentence 99.9 per cent of all offenders. Where the evasion offence is not the MSO, Magistrates Courts will sentence 91.2 per cent, the District Court will sentence 7.4 per cent and the Supreme Court will sentence 1.3 per cent together with other offences receiving a more serious sentence.

247 As discussed at 26 [58] by Long SC, DCJ in *Campbell v Galea* [2019] QDC 53 (18 April 2019).

248 In a further 69 cases, the status was 'unknown' so they have not been included.

Figure 5-1: Penalty type for evasion offence (MSO), where offence committed on or after 17 October 2013[249]

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: 'Disqualification of driver's licence' appears when that was the most serious sentence imposed reported in the data for the offence. If an offender received another sentence order and a driving disqualification, only the sentence order will be reported in the figure.

Weapon offences and the PSA framework

Mandatory minimum penalties for some weapons offences were introduced in 2012.[250] Similar to the evasion offence, the District Court in interpreting these provisions in the context of the current provisions of the PSA have determined that a community based order is available for offences which attract mandatory imprisonment under the *Weapons Act 1990* (Qld).[251]

A review of the data for weapons offences which are subject to the mandatory minimum imprisonment regime,[252] illustrate the penalty types which are being imposed where a weapons offence is the MSO.

There have only been 55 sentences where the offence was an MSO. Figure 5-2 shows that 79.6 per cent (n=43) were sentenced to imprisonment, 7.4 per cent (n=4) received probation and 5.6 per cent (n=3) received a fine.

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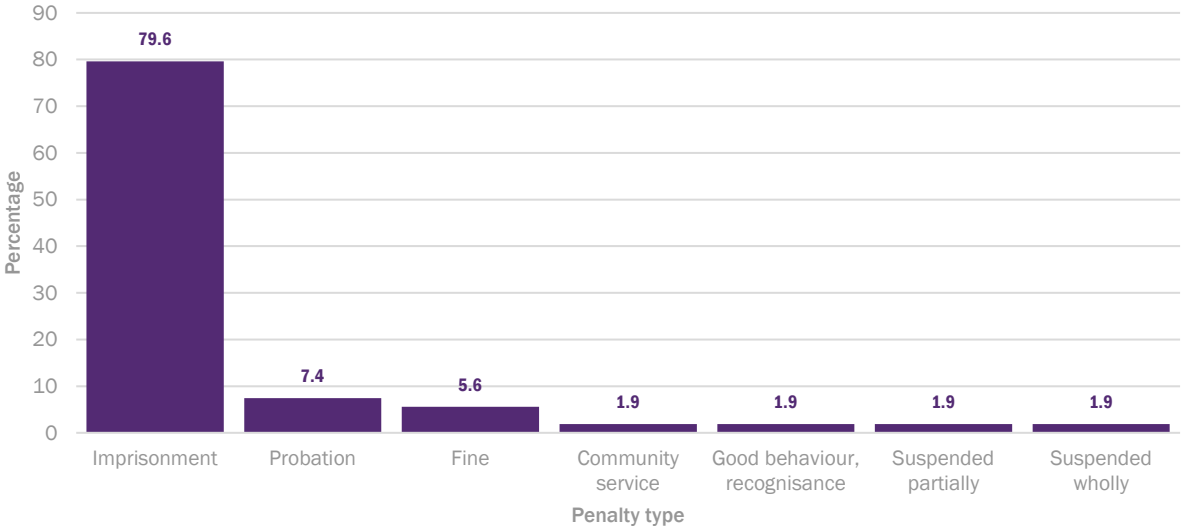
249 These offences period of 17 October 2013 is used because this is when the offence wording of section 754 of the *Penalties and Sentence Act 1992* (Qld) was amended to prescribe the mandatory 'minimum of 50 penalty units or 50 days imprisonment served wholly in a corrective services facility'. See *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 64.

250 *Weapons and Other Legislation Amendment Act 2012* (Qld).

251 *R v Ham & Anor* [2016] QDC 255 (14 October 2016) 5 [16] (Chowdhury DCJ): 'the minimum penalty prescribed by s 50B(1)(e) [of the *Weapons Act 1990*] does not exclude the operation of ss. 91 and 101 *Penalties and Sentences Act 1992.* By extension the same ruling applied to the minimum penalties provided by s. 50(1)(d) *Weapons Act 1990*'. See Appendix 4 for a list of offences and mandatory minimum penalties.

252 *Weapons Act 1990* (Qld) ss 50(1)(d); 50(1)(e); 50B(1)(e); 65(1)(c).

Figure 5-2: Penalty type for mandatory minimum weapon offences (MSO) (where offence occurred on or after 10 December 2012)[253]



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

Mandatory community service and graffiti orders and the PSA framework

Mandatory community service orders were introduced in the PSA in 2014.[254] A sentencing court must make a community service order for an offender (whether or not it also makes another order) for a 'prescribed offence' (affray, grievous bodily harm, wounding, common assault, certain types of serious assault, and assaulting or obstructing police) committed with a circumstance of aggravation (committed in a public place while adversely affected by an intoxicating substance). This does not apply if the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with a community service order.

If the person is also imprisoned, the community service order is suspended until their release and extended by the period of time detained.[255] Unlike all other community based orders in the PSA (except graffiti removal orders), an offender is not required to consent to the making of the order under the mandatory community based order regime.[256] If the offender does not comply and the order is revoked and the offender resentenced,[257] it is mandatory for the court to record a conviction.[258]

Graffiti removal orders, discussed earlier in this chapter at section 5.2.2, are a separate form of mandatory order which mimic community service and must be made for graffiti offences (wilful damage by graffiti and possessing a graffiti instrument).[259] There are similar provisions requiring imposition of the order irrespective of whether any other order is made, suspension and extension in the case of imprisonment and the discretion to not make the order due to inability to comply because of a disability.

253 This is the date of commencement of the mandatory minimum penalties introduced in the *Weapons and Other Legislation Amendment Act 2012* (Qld).

254 Introduced through the *Safe Night Out Legislation Amendment Act 2014* (Qld). See sections 108A-D and 120A of the *Penalties and Sentences Act 1992* (Qld).

255 *Penalties and Sentences Act 1992* (Qld) s 108D.

256 Ibid s 106(2).

257 Ibid s 121.

258 Ibid s 12(6).

259 See Ibid ss 110A–I and 120A.

For either of these orders, if a court determines that, having considered the relevant sentencing principles[260] and for reasons other than a physical, intellectual or psychiatric disability,[261] a community based order is not appropriate, it must still make the community service or graffiti order. For example, the offence may not otherwise warrant community service, the offender may have served time on pre-sentence custody which is in itself a just sentence for the offending, or the offender may not be a resident of Queensland or have other personal circumstances which would make it difficult to comply with an order and supervision.[262]

5.4.5 Stakeholder views

In preliminary consultation, legal stakeholders generally agreed that mandatory sentencing was seen as limiting the proper exercise of the sentencing discretion and that judicial officers cannot give effect to commonly recognised common law sentencing principles or to significant cooperation by an offender with law enforcement agencies.

Concern was raised that mandatory community based orders were problematic and disproportionately affected people in public spaces who regularly come into contact with police. Another stakeholder suggested that mandatory minimum penalties for offences such as murder do not provide an incentive for an offender to plead guilty. It was further suggested that should the mandatory sentence for murder be removed, this might mean partial defences (such as 304 (killing on provocation), 304A (diminished responsibility) and 304B (Killing for preservation in an abusive domestic relationship)) would not be needed.

5.4.6 Alternatives to mandatory imprisonment

In its 2014 Mandatory Sentencing Discussion Paper, the Law Council of Australia identified the following alternatives to mandatory sentencing:[263]

- Justice reinvestment – diverting funds from incarceration to community based programs and services that address the underlying causes of crime.
- Responding to underlying social problems and averting crime.
- Applying standard non-parole periods which still enable judicial discretion.
- Increasing maximum penalties for particular offences to reflect community concern regarding the seriousness of the offence.

5.4.7 The Council's position on mandatory sentences

The Council's position is that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the Act, or in reducing recidivism.[264] This is because, as a matter of principle, it assumes that every offence and every offender are the same which is patently not the case. The Council recommends a review of all the mandatory sentencing provisions presently in the law of Queensland and as set out in this Chapter and Appendix 4.

We also invite feedback on whether current mandatory provisions create certainty and consistency in their application, and what reforms should be considered.

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260 Ibid s 9.

261 Ibid s 108B(2A): if a court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with a community service order.

262 Ibid s 103: General Requirements of community service order includes report to and receive visits from an authorities corrective services officer, notifying a change in the offender's place of residence, must not leave or stay out of Queensland without permission.

263 Law Council of Australia, above n 222, 39-45.

264 See, for instance, Queensland Law Society, *Mandatory Sentencing Laws Policy Position*, 4 April 2014, 2: 'The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of re-offending and often results in a greater rate of recidivism (citing Sentencing Advisory Council (Victoria), above n 63, 2). See also Law Council of Australia, above n 217, 13–15.

QUESTION 2: MANDATORY SENTENCING PROVISIONS

Are current Queensland mandatory sentencing provisions sufficiently clear so as to operate with certainty and consistency? If not, what provisions should be considered for review and how should they be reformed?

5.5 Conclusion

This chapter has provided an overview of current Queensland sentencing principles, community based orders and custodial penalty types, and how orders can be combined, either when sentencing for a single offence, or when a person is being sentenced for two or more offences. It also considered the current approach to sentencing in Queensland, and asked whether any reforms to existing principles under section 9 of the PSA are necessary to allow for the greater use of CBSOs in appropriate cases.

Mandatory sentencing was considered, including the potential benefits and detriments that it can bring to the criminal justice system. Specific examples illustrated forms of mandatory sentencing that currently exist in Queensland, and how mandatory sentencing provisions can risk creating anomalies and uncertainty in their application, including in their interaction with sentencing provisions under the PSA. A question is posed regarding whether current Queensland mandatory sentencing provisions are sufficiently clear so as to operate with certainty and consistency.

The following chapters of this paper consider reforms relating to specific types of CBSOs and to court ordered parole, as well as other issues necessary to ensure any reforms operate as intended.

Chapter 6 Intensive Correction Orders

The 2016 *Queensland Parole System Review Final Report* observed the lack of flexible community based sentencing options, a likely consequent adverse impact upon the prisoner population, and the need to improve Queensland's sentencing laws.

The Terms of Reference suggest, among other matters, some of the current lack of flexibility may be a result of restrictions on the ability to impose a term of imprisonment with a community based order. They further suggest consideration be given to flexible CBSOs used in other jurisdictions providing for supervision (e.g. Victorian CCOs) and appropriate options for Queensland.

This chapter explores the use of ICOs in Queensland and potential reforms in this context.

6.1 ICOs in Queensland

ICOs were created in Queensland by the PSA, as introduced. The second reading speech noted that ICOs:

- Impose very strict conditions of surveillance and attendance 'to ensure that the offender makes appropriate restitution—in one form or another—for the crime committed'.
- Allow an offender to rehabilitate in the community and spare the community 'the considerable expense of having a citizen unproductively imprisoned'.
- Fill a 'gap between straightforward community service at the lower end of the scale and imprisonment at the higher end'.[265]

6.1.1 Order composition

ICOs in Queensland are substitutional — a term of imprisonment served in the community. As such, a breach carries presumptive conversion into a finite term of imprisonment. They are created by part 6 of the PSA (ss 111-119). Part 7 (ss 120-142) deals with breaches.

An ICO is defined as simultaneously a sentence of imprisonment served in the community (s 113(1)) and a community based order ('community based order means any community service order, graffiti removal order, intensive correction order or probation order': s 4). An offender sentenced to an ICO is taken not to have been sentenced to a term of imprisonment for the purposes of the provisions of an Act providing for disqualification for, or loss of, office or the forfeiture of benefits (s 113(2)). An ICO is imprisonment,[266] although this has been said to involve 'an element of statutory fiction'[267] or 'a form of "double speak" involving the legislative fiction that someone is in prison when they quite plainly are not':[268]

> In substance, if not in form, an intensive correction order is a special form of probation order, with particular requirements, some of which do not sit altogether comfortably with the more general form of probation order … or the requirements it imposes.[269]

The same judge (McPherson JA) gave a further description in another case:

> A sentence under s 113 is really a partly disguised form of short-term probation designed to impose such close and continuous supervision of an offender that he (or she) has much less opportunity to re-offend within the stipulated period of 12 months. It is a useful method for dealing with young offenders, and it is used particularly where there is considered to be some prospect they will not re-offend.[270]

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265 Queensland, *Parliamentary Debates*, Legislative Assembly, 5 November 1992, 151 (Dean Wells, Attorney-General and Minister for Justice). See also Queensland, *Parliamentary Debates*, Legislative Assembly, 6 August 1992, Second Reading, 6303 (Dean Wells, Attorney-General and Minister for Justice).

266 *R v Skinner, ex parte Attorney General* [2001] 1 Qd R 322, 325 [14] (de Jersey CJ, Davies and Pincus JJA) and *R v M; ex parte Attorney-General* [2000] 2 Qd R 543, 550 [40] (Jones J).

267 *R v M; Ex parte Attorney-General (Qld)* [2000] 2 Qd R 543, 544 [3] (McPherson JA); *R v Skinner; Ex parte Attorney General (Qld)* [2001] 1 Qd R 322, 325 [15].

268 *R v Taylor; R v Napatali* (1999) 106 A Crim R 578, 581 (McPherson JA).

269 *R v M; Ex parte Attorney-General (Qld)* [2000] 2 Qd R 543, 544 [3] (McPherson JA) and see 550 [40] (Jones J).

270 *R v Taylor; R v Napatali* (1999) 106 A Crim R 578, 581 (McPherson JA).

The Court of Appeal has also noted that an ICO is a significant penalty:

> An intensive correction order under the *Penalties and Sentences Act 1992* is regarded as a period of imprisonment and involves the mandatory recording of a conviction. In practical terms it is the final option before the imposition of an actual custodial sentence. It involves strict compliance with the onerous conditions set out in the *Penalties and Sentences Act 1992* and is a very substantial curtailment on the respondent's freedom. It requires reporting at least twice weekly and participation in counselling and other programs for up to 12 hours a week for 12 months. It also requires that the respondent satisfactorily perform community service for up to 12 hours per week during the 12 month period of the order. Breach of the intensive correction order may result in re-sentence to a term of imprisonment for the original offence or an order to serve the remainder of the period of the intensive correction order in custody.[271]

The fact that such an order is a sentence of imprisonment is not, as Keane JA put it in *R v RY; Ex parte A-G* 'a matter of empty words'.[272] Rather it is a sentence of imprisonment which, as his Honour observed, 'affords an offender an opportunity to demonstrate genuine rehabilitation while at the same time leaving open the prospect of actual imprisonment if the order were not adhered to'.[273]

An ICO is a term of imprisonment of one year or less, with a conviction recorded and nine mandatory requirements (s 114) addressing reoffending, reporting and receiving visits (at least twice per week), counselling and programs directed by the court or department, community service,[274] confinement to community residential facilities (not more than 7 days at a time), notification of change of residence and employment, remaining in Queensland and compliance with reasonable directions.

An authorised corrective services officer must not direct the offender to attend programs or perform community service for more than 12 hours in any week: section 114(2).

The legislation assumes, subject to a court or corrections officer ordering or directing otherwise, that one-third of the time directed will be allocated to program attendance and the remainder to community service (s 114(2A)) (meaning, read with s 114(2), an apparent theoretical maximum of 416 hours of community service over 52 weeks).

Additional requirements may be ordered: submission to medical, psychiatric or psychological treatment and compliance, for the whole or part of the order, with conditions necessary to cause behaviour acceptable to the community and stop reoffending (in the same or different ways) (s 115).

Before making an ICO, the court must explain, or cause to be explained, the purpose and effect of the order, possible consequences of contravention, and amendment and revocation options (s 116).

Offender agreement to the making or amendment of (and compliance with) an ICO is a prerequisite (s 117).

QCS provided a table outlining 12 programs available for offenders on community based orders, including ICOs, at Appendix 5, while noting some issues with program availability in certain locations.

Figure 6-1 shows that the use of ICOs has reduced over time in both the higher courts and the Magistrates Courts.

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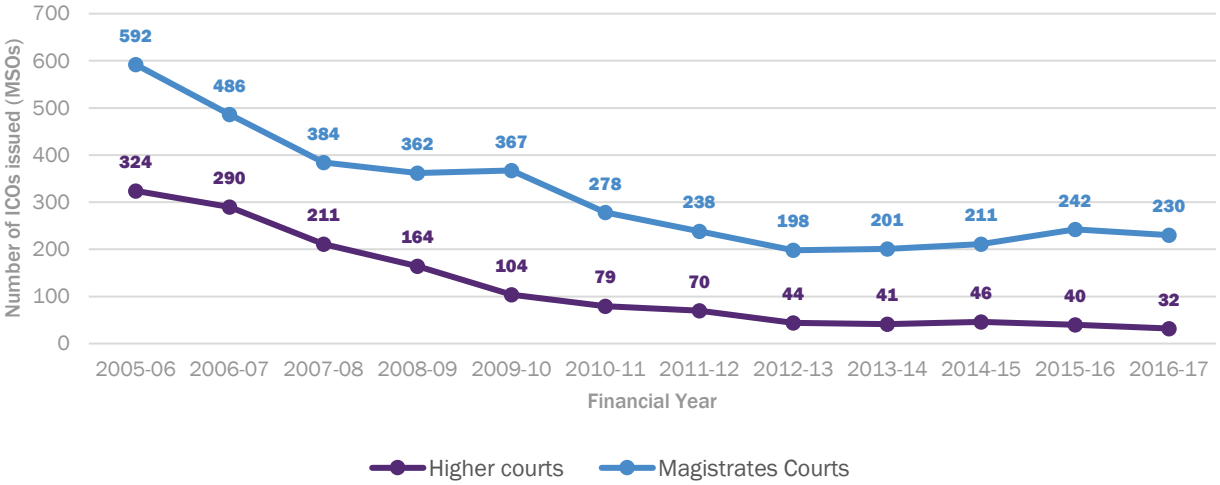
271 *R v Tran; Ex parte Attorney-General (Qld)* (2002) 128 A Crim R 1 (12 February 2002) 4-5 [15] (McMurdo P and Douglas J) (citations omitted).

272 [2006] QCA 437 (3 November 2006), 5–6 [27] (Keane JA).

273 Ibid.

274 An authorised corrective services officer must not direct the offender to attend programs or perform community service for more than 12 hours in any week: s 114(2). If this were applied only to community service, it would technically result in a maximum of 624 hours over 52 weeks. A community service order cannot exceed 240 hours in 52 weeks: s 103(2)(a).

Figure 6-1: Change in the number of sentencing events involving an ICO, 2005-06 to 2016-17



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

6.1.2 Shared provisions with probation

The general requirements of probation orders (s 93) and ICOs (s 114) are substantially the same (except that ICOs have extra provisions regarding reporting/visit frequency, community service, and community residential facility attendance). The additional requirements provisions of both orders (s 94, probation; s 115, ICOs) are identical.

6.1.3 Pre-sentence reports and risk assessments by Probation and Parole

There is no mandatory requirement for a pre-sentence report. However, a sentencing court considering imposing an ICO may order a written report to be completed by Probation and Parole.[275]

Further, Probation and Parole may provide a brief verbal pre-sentence report (depending on court, Magistrate or Probation and Parole availability) at Magistrates Courts sentencing hearings. This is not as in-depth as a written Probation and Parole report, but will include an assessment as to an offender's suitability for a community based order such as an ICO.

An immediate risk assessment is undertaken when an offender first reports directly to Probation and Parole (required within two business days of sentencing). A Risk of Reoffending (RoR) score is calculated within the first five days, once all of the relevant information has been received.

The RoR assessment is calculated at the beginning of a correctional episode with QCS. It is generally not recalculated unless there has been a break in supervision (i.e. not in custody or under Probation and Parole supervision) or a significant change in risk profile has occurred.

There are two methodologies used to calculate a RoR score; one for prison, and another for probation and parole. It is comprised of four or six items (depending on whether administered in custody or on parole). The six item version consists of: age at the date of assessment, highest educational qualification, employment status, number of offences for which sentenced currently, number of convictions in the last 10 years and whether or not there is a conviction for breaching a 'justice order' (such as breach of parole, breach of bail or breach of a domestic violence order).[276] Each answer is given a numerical value and these numbers are then added, with a score assigned ranging from 1 to 20, if administered on parole, or 1 to 22, if administered in custody.[277]

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275 *Penalties and Sentences Act 1992* (Qld) s 15; *Corrective Services Act 2006* (Qld) s 344. This is distinct from an 'independent' report by a psychologist, psychiatrist or other medical practitioner obtained by the defence on the instructions of the defendant.

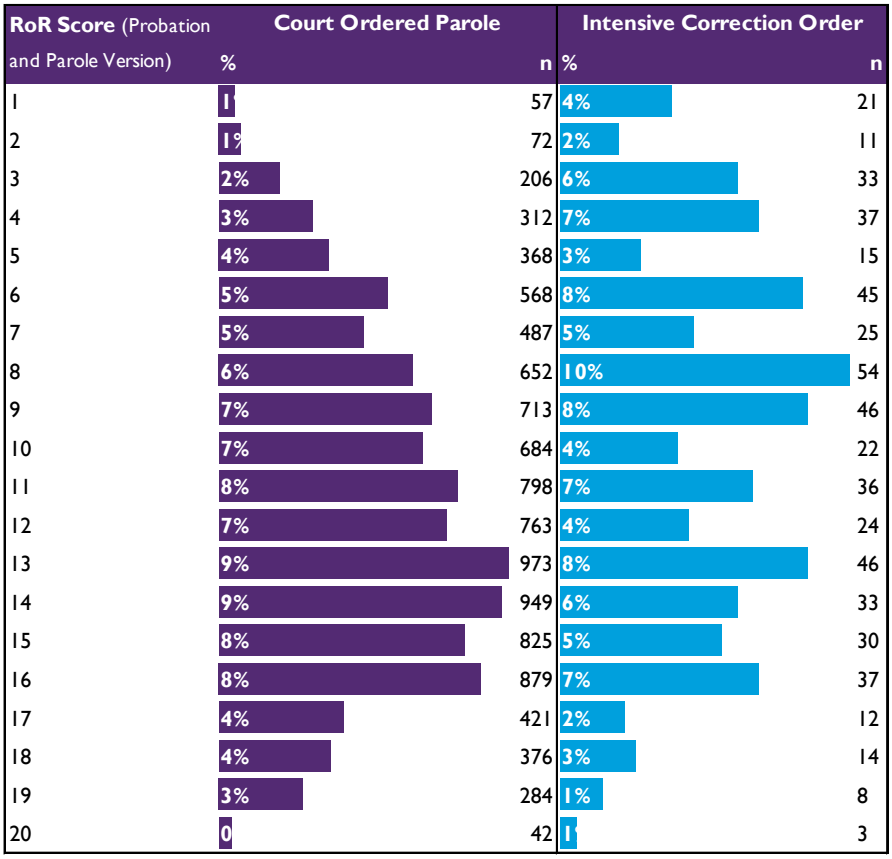
276 Queensland Parole System Review (2016), above n 9, 12 [73].

277 Ibid. Note, there have been some criticisms made of the use of the RoR assessment tool as a basis for parole decisions. For a discussion of this issue, see Queensland Parole System Review, above n 9, 12 [73]–[74].

The following analysis uses the probation and parole RoR scores to compare cohorts of offenders on court ordered parole to those on an ICO.

The average RoR score for offenders on an ICO (9.7) is slightly lower than offenders on court ordered parole (11.5). Figure 6-2 shows the spread of RoR scores for offenders on court ordered parole compared to offenders on ICOs. The average RoR score for ICOs is lower than for court ordered parole, with 37 per cent of those on ICOs having RoR scores greater than 11, compared to 52 per cent on court ordered parole.

Figure 6-2: Risk of Reoffending scores (Probation and Parole version) for ICOs and court ordered parole, 2016-17 to 2017-18



Source: Queensland Corrective Services – Integrated Offender Management System Database.

6.1.4 Order combinations

Multiple ICOs can be made where a court sentences an offender to two or more terms of imprisonment at the same time for multiple offences, provided that the total period sentenced does not exceed one year (s 118(2)). If terms of imprisonment (including ICOs)[278] are imposed for multiple offences, separate terms must be imposed for each.[279]

An ICO can be imposed cumulatively upon an activated term of a suspended period of imprisonment (for instance, a 12 month ICO and a two-year prison term), because activating a suspended sentence in whole or part involves 'dealing' with it (making an order pursuant to a sentence already imposed), as opposed to sentencing afresh.[280]

278 *R v CAI* [2008] QCA 359 (17 November 2008), 3 (Muir JA).

279 *R v Crofts* [1999] 1 Qd R 386, 387 (Fitzgerald P, Davies JA, Moynihan J).

280 *R v Skinner, ex parte Attorney General* [2001] 1 Qd R 322, 324-325 (de Jersey CJ, Davies and Pincus JJA).

However, an ICO cannot be imposed as a means of activating a suspended sentence in whole or part, for the same reason.[281] 'This has the unfortunate effect that the custodial and non-custodial options available to a sentencing judge such as … intensive corrections orders are not available even where these would be the most suitable orders'.[282]

ICOs cannot be combined with probation. Probation can only be combined with actual imprisonment (i.e., not an ICO) of one year or less. The imprisonment cannot be suspended and parole cannot apply.[283] The duration of the probation order must be between nine months and three years, which starts on the day the order is made (and therefore runs along with the period of imprisonment). At the end of the term of imprisonment, the offender is released on supervision for the remainder of the probation order. The requirements of such a probation order do not start until the offender is released from prison or at the end of any re-integration program.[284]

In *R v Hood*, Jerrard JA commented on the request by an offender for an (impermissible) combination of a partially suspended sentence (suspended after nine months) followed by an 18-month ICO:

> Regrettably, an order in those terms is not available by reason of [PSA] s 112 … which only permits a court to make an intensive correction order when sentencing an offender to a term of imprisonment of one year or less.[285]

A fine may be ordered in addition to, or instead of, any other sentence to which the offender is liable (s 45).

Community service under an ICO is to be cumulative with any other community service: section 141.

Table 6-1 shows how often each penalty type was imposed at the same sentencing event as an ICO. For example, 23 per cent of sentencing events in Magistrates Courts where an ICO was imposed also involved a fine. More than half (57%) of sentencing events in Magistrates Courts involving an ICO had at least one other ICO imposed during the sentencing event.

Table 6-1: Sentencing orders issued at the same court event as an ICO, 2005-06 to 2016-17

Penalty Type	Magistrates Courts	District and Supreme Courts
Multiple ICOs	57%	45%
Fine	23%	1%
Convicted, not further punished	15%	12%
Wholly suspended sentence	4%	6%
Probation	3%	3%
Imprisonment	2%	2%
Community service	1%	0%
Recognisance	1%	1%
Partially suspended sentence	0%	0%

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

6.1.5 Breach and revocation

An ICO is terminated at the end of its period, if the offender is sentenced or further sentenced for the offence for which the order was made, if the order is revoked under section 120(1) of the Act or if the offender is committed to prison under section 127(1).[286]

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281 *R v Muller* [2006] 2 Qd R 126, 130 [7] Williams JA, 139-140 [47]-[48] Jerrard JA and 143 [62] (Atkinson J); applying *R v Waters* [1998] 2 Qd R 442 — see 445 (Pincus JA) and 446 (McPherson JA) and *R v Skinner, ex parte Attorney General* [2001] 1 Qd R 322, 324-325 (de Jersey CJ, Davies and Pincus JJA).

282 *R v Muller* [2006] 2 Qd R 126, 143 [62] (Atkinson J).

283 See *Penalties and Sentences Act 1992* (Qld) ss 160A(2) and 160A(6)(b).

284 *Penalties and Sentences Act 1992* (Qld) s 92, see also *R v M; Ex parte Attorney-General (Qld)* [2000] 2 Qd.R. 543, 544 [3] (McPherson JA) and 550 [40]-[41] Jones J) or as outlined in *R v Hood* [2005] 2 Qd R 54, 65 [41] (Jerrard JA).

285 *R v Hood* [2005] 2 Qd R 54, 60 [23] (Jerrard JA).

286 *Penalties and Sentences Act 1992* (Qld) s 119.

A court, on application made by the offender, a corrective services officer or the DPP while the order is in force,[287] may amend or revoke an ICO if satisfied that the offender is unable to comply with the order because his or her circumstances have materially altered since it was made, or the circumstances were wrongly stated or were not accurately presented to the court, or the offender is no longer willing to comply with the order.[288] If the order is revoked, in determining how to re-sentence the offender, the court must take into account the extent to which the offender had complied with the order prior to its revocation.[289]

The process of amending or revoking the order is distinct from the courts' powers to deal with an offender for contravening a requirement of an ICO which, when done without reasonable excuse, is an offence under section 123(1) (maximum penalty – 10 penalty units). A contravention need not be an offence against another Act or law and can occur outside Queensland.[290] A proceeding for a contravention may be taken, and the offender dealt with, even though the order has been terminated or revoked.[291]

There is a presumption that an offender before the court did contravene the requirement in a community based order as alleged in a complaint or statement purporting to be that of an authorised person, until the contrary is proved.[292] Sections 125(2) and 126(2) set out powers of a court that can be exercised in addition to, or instead of dealing with the offender under section 123(1) for contravention of a requirement of the ICO. These include, any, or a combination of, admonishment and discharge and ordering payment and enforcement of an unpaid amount ordered under the order. The imposition of a fine or other order in this context does not affect the continuation of the ICO.[293]

Sections 125(4)(a) and 126(4) allow courts to deal with the offender for the offence for which the ICO was made in any way in which it could deal with the offender if the offender had just been convicted by it of that offence. However, a disqualification imposed under the original order cannot be changed or revoked. [294]

In addition dealing with the offender for the offence for which the ICO was made, a court may revoke the order and commit the offender to prison for the portion of the term of imprisonment that was unexpired on the day the relevant offence against section 123(1) was committed, regardless of whether the order is still in force.[295] Such imprisonment must be served immediately and concurrently with any other term, unless the court otherwise orders.[296]

Table 6-2, provided by QCS, sets out the completion rates for ICOs, which have increased over the past 12 years, from 57 per cent in 2006–07 to 71 per cent in 2017–18.

The increase in completion rates coincides with the introduction of court ordered parole. While the reasons for the higher rates of completion are unclear and, as discussed further below, could reflect a number of factors, it is possible this could be at least partly due to some higher risk offenders being made subject to court ordered parole rather than being placed on an ICO. The data in Figure 6-2 above shows that currently, offenders on ICOs, on average, have a slightly lower RoR score than those subject to court ordered parole.

287 Ibid s 122.

288 Ibid s 120.

289 Ibid s 121(2).

290 Ibid s 123(2).

291 Ibid s 132.

292 Ibid s 137.

293 Ibid ss 125(3) and 126(3).

294 Ibid ss 125(4(a), 126(4) and 126A.

295 Ibid s 127(1).

296 Ibid s 127(3).

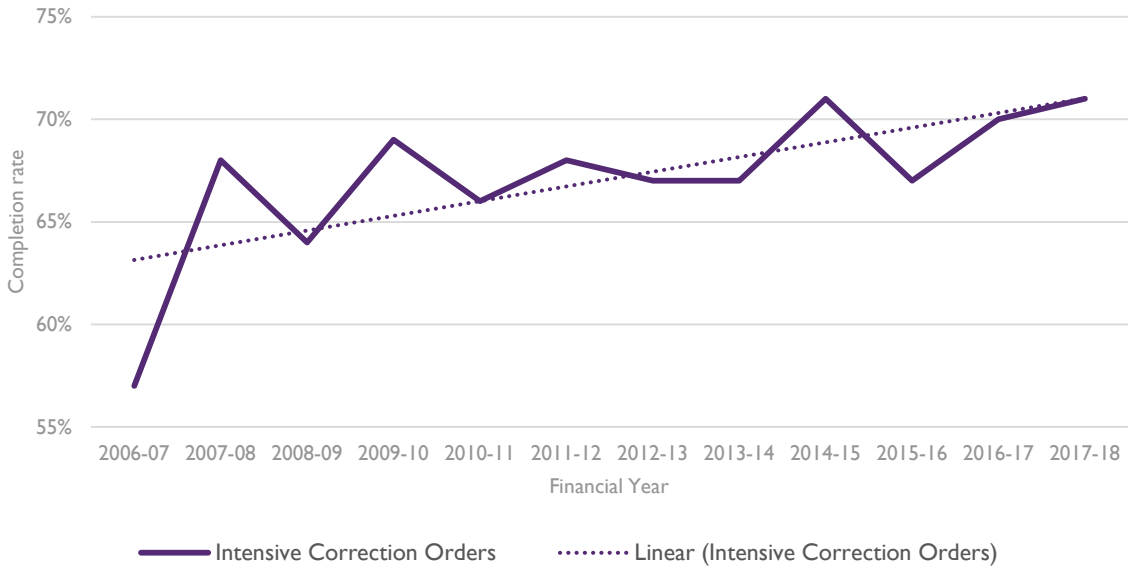
Table 6-2: Successful completion rates – intensive correction orders

Financial year	ICOs
2006-07	57%
2007-08	68%
2008-09	64%
2009-10	69%
2010-11	66%
2011-12	68%
2012-13	67%
2013-14	67%
2014-15	71%
2015-16	67%
2016-17	70%
2017-18	71%

Source: Queensland Corrective Services – Integrated Offender Management System Database

Figure 6-3 below provides a graphical representation of the data in the table above.

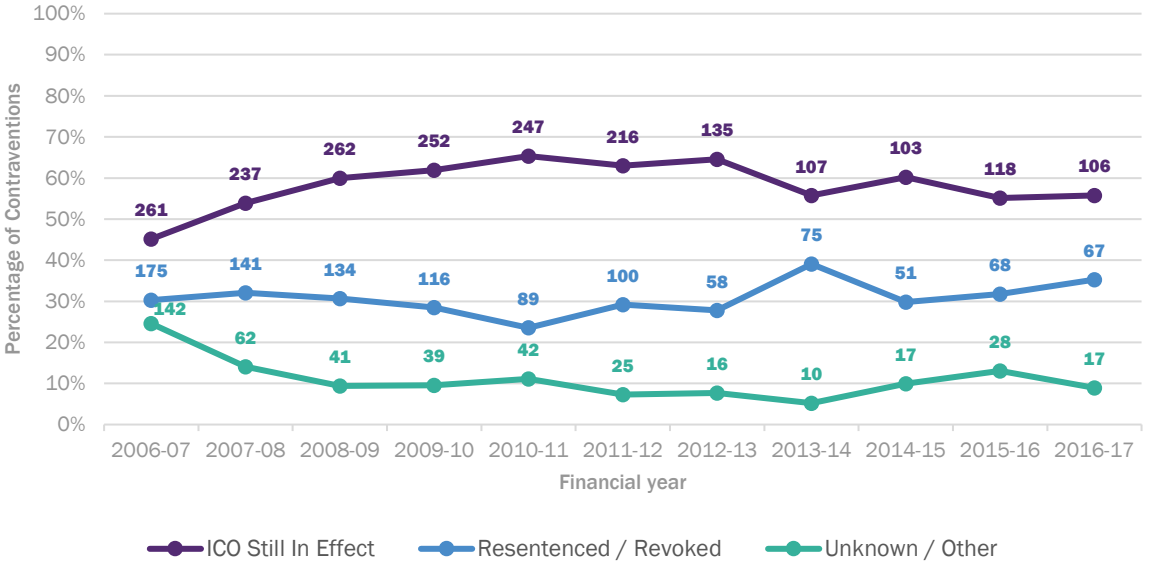
Figure 6-3: Successful completion rates - intensive correction orders



Source: Queensland Corrective Services – Integrated Offender Management System Database

QCS has also provided data on contraventions of ICOs, detailing the final court outcome as a result of the breach. Figure 6-4 reveals that when an ICO is breached, in the majority of cases (over 50%), the ICO remains in effect. In about 30 per cent of breaches, the ICO is revoked, or the offender is resentenced. These figures have remained relatively stable over the past 10 years. Note there are potential problems with the quality of court outcome data drawn from the Integrated Offender Management System (IOMS) database prior to the electronic transfer of court records (ETCR) initiative from 2015, as prior to this, entry of finalised court outcomes was a manual process.

Figure 6-4: Contraventions of ICOs by the final court result outcome, 2006-07 to 2016-17



Source: Queensland Corrective Services – Integrated Offender Management System Database

The Commonwealth Government's Report on Government Services cautions that, while high or increasing percentages of combined community order completions are desirable, completion rates in that report should be interpreted with caution:

> The indicator is affected by differences in the overall risk profiles of offender populations, and risk assessment and breach procedure policies. High-risk offenders subject to higher levels of supervision have a greater likelihood of being detected when conditions of orders are breached. High breach rates could therefore be interpreted as a positive outcome reflecting the effectiveness of more intensive offender management. Alternatively, a high completion rate can mean either high compliance or a failure to detect or act on breaches of compliance.[297]

The breadth of conditions available, and the resources required to monitor them, mean that completion rates can be influenced by a myriad of factors.

Breach rates can reflect a range of factors apart from offender compliance with order conditions. For example, enforcement practices (level of care in monitoring compliance with conditions and decisions made as to initiating formal breach proceedings) can significantly impact on completion rates.[298] One report noted that significant case manager workloads caused difficulty in promptly managing offenders who did not comply with conditions.[299]

A Victorian review of contravention of CCOs explored the relationship between identified factors and likelihood of offender contravention, 'either by further offending or by failing to comply with another condition ("contravention by non-compliance")'.[300] Three groups of factors were identified:

1. Offender related (as at sentence): including age, gender, principal offence and prior convictions.

2. Offence related: offence type for the principal (most serious) offence that received the CCO.

3. Order related: including CCO type, length, conditions and sentencing court.[301]

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297 Australian Government. Productivity Commission, above n 14, 8.20, Box 8.12 'Completion of community orders'.

298 Sentencing Advisory Council (Victoria), above n 1, 60 [3.58].

299 Victorian Auditor-General, *Managing Community Correction Orders: Victorian Auditor-General's Report 2016* (2017) 31.

300 Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders* (2017) 41 [5.1].

301 Ibid [5.3].

CCOs imposed in the Magistrates Courts and higher courts were analysed separately in the discussion of individual factors, because of 'considerable differences between offenders and offences sentenced to CCOs at each court level'.[302]

Other factors which may also influence a person's propensity to contravene an order included 'homelessness, addiction, a chaotic or dysfunctional lifestyle and the timely availability of suitable programs to address the causes of the offending'.[303]

6.2 Community service – widening the scope?

In Queensland, 'community service' is defined as an activity declared to be community service under section 270(1) of the CSA.[304] Section 270 permits the chief executive to:

- Declare, in writing, an activity to be community service for that Act or the PSA.
- Appoint an appropriately qualified person (a community service supervisor) to supervise offenders.[305]

QCS advised the Council that its sentencing guidelines generally support use of community service as a method of delivering rehabilitation services so as to minimise the risk of reoffending. Programs and services can be established to assist offenders to find belonging and connectedness within their communities. QCS can offer individuals subject to 'reparation orders' enrolment in specific courses and programs which are declared to be community service projects by the appropriate delegate after review and approval. These are intended to:

> Address behavioural change in order for them to acquire new skills and increase their employability, social worth and connect … The current guideline allows for up to 50% of the total hours ordered to be applied to education/training and programs.

However, this guideline is not 'routinely' applied to the community service aspect of ICOs, because section 114(2A) of the PSA expressly recognises a split between programs and community service: it presumes that one-third of the time directed will be spent attending programs, and two-thirds will be spent performing community service. Program attendance is therefore generally not credited towards the standard ICO community service obligation. QCS noted that:

> While there is flexibility for an authorised corrective services officer to make exceptions to the above, the current provisions are restrictive in terms of the rehabilitative nature of community supervision. It is rare for an individual who receives an ICO to have needs that require such intense regularity and further, at times impedes the individualisation of assessment outcomes developed by Probation and Parole.

In some other jurisdictions, the legislation itself expressly acknowledges that programs and treatment can be counted as part of community service, addressing concerns that offenders with disabilities and/or complex needs may not be considered suitable for ICOs because of their inability to perform traditional forms of community service.

The NSW definition of 'community service work', which applies a condition of an ICO,[306] is: 'any service or activity approved by the Minister, and includes participation in personal development, educational or other programs' (emphasis added).[307]

Victoria's CCO scheme allows a court to determine that some or all hours satisfactorily undertaken for a treatment and rehabilitation condition can be counted as hours for an unpaid community work condition.[308]

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302 Ibid [5.4].

303 Ibid 18 [2.10].

304 *Corrective Services Act 2006* (Qld) sch 4 and *Penalties and Sentences Act 1992* (Qld) s 4.

305 *Corrective Services Act 2006* (Qld) s 271 permits delegation by the chief executive of a function under that Act to an appropriately qualified person (the delegate) and the delegate may sub-delegate the delegated function to an appropriately qualified person.

306 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3 and 73A(2)(d).

307 *Crimes (Administration of Sentences) Act 1999* (NSW) s 3.

308 *Sentencing Act 1991* (Vic) s 48CA.

New provisions introduced in Victoria determine that, where an offender on a CCO with a community service condition attends an educational or other program as directed, the time spent attending that program is taken to be performance of community service under the order.[309]

Northern Territory community custody orders carry a statutory condition requiring performance of community work.[310] This refers back to an 'approved project' which means a rehabilitation program or work, or both, approved by the Commissioner.[311]

Conversely, community work in New Zealand cannot be ordered as part of an intensive supervision order, which can include wide-ranging special conditions incorporating therapeutic and reintegrative programs and placement into the care of ethnic, cultural, religious and other groups.[312] Separately, when considering imposing community service, the court must give 'particular consideration to whether the sentence is appropriate having regard to the offender's character and personal history, and to any other relevant circumstances'. A sentence of community work is inappropriate if the court is satisfied that:

> (a) the offender has alcohol, drug, psychiatric, or intellectual problems that indicate that it is unlikely that he or she would complete a sentence of community work; or
>
> (b) for any other reason it is unlikely that the offender would complete a sentence of community work.[313]

A New Zealand probation officer may direct (with offender consent), hours of community work not exceeding 20 per cent of an order of at least 80 hours, to be spent in training in basic work and living skills, which are counted as community work unless the offender fails, without reasonable excuse, to complete them.[314]

An alternative to widening the definition of 'community service' in Queensland is a conversion scheme. A potential model for such a scheme already exists in Queensland in part 3B of the *State Penalties Enforcement Act 1999* (Qld). Work and development orders (WDOs) require a person to undertake any or all of the following to satisfy all or part of the enforceable amount of the person's State Penalties Enforcement Register (SPER) debt (s 32G):

- Unpaid work for an approved sponsor.
- Medical/mental health treatment under an approved sponsor's plan provided by a health practitioner.
- The following as decided by an approved sponsor:
    - An educational, vocational or life skills course.
    - Financial or other counselling.
    - Drug or alcohol treatment.
    - A mentoring program (if person under 25).
    - A culturally appropriate program (if the person is an Aboriginal or a Torres Strait Islander person living in a remote area.

To be eligible, the person must be unable to pay because of financial hardship, (prescribed) mental illness, cognitive or intellectual disability, homelessness, a (prescribed) substance use disorder or they are experiencing domestic and family violence (s 32H).

An approved sponsor is a person or entity approved by the registrar (s 32F). The approved sponsor may apply to the registrar for the order with the eligible person's agreement (s 32J) and must undertake an eligibility assessment (s 32K).

The QCS Annual Report 2017-18 (p. 32) states that 'stage 1 of the WDO scheme commenced in October 2017 and QCS continues to support the rollout of the scheme as the sole sponsor available to provide community service as a WDO option. As at 30 June 2018, there were 1,634 people on WDOs'.

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309 *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) s 42AT(3).

310 *Sentencing Act 1995* (NT) s 48E.

311 Ibid ss 3, 34 and 48E and *Correctional Services Act 2014* (NT) s 167.

312 See *Sentencing Act 2002* (NZ) s 54H.

313 Ibid s 56.

314 Ibid ss 66A and 66C.

6.2.1 ICO use has declined as court ordered parole has increased

As outlined earlier in Chapter 2 of this paper (see section 2.2.3), ICOs have declined steadily since their introduction on the 2005-06 financial year. The latest QCS Annual Report identifies there were 152 ICOs active in Queensland as of 30 June 2018 (down from 166 in 2017, 191 in 2016, 181 in 2015 and 156 in 2014).[315]

Table 6-3 reveals that only 0.2 per cent (3,789) of sentencing events in the Magistrates Courts and 2.8 per cent (1,444) of sentencing events in the higher courts, resulted in an ICO.

Table 6-3: Proportion of ICOs by offenders, events, offences and penalties, 2005-06 to 2016-17

Court Type	Adult offenders	Sentencing events	Offences	Penalties
District and Supreme Courts	3.3%	2.8%	1.5%	1.6%
Magistrates Courts	0.5%	0.2%	0.4%	0.5%

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

The median duration of ICOs in the Magistrates Courts was 0.7 years and one year in the District and Supreme Courts (Table 6-4).

Table 6-4: Length and count of ICO penalties, 2005-06 to 2016-17

Court Type	ICO Sentencing Events	Average duration	Median duration
District and Supreme Courts	1,444	0.9 years	1 year
Magistrates Courts	3,789	0.7 years	0.7 years

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Table 6-5 shows that the number of ICOs imposed decreased by 90 per cent in the higher courts, from 324 sentencing events involving an ICO in 2005–06 to 32 in 2016–17 and by 61 per cent in the Magistrates Courts (from 592 sentencing events in 2005–06 to 230 in 2016–17).

Table 6-5: Change in ICOs over time, 2005-06 to 2016-17

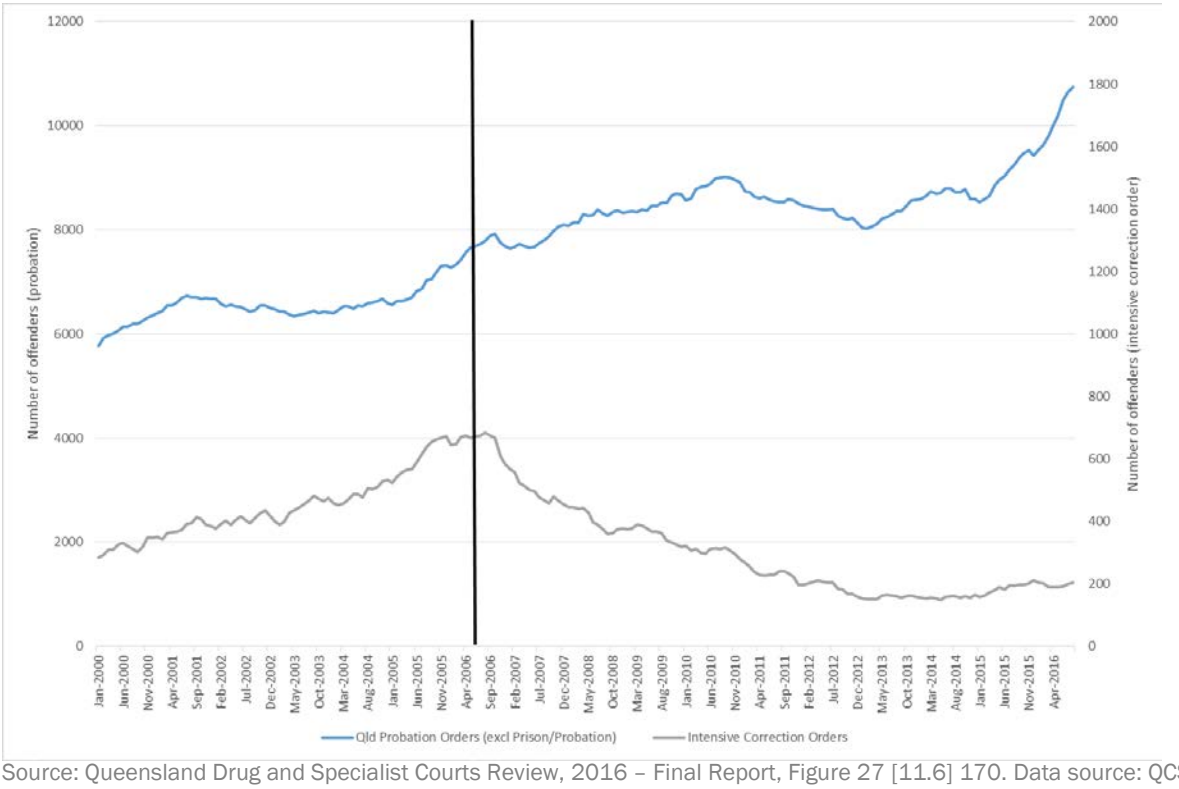
	Number of sentencing events involving an ICO			ICOs as a proportion of all custodial sentences	
Court Type	2005-06	2016-17	% Change	2005-06	2016-17
District and Supreme Courts	324	32	▼ -90%	8.9%	0.8%
Magistrates Courts	592	230	▼ -61%	7.4%	1.5%

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Figure 6-5 below shows that the number of distinct offenders on ICOs (as their most serious order) roughly doubled from 2000 to 2005, but steadily declined after the introduction of court ordered parole in August 2006 (the black line). This trend did not apply to probation orders.

315 Queensland Corrective Services, above n 234, 122, Table 12.

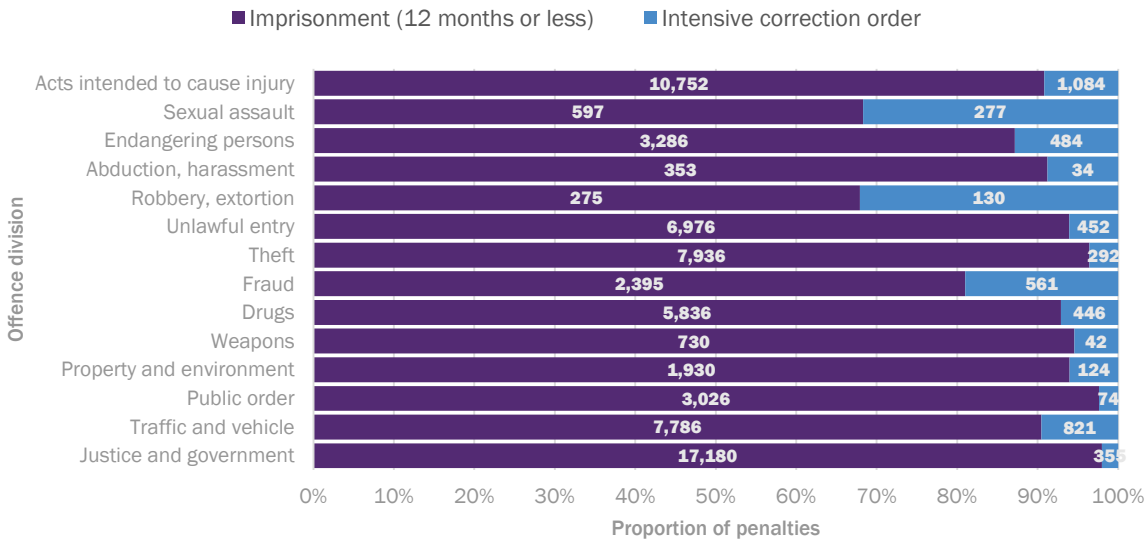
Figure 6-5: Number of distinct offenders on probation and intensive correction orders (as most serious order), January 2000 to August 2016, Queensland



Source: Queensland Drug and Specialist Courts Review, 2016 – Final Report, Figure 27 [11.6] 170. Data source: QCS administrative data. Note: Number of offenders represents the number of offenders on the last day of the month. The black line represents the introduction of court ordered parole.

Figure 6-6 below compares offenders sentenced to an ICO compared to those sentenced to a period of imprisonment of 12 months or less. Of note, offences of sexual assault, robbery and extortion, and fraud receive a higher rate of ICOs (when compared to short sentences of imprisonment) compared to other offences.

Figure 6-6: ICOs compared with periods of imprisonment of 12 months or less by offence division, 2005-06 to 2016-17



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

6.3 Parole – a different system

Parole orders differ from ICOs in terms of the applicable durations (0-3 years, over three years) and relevant offences (court ordered parole cannot be imposed for a serious violent or sexual offence; which does not apply to ICOs) (PSA ss 160A(6), B, C, D).

There are different powers as regards the sentencing court, the Parole Board Queensland (the Board) and the department.

In a submission to QSAC, QCS observed that:

> In practice, ICOs in Queensland are seen as being inflexible and restrictive, particularly in relation to the ability to impose an ICO, the core conditions required, and how the breach process is managed. Comparatively, COP [court ordered parole] allows QCS to respond to risk by, for example, increasing or decreasing supervision of individuals.

In further advice, QCS noted that ICOs sometimes do not allow sufficient flexibility to effectively respond to the diverse range of risks that different offenders represent. QCS' offender management framework is designed to target more resources towards high risk offenders, achieved through a graduated supervision response based on six levels of service (LOS). Generally, offenders with a higher risk of reoffending are given an enhanced or intensive LOS, meaning they will have a reporting frequency of weekly to monthly. By contrast, ICOs have a legislated twice-weekly reporting requirement, even though in 2017-18 the majority of offenders sentenced to an ICO would have been assigned a standard LOS based on their RoR score, attracting a monthly to three-monthly reporting frequency for other orders. QCS noted that:

- ICO reporting conditions 'are more stringent than the majority of court ordered parole and Board Ordered Parole orders'.
- Research indicates that over servicing offenders presenting with lower risk levels can increase their reoffending risk.[316]
- It could also be argued that twice-weekly reporting gives insufficient time for offender reflection on previous case management sessions and to commence behavioural change, which can lead to case management sessions becoming compliance focused which may potentially run contrary to the intent of supervision.

A court can only order a parole release or eligibility date. Unlike ICOs, breaches of parole do not concern the court as these are managed by the Board.

The CSA mandates various standard conditions of a parole order.[317]

Section 200A of the CSA enables corrective services officers to direct a prisoner on parole to remain at a stated place, wear a stated device, or permit installation of a device or equipment at the prisoner's residence.[318] They have further power to give other reasonable directions necessary for the proper administration of one of these directions.[319] The purpose of the power is to enable movements of a prisoner

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316 See, for example, Christopher T Lowenkamp and Edward J Latessa, 'Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders', *Topics in Community Corrections – 2004* (2004) 6 referring to D A Andrews and J Bonta, *The Psychology of Criminal Conduct* (Cincinnati, OH: Anderson Publishing Co, 1998); D Andrews, I Zinger., R D Hoge, J Bonta, P Gendreau and F T Cullen, 'Does correctional treatment work? A clinically relevant and psychologically informed meta-analysis' (1990) 28 *Criminology* 369-404; Bonta, J., Wallace-Capretta, S., & Rooney, J. (2000), 'A quasi-experimental evaluation of an intensive rehabilitation supervision program', *Criminal Justice and Behavior* 27, 312-329; Lowenkamp, C. T. and Latessa, E. J. (2002). Evaluation of Ohio's halfway house and community based correctional facilities. Cincinnati, Ohio: University of Cincinnati: 'When taken together, these meta-analyses and individual studies provide strong evidence that more intense correctional interventions are more effective when delivered to higher-risk offenders, and that they can increase the failure rates of low-risk offenders…intensive supervision reduces recidivism for higher-risk offenders but increases the recidivism rates of lower-risk offenders'.

317 Be under the chief executive's supervision, carry out the chief executive's lawful instructions, give a test sample if required of blood, breath, hair, saliva or urine, report and receive visits as directed, notify of a change of address or employment within 48 hours and not committing an offence (*Corrective Services Act 2006* (Qld) s 200(1)). Leaving Queensland requires approval (*Corrective Services Act 2006* (Qld) ss 212, 213).

318 *Corrective Services Act 2006* (Qld) s 200A(2).

319 Ibid s 200A(3).

subject to a parole order to be restricted and to enable the location of the prisoner to be monitored.[320] A parole order can also contain a condition requiring a prisoner to comply with such a direction.[321] The chief executive can make a written order, effective for no more than 28 days, amending a parole order[322] and can request an immediate suspension from the Board.[323]

The Board has the greatest power. A parole order granted by the Board may also contain conditions the Board reasonably considers necessary to ensure the prisoner's good conduct or to stop him or her committing an offence (for instance, a condition about residence, employment or participation in a program, or a curfew, or providing a test sample).[324] The Board can amend, remove or insert such conditions.[325] The Board can also insert such conditions into a court ordered parole order.[326] It may amend, suspend or cancel a parole order.[327]

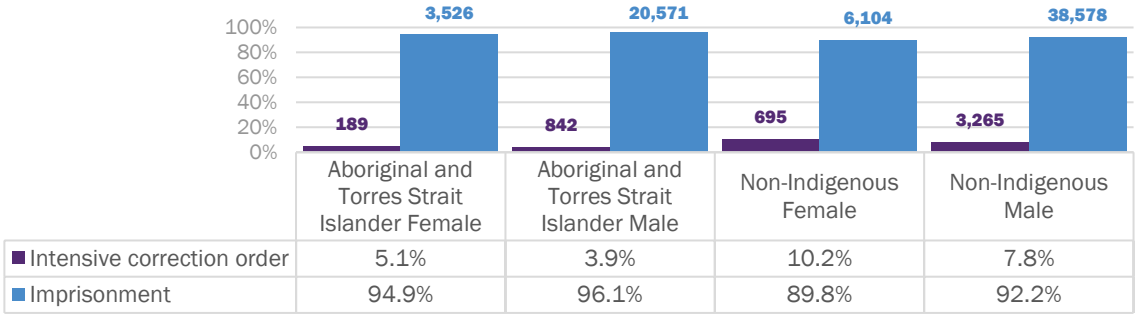
Suspension or cancellation means a return to custody; a warrant can be issued for the prisoner's arrest.[328] A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.[329]

6.4 Who were ICOs used for?

Figure 6-7 below allows a comparison between demographic groups, showing the proportion of ICOs imposed compared to sentences of imprisonment of 12 months or less. It shows for example, that 5.1 per cent of Aboriginal and Torres Strait Islander women who received a term of imprisonment of 12 months or less were sentenced to an ICO. This is in comparison to the 94.9 per cent of Aboriginal and Torres Strait Islander women who were instead sentenced to a period of imprisonment of 12 months or less.

It shows that Aboriginal and Torres Strait Islander people are less likely to receive an ICO and more likely to receive a period of imprisonment of 12 months or less, compared to their non-Indigenous counterparts. Similarly, women are more likely to receive an ICO (instead of a sentence of imprisonment of 12 months or less) compared to men.

Figure 6-7: Proportion of sentences resulting in an ICO, compared with terms of imprisonment of 12 months or less, 2005-06 to 2016-17



	Aboriginal and Torres Strait Islander Female	Aboriginal and Torres Strait Islander Male	Non-Indigenous Female	Non-Indigenous Male
Intensive correction order	5.1%	3.9%	10.2%	7.8%
Imprisonment	94.9%	96.1%	89.8%	92.2%

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

320 Ibid s 200A(1).

321 Ibid s 200(2).

322 On the basis that the prisoner has failed to comply with the order, poses a serious and immediate risk of self-harm or poses an unacceptable risk of committing an offence (*Corrective Services Act 2006* (Qld) s 201). The amendment can be cancelled by the Parole Board at any time (s 202).

323 *Corrective Services Act 2006* (Qld) ss 208A-208C; on grounds of failure to comply, serious and immediate risk of harm to another, unacceptable risk of committing an offence, or preparation to leave the State without approval.

324 *Corrective Services Act 2006* (Qld) s 200(3).

325 Ibid s 205(1).

326 *Corrective Services Act 2006* (Qld) s 205(1)(b). See Chapter 9 for a full discussion of executive power regarding administration of court ordered parole orders.

327 Ibid s 205(2), 208 on the grounds of failing to comply with the order, posing a serious risk of harm to another or an unacceptable risk of committing an offence, or preparing to leave Queensland without permission. These three actions are also available for board-ordered (as opposed to court ordered) parole where the board receives information after granting parole which would have resulted in it making a different parole order or not making one (s 205(2)(b)). The Parole Board can amend or suspend a parole order if the prisoner is charged with an offence (*Corrective Services Act 2006* (Qld) s 205(2)(c)).

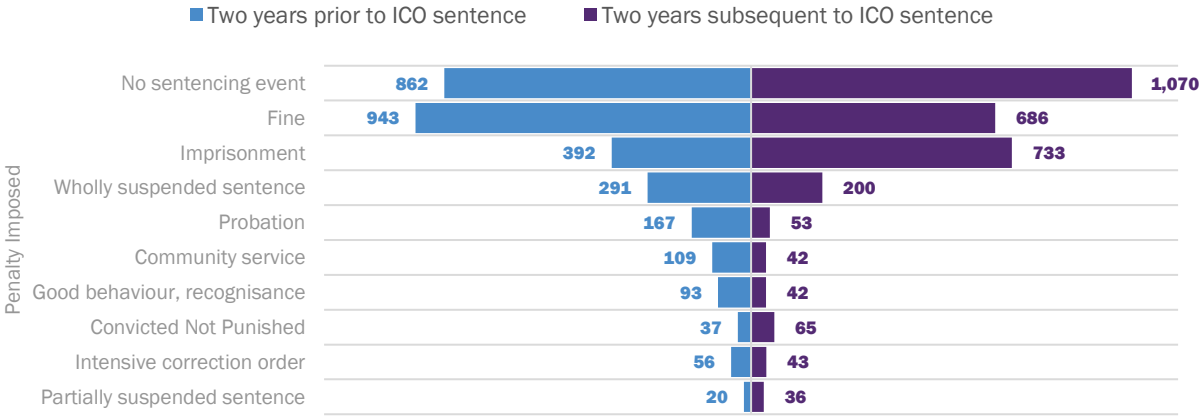
328 *Corrective Services Act 2006* (Qld) s 206.

329 Ibid s 200, and see *Penalties and Sentences Act 1992* (Qld) s 160E.

Figure 6-8 below shows the prior and subsequent offending within two years of an ICO sentencing event. Most offenders who are sentenced to an ICO had either not been subject to any sentencing event in the prior two years (862 cases), or had received a fine (943 cases).

There were 1,070 cases in which the offender was not subject to a sentencing event in the two years subsequent to their ICO sentence. Those who were sentenced within the next two years were most likely to receive a sentence of imprisonment (733 cases), followed by a fine (686 cases).

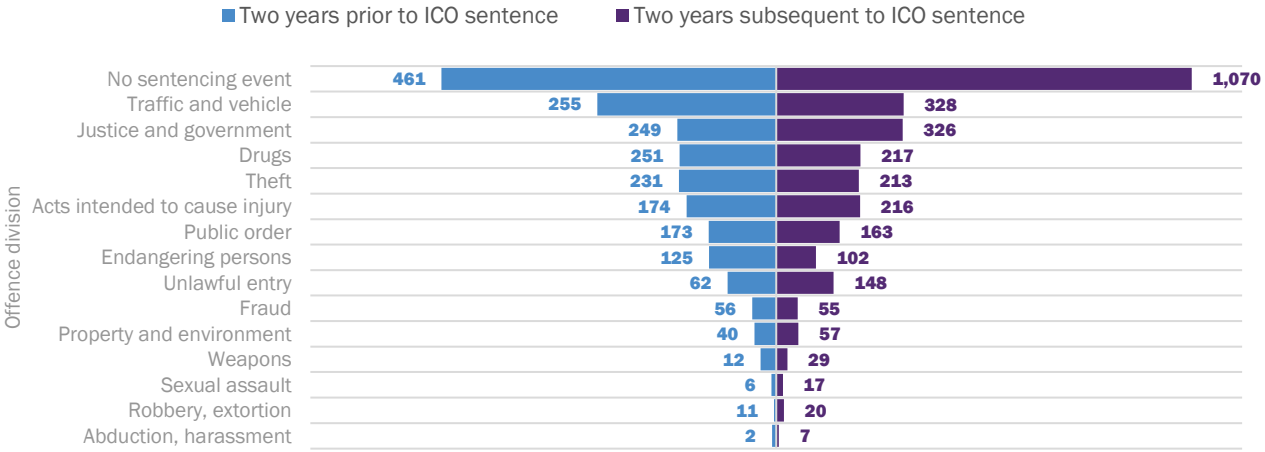
Figure 6-8: The most serious penalty imposed before and after an ICO sentencing event, 2005-06 to 2016-17



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Figure 6-9 shows the most serious offence for which an offender was sentenced in the two years before and after receiving an ICO.

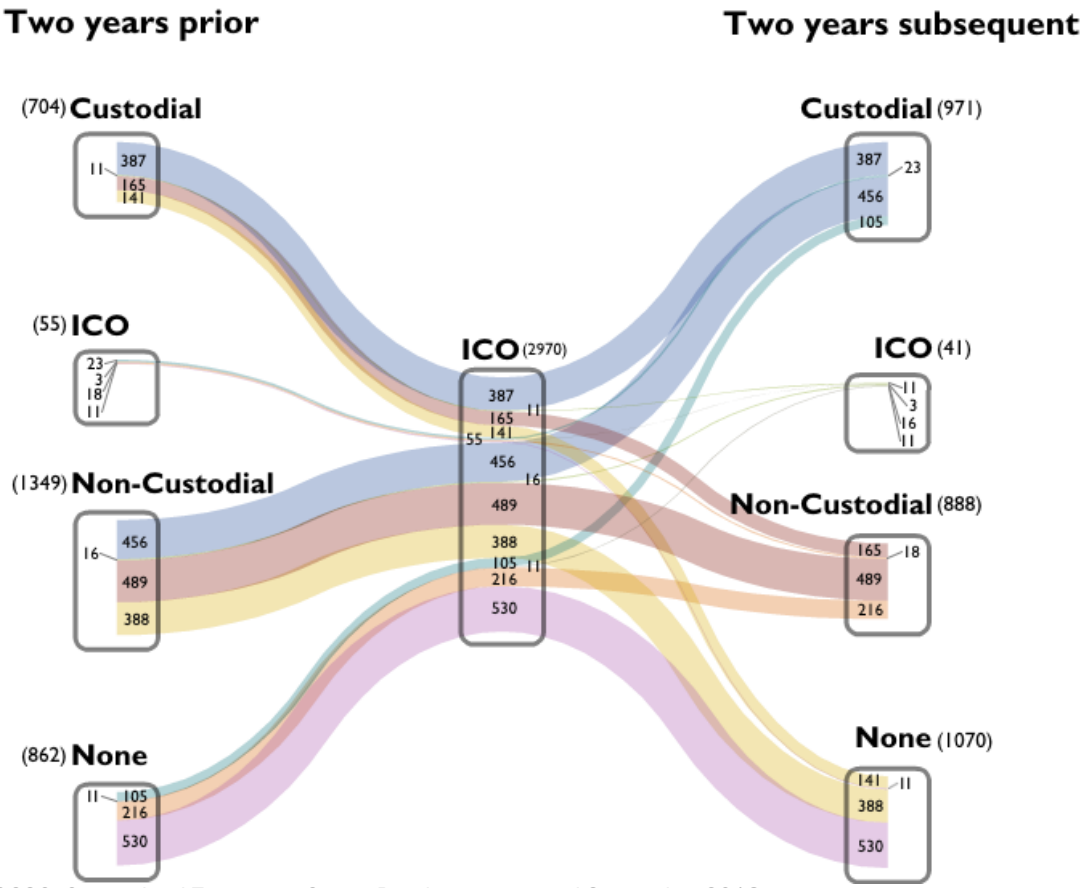
Figure 6-9: The most serious offence committed before and after an ICO sentencing event, 2005-06 to 2016-17



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Figure 6-10 shows the 'sentencing pathway' of offenders who were sentenced to an ICO. It tracks each offender who received an ICO and shows the most serious sentence imposed in the two years prior to the ICO, and the most serious sentence imposed in the two years after the ICO. For example, a group of 530 offenders had not been sentenced either in the two years prior to the ICO sentence or was also not sentenced in the two years following the ICO sentence. A second group of 584 offenders 'graduated' from either no sentencing event, or a sentencing event that resulted in a non-custodial order or an ICO to a sentence of imprisonment in the two years following their ICO.

Figure 6-10: ICO pathways, showing penalties imposed two years prior and two years subsequent to an ICO sentencing event, 2005-06 to 2016-17[330]

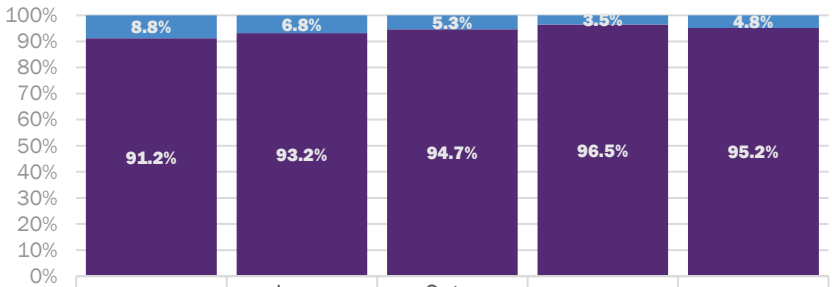


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

6.4.1 Remoteness

Offenders residing in regional and remote areas are much less likely to receive an ICO in contrast to sentences of imprisonment of 12 months or less – see Figure 6-11.

Figure 6-11: ICOs by remoteness area, compared to periods of imprisonment of 12 months or less, 2005-06 to 2016-17



	Major Cities of Australia	Inner Regional Australia	Outer Regional Australia	Remote Australia	Very Remote Australia
Intensive correction order	2848	1170	783	115	187
Imprisonment (12 months or less)	29656	16125	13913	3165	3700

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

330 Includes offenders sentenced to an ICO between 01 July 2007 and 30 June 2015. This period is four years shorter than the council's 12 year data period to allow for two years of prior sentences and two years of subsequent sentences. For each ICO, the most serious prior penalty and most serious subsequent penalty was included.

6.5 2016 Queensland Drug and Specialist Courts Review

The final report of the Queensland Drug and Specialist Court Review outlines relevant stakeholder views on the effectiveness of current sentencing orders available in Queensland:

- The use of the ICO was very limited.
- The 12-month duration of the order was too short.
- There were some concerns about the level of supervision and referral to programs to address the underlying causes of offending (as with probation orders, where magistrates had limited confidence that specific conditions attached to orders were actually observed or delivered as there is no court monitoring of the order).
- As a result, court ordered parole was being used as an intermediate order with imprisonment as the default. This had resulted in net-widening for offenders who would otherwise have been placed on a community based order.
- Delay in District Court breach hearings was a problem: these may take up to six to 12 months if the offence is first heard in the Magistrates Court. There was no swift and certain punishment for breaches of community based orders ordered in the higher courts.
- There was support from some magistrates to see a return to the making of specific orders about the courses, treatments and/or programs that offenders should complete rather than making a general order for QCS to determine what is suitable for the offender.[331]

The report identified two 'fundamental problems' in the use of probation and ICOs:

- Structure: there is a need for a more detailed and structured order that provides a similar framework for alcohol and other drug offenders whose offences are less serious, and whose risk is lower, than those offenders who would be appropriate for a Drug Treatment Order.
- Delivery of services: it is essential that appropriate treatment services be provided to people on community based orders.[332]

In the report authors' view:

- Judicial officers should have a broader range of sentencing options for alcohol- and drug-related offences in the moderate range, in particular, ones that may allow for judicial monitoring, in line with evidence of its importance and efficacy in therapeutic jurisprudence literature.
- Either more, or more appropriate, conditions should be added to probation and ICOs or a new order could be created.[333]

6.6 Other jurisdictions

Details regarding analogous orders in other Australian jurisdictions and Canada are outlined in the document *Community based Sentencing Orders, Imprisonment and Parole: Cross-jurisdictional Analysis*, which can be found on the Council's website.

In brief, differences between ICOs in other jurisdictions include:

- the maximum term of the order (12 months in Queensland and the Northern Territory, but up four years in the ACT where certain criteria are met);
- how much flexibility there is in the conditions attached (for example, the new form of ICO in NSW has minimal core conditions, but with a supervision condition which allows the person to be directed to participate in relevant programs, including treatment programs, as mandatory, versus the conditions in Queensland and the Northern Territory which are quite rigid);
- the types of additional conditions that can be ordered (for example, ICOs in NSW expressly provide for home detention, electronic monitoring and curfew conditions, and community service as an additional (but not mandatory) condition, while in Western Australia, community service cannot be ordered);

331 Freiberg et al, above n 86, 169 [11.5].

332 Ibid 169 [11.6].

333 Ibid 171 [11.6].

- the scope of administrative powers on breach (for example, in the ACT, the Sentence Administration Board (the equivalent to the Parole Board in Queensland) has the power to suspend or cancel the order without the need to return the matter to court).

6.6.1 Recent reviews in other Australian jurisdictions

NSW

In a 2013 report, the NSWLRC recommended that ICOs (and home detention and suspended sentences) be replaced with a new community detention order (combining home detention and ICOs).[334] Instead, the latest amendments,[335] in force from 24 September 2018, reformed ICOs and introduced CCOs, but did abolish home detention orders, community service orders, suspended sentences and good behaviour bonds. Other amendments introduced re-integration home detention from 28 May 2018.[336]

The advantages of ICOs noted by the NSWLRC were that ICOs:

- Are cheaper than imprisonment.
- Allow an offender to remain in employment and maintain contact with family.
- Avoid potential contaminating effects of imprisonment, particularly for first time offenders.
- Allow offenders to retain housing.
- Can combine benefit to the community (through community service work) with rehabilitation and an element of punishment.[337]

The NSWLRC view was that ICOs were, at that time:

> Underused and not targeted to those offenders who might benefit most. For these sentences to be effective, the courts and the community must have confidence that they are serious sentences that can provide interventions that make a difference to an offender's level of reoffending.[338]

There was stakeholder advice that ICOs were still not available in some rural and remote areas and, even where technically available, limited local opportunities for community service work and appropriate rehabilitation programs were barriers to their use (e.g. an offender from a rural area on an ICO could have difficulties complying with the order due to needing to travel to a larger town).[339]

While supporting the replacement of ICOs and home detention with the new proposed community detention order, as an interim measure, the NSWLRC recommended the current scheme be reformed to increase their use. Recommendations made by the NSWLRC included that:

- Corrective Services NSW should make home detention and ICOs available across NSW (as was Parliament's intention)[340] and provide information to courts and lawyers about the local availability of ICOs and of the necessary support services and programs.[341]
- The maximum length of the order should be extended from two to three years (in the higher courts) and stay at two years in local (magistrates) courts, with an extension to three years when sentencing for multiple offences.[342] [Recent amendments introduced a blanket increase in the maximum duration (for an aggregate sentence only) to three years.[343]]

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334 NSW Law Reform Commission, above n **62**, Recommendation 11.1.

335 *Crimes (Sentencing Procedure) Act 1999* (NSW) as amended by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

336 New part 5A of the *Crimes (Administration of Sentences) Act 1999* (NSW) inserted by the *Parole Legislation Amendment Act 2017* (NSW).

337 NSW Law Reform Commission, above n 62, 199–200 [9.16]–[9.117].

338 Ibid [9.2] 195.

339 Ibid [9.24] 201–202.

340 NSW Law Reform Commission, above n 62, 201 [9.23] citing NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.

341 NSW Law Reform Commission, above n 62, 203, Recommendation 9.1. Corrective Services NSW had advised that ICOs could be provided through all community corrections offices state-wide: 202 [9.26].

342 Ibid 212, Recommendation 9.4.

343 *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) s 68.

- Courts should be able to set a non-parole period of up to two years as part of an ICO.[344] [This recommendation has not been implemented.]
- If the State Parole Authority revoked an ICO during the non-parole period, it should be empowered to commit the offender to full time custody or home detention, with the offender able to apply to the authority for reinstatement of the ICO after one month. [This recommendation has been adopted in part. The Authority can suspend the order for an interim period of up to 28 days,[345] and can also revoke the order, in which case it can be reinstated after the offender has served at least one month of full-time detention.[346]]
- It should be possible to satisfy the hours of community service work attached to an ICO by the offender engaging in a range of activities including literacy, numeracy, work-ready, educational or other programs according to the needs of the offender. [347] [This recommendation has since been adopted.[348]]
- Corrective Services NSW should be able to defer commencement of the work hours requirement of an ICO while the offender completes residential drug or alcohol treatment or another program. This should not increase the length of the order.

The NSWLRC acknowledged research indicating that 55 per cent of ICO assessments resulted in an ICO being imposed, with the most common cause of negative suitability assessment being alcohol or other drug dependency (although Corrective Services was said to have since relaxed its approach).[349]

The mandatory community service requirement was identified as the key barrier to ICO suitability for offenders with a substance dependency or significant mental health issue (e.g. there may be work safety issues). Likelihood of compliance could be compromised because of instability regarding housing, substance dependency, cognitive impairment or mental health issues.

The NSWLRC noted that when it recommended the introduction of ICOs, the NSW Sentencing Council did not envisage community service work being a mandatory ICO component.[350]

The NSWLRC noted that ICO conditions needed to be 'reworked and made more flexible'. It supported the concept of 'work-ready' programs where offenders serving ICOs could, before commencing the community service work requirement, undertake intensive drug treatment, work training education, and dedicated workshops to enable offenders who would otherwise be unsuitable for community service work to complete work under direct Corrective Services supervision.[351]

The NSW Sentencing Council carried out a statutory review of ICOs in 2016.[352] It supported the NSWLRC's recommendations and did not put forward further recommendations as the NSW Government was considering the NSWLRC report at the time. It did comment that 'the ICO scheme is underused and not targeted to those offenders who might benefit most'.[353]

Much of the content of this statutory review was updated in the Sentencing Council's 2016 Annual Report.[354] The three leading causes of breaches leading to revocation from 2014–2016 were consistent (and close in

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344 The opposite applies — a court is not to set a non-parole period for an ICO. See s 7(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

345 See *Crimes (Administration of Sentences) Act 1999* (NSW) s 91 and discussion above

346 See Crimes (Administration of Sentences) Act 1999 (NSW) s2 164A and 165.

347 NSW Law Reform Commission, above n 62, 217, Recommendation 9.6.

348 See *Crimes (Administration of Sentences) Act 1999* (NSW) s 3 and discussion above.

349 NSW Law Reform Commission, above n 62, 214 [9.72] citing C Ringland, 'Sentencing Outcomes for Those Assessed for Intensive Correction Order Suitability', *Bureau Brief No 86* (NSW Bureau of Crime Statistics and Research, 2013) and see 214 [9.73].

350 Ibid 215 [9.75] citing NSW Sentencing Council, *Review of Periodic Detention, Report* (2007) 161–162.

351 Ibid 216 [9.80].

352 Sentencing Council (NSW), *Intensive Correction Orders: Statutory Review Report* (2016).

353 Ibid 23.

354 NSW Sentencing Council, *2016 Annual Report – Sentencing Trends and Practices (2017).*

number) in each year: community service, be of good behaviour and not commit any offence, and comply with reasonable directions.[355]

In contrast to most other jurisdictions, the use of ICOs in NSW has been steadily increasing. Data from Corrective Services NSW shows that there has been steady growth each year in the number of offenders sentenced to an ICO, almost tripling from 738 in 2010-11 to 2,166 in 2017.[356] There has been a substantial growth in the number of ICOs registered with Corrective Services NSW each year, from 1,229 to 5,996 (a 388% increase over the seven years, including a 97% increase since 2015).[357]

Following the introduction of new ICO scheme, in *R v Pullen*,[358] the NSW Court of Criminal Appeal commented:

> The new statutory scheme provides some additional flexibility to sentencing judges in that it decreases the number of mandatory conditions attached to ICOs and allows the Court to impose further conditions which are appropriate in the circumstances of the particular case.[359]

In *Pullen*, it was argued by the Crown that an ICO under the new scheme was more lenient because of the removal of the mandatory conditions which applied under the old scheme.[360] The Court of Appeal accepted, to a small extent, the Crowns submission but noted:

> The statement in *R v Pogson; R v Lapham; R v Martin* that ICOs involve substantial punishment was to a significant extent premised on the existence of onerous mandatory conditions which imposed significant restrictions upon an offender's liberty … That remains the case with the new scheme as persons subject to an ICO are required to comply with multiple mandatory obligations which are attached to the standard conditions. There are also additional obligations which are prescribed by regulation which attach to the additional conditions that may be imposed… The degree of punishment involved in an ICO, and therefore its appropriateness in a particular case, must now be assessed having regard to the number and nature of conditions imposed. In some cases, as a result of the significant number of obligations prescribed by the regulations, an ICO will be more onerous than it was under the previous scheme.[361]

The Court of Appeal concluded that:

> The result of these amendments is that in cases where an offender's prospects of rehabilitation are high and where their risk of reoffending will be better managed in the community, an ICO may be available, even if it may not have been under the old scheme. The new scheme makes community safety the paramount consideration. In some cases, this will be best achieved through incarceration. That will no doubt be the case where a person presents a serious risk to the community. In other cases, however, community protection may be best served by ensuring that an offender avoids gaol. As the second reading speech makes plain, evidence shows that supervision within the community is more effective at facilitating medium and long term behavioural change, particularly when it is combined with stable employment and treatment programs.[362]

ACT

In March 2015, the ACT Parliamentary Standing Committee on Justice and Community Safety (the Committee) published a report on its inquiry into sentencing.[363] This followed Terms of Reference announced in May 2013 and an unfinished inquiry of a similar nature which had lapsed in October 2008. The inquiry covered issues including sentencing practice in the ACT, and alternative approaches.[364] Several

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355 Ibid [5.29] 58, Table 5.7.

356 NSW Sentencing Council (2018) as cited in Karen Gelb, Nigel Stobbs and Russell Hogg, *Community Based Sentencing Orders: Literature Review* (QUT for Queensland Sentencing Advisory Council, 2019) 43.

357 Ibid.

358 *R v Rullen* [2018] NSWCCA 264 (23 November 2018).

359 Ibid [63] (Harrison J, Johnson and Schmidt JJ agreeing).

360 Ibid [64].

361 *R v Pullen* [2018] NSWCCA 264 (23 November 2018) [66] (Harrison J, Johnson and Schmidt JJ agreeing) (referenced omitted).

362 Ibid [89].

363 Australian Capital Territory Standing Committee on Justice and Community Safety, *Inquiry Into Sentencing Report Number 4* (2015).

364 Ibid iii.

stakeholders considered whether ICOs should be a sentencing option in the ACT (although the Victorian CCO model was discussed alongside the NSW ICO in this context). In its report, the Committee welcomed:

> The potential for intensive corrections orders to be introduced as a sentencing option in the ACT. In the Committee's view, the potential aggregation and extension of the scope of supervision orders available to ACT courts is likely to be a positive step in responding to the ACT's acknowledged high levels of recidivism, so long as sufficient resourcing is applied.[365]

It recommended legislative amendments to introduce an ICO regime and further, that the government 'accurately assess resource requirements' for an ICO regime, and 'ensure that adequate resources are applied to any future intensive orders regime'.[366]

The inquiry report noted advice from Dr Lorana Bartels that in the context of conditions favourable to reform in the ACT, that jurisdiction 'did not have "the tyranny of distance", in contrast to jurisdictions such as NSW [and Queensland] and, as a result, in terms of "access to the courts and access to treatment", "you do not have people who are hundreds of kilometres from anything" '.[367]

In the same evidence, Dr Bartels had also told the Inquiry that:

> We simply cannot keep building new prison beds. So we need to ensure we are thinking intelligently and creatively about justice and sentencing. We need to make sure our focus is and remains on things that research shows us really do help to cut involvement in crime: drug and alcohol treatment, counselling and mental health, housing, education, employment and transport.[368]

The ACT Government had earlier announced in March 2014 that it would end periodic detention and consider whether 'community correction orders' would succeed them.[369] It responded to the inquiry by announcing a Justice Reform Strategy with a focus on sentencing, including the adequacy of existing sentencing options.[370] The Attorney-General appeared before the Committee for its inquiry, and stated that the purpose of the Government's strategy was to:

> Recognise that, in many instances, people who are ending up in prison perhaps should not be there. But because of the nature of their offending behaviour and because of the way sentencing laws are currently constructed, they are being sent to prison.[371]

The Government's March 2016 response to the Inquiry Report noted that it had already:

> Presented the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015 to the Legislative Assembly in the November [2015] sittings as part of the work of the Justice Reform Strategy. The intention of this Bill is to follow on from the *Crimes (Sentencing) Amendment Act 2014*, by abolishing periodic detention and introducing a new sentencing option. The new Intensive Corrections Order scheme commenced on 2 March 2016. The new Intensive Correction Order while being a sentence of imprisonment is an alternative sentence to full-time custody.[372]

In July 2016, the Government published the second stage report regarding its Justice Reform Strategy, which included an update on work undertaken to implement the new ICO regime.[373] The report noted the considerable work undertaken to prepare for introduction of the new reforms, including to development of an evaluation framework and program logic developed by the Australian Institute of Criminology.[374]

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365 Ibid 104 [4.164].

366 Ibid 105 [4.166]-[4.169], Recommendations 4 and 5.

367 Ibid 391 [9.7].

368 Evidence to Standing Committee on Justice and Community Safety, Australian Capital Territory Legislative Assembly, Canberra, 25 May 2014, 146 (Dr Lorana Bartels, Associate Professor of Law, University of Canberra).

369 Australian Capital Territory Standing Committee on Justice and Community Safety, above n 363, 97–98 [4.132]–[4.135].

370 Ibid 391 [9.3], 393–395 [9.16]–[9.24].

371 Ibid 394 [9.21].

372 Legislative Assembly for the Australian Capital Territory, Government Response to the Standing Committee on Justice and Community Safety's Report on the Inquiry Into Sentencing (2016) 7.

373 Australian Capital Territory, *Justice Reform Strategy – Second Stage Report* (2016).

374 Ibid 14 [10.12].

As at 30 June 2018, there were 69 offenders serving an ICO in the ACT.[375]

Tasmania

In a 2016 report, the Tasmanian Sentencing Advisory Council (TSAC) recommended that ICOs not be introduced. It noted barriers to the use of/concerns with ICOs as:

- The rigorous nature of the suitability criteria excluded offenders with cognitive impairment, mental illness, substance dependency or homelessness or unstable housing.
- Availability of ICOs in rural and remote areas.
- Mandatory community service work requirement.
- The substitutional nature of the sanction.
- Insufficient resources to support the sanction, causing sentencers to lose confidence in it.[376]

No submissions supported the introduction of ICOs. The TSAC recommended that CCOs should be introduced instead.

Victoria

Victoria had ICOs from April 1992 until the CCO replaced them, and other community based orders, in January 2012.[377] In an April 2008 report,[378] the Victorian Sentencing Advisory Council (VSAC) had recommended major changes to the ICO scheme which appear to have influenced the subsequent CCO regime. The VSAC made numerous recommendations:

- Recast ICOs: as non-custodial sentencing, targeting offences of medium to high seriousness and medium to high-risk/needs offenders.
- Permitting broader sentencing combinations – with immediate imprisonment not exceeding three months, and with a community based order.
- Purposes: reducing the likelihood of reoffending through rehabilitation and reintegration and to allow for adequate punishment in the community.
- Duration: increased from 12 months to two years (in all courts).
- Pre-sentence report: mandatory.
- A supervision period: completing the more intensive aspects (supervision, work and other program conditions) shortly after imposition of sentences of six months or more, during an initial supervision period of lesser time than the total term. For the remainder of the order, the level of contact and supervision is reduced; the offender being subject only to the remaining core conditions of the order until it expires.
- Other ways of fulfilling community service: where it is a core condition, permitting it to be performed through participation in services as part of a justice plan, or directed to be satisfied, in whole or part, by completing an 'activity requirement' if the court is satisfied that the offender's personal circumstances make this desirable. Approved activities would include reparation, educational, employment-related and life skills activities.
- Additional discretionary program conditions (i.e., assessment and treatment, live at specified place, vocational programs):
    - Criteria: a court could not attach any more program conditions than are necessary to achieve the order's purpose or purposes.[379]
- Additional discretionary special conditions (i.e., non-association, curfew):

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375 Australian Capital Territory, Justice and Community Safety and Directorate*, Annual Report 2017–18* (2018) 91.

376 Sentencing Advisory Council (Tasmania), above n 67, 83 [7.5.5] footnotes omitted, see also 84 [7.5.10].

377 Through the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

378 Sentencing Advisory Council (Victoria), above n 1, Chapter 6 Intensive Correction Orders. Recommendations are at 136–140.

379 VSAC noted a Victorian provision prohibiting the imposition of any more program conditions than necessary to achieve the purpose/s for which the order is made. It noted some stakeholder concern that courts may add a raft of conditions to try and 'cover all bases' when the conditions are not necessary to achieve the purpose or purposes sought in the context of the legislative phrase 'any other conditions the court considers necessary or desirable': Old section 38(3) of the *Sentencing Act 1991* (Vic) cited at [6.112] 128.

    - Criteria: significant risk of further offending and the condition would reduce the likelihood which could not be achieved by any less restrictive condition or combination of conditions.
- These could apply for the duration of the order, or a shorter period as ordered.

VSAC also suggested the establishment of a Community Corrections Board to oversee management of offenders on community sentences.[380]

VSAC noted that ICOs had only ever been used in a very small proportion of cases, at least in part due to structural problems and a possible lack of court confidence in their effectiveness.[381]

It discussed differences in therapeutic and surveillance purposes: participation in intensive supervision programs involving higher levels of contacts and supervision, were in itself not associated with lower rates of recidivism. However, when combined with treatment, results were more promising, especially when targeted at high risk offenders.[382] Pure surveillance-based supervision approaches were therefore at best a means of punishment and monitoring compliance, rather than effecting any long-term behavioural change.[383]

Further, more intensive supervision resulted in higher levels of technical breaches – most likely as a result of higher levels of surveillance and detection. Depending on the response to breaches, high breach rates may affect the potential of these forms of orders to divert offenders from prison.[384]

6.7 Evidence of effectiveness

The QUT literature review undertaken for the purposes of this reference found:

- No difference in the effectiveness of ICOs when compared with supervised suspended sentences.
- Good evidence that ICOs are more effective at reducing recidivism than either periodic detention or short terms of imprisonment, especially among offenders classified as high risk.
- No evidence of the effectiveness of ICOs among vulnerable cohorts.
- Reoffending following an ICO appears to be more likely among men, Aboriginal and Torres Strait Islander offenders, those with criminal histories and those classified as high risk.[385]

A 2017 NSW study used propensity score matching to compare reoffending within two years following ICOs and short terms of imprisonment of up to two years.[386] Over a third (36%) of those who received an ICO and 60 per cent of those who had spent time in prison had reoffended within two years. The results from the strongest of their models showed that there was a 27 per cent reduction in the odds of reoffending for people who received an ICO compared with people who had been sentenced to imprisonment.

Supplementary analyses on offenders with a medium to high risk of reoffending and prisoners who had served a term of imprisonment of six months or less found:

- a 20 to 30 per cent reduction in the odds of reoffending for medium to high-risk offenders who received an ICO compared with a term of imprisonment;
- an estimated 25 to 43 per cent reduction in the odds of reoffending associated with an ICO for offenders in all risk categories;
- an estimated 33 to 35 per cent reduction for offenders in medium to high risk categories who had received an ICO compared with those who had been imprisoned.[387]

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380 Sentencing Advisory Council (Victoria), above n 1, Chapter 11.

381 Ibid 4.

382 Ibid 116 [6.45].

383 Ibid 116 [6.46].

384 Ibid 116 [6.47], footnotes omitted.

385 Gelb, Stobbs and Hogg, above n 356, xiii.

386 Wang and Poynton (2017) cited in Gelb, Stobbs and Hogg, above n 356, 120.

387 Ibid cited in Gelb, Stobbs and Hogg, above n 356, 121.

The authors of this study conclude that their results:

> further strengthen the evidence base suggesting that supervision combined with rehabilitation programs can have a significant impact on reoffending rates, and further, that programs targeting offenders at high risk of reoffending produce larger reductions in reoffending than those targeting offenders at medium or low risk.[388]

There is no evidence of the effectiveness of ICOs among vulnerable cohorts, other than the finding that Aboriginal and Torres Strait Islander status increases the likelihood of reoffending.[389]

Aboriginal and Torres Strait Islander offenders are also under-represented among those who receive an ICO, possibly due (in part) to accessibility issues: offenders in this cohort are more likely to live in remote areas, and some ICO facilities may lack reliable and appropriate public transport options.[390]

6.8 General themes from stakeholder consultation

In consultation with key stakeholders to date, there has been no call to repeal Queensland's ICO provisions. ICOs have largely been described as useful, or at least potentially so, in the right circumstances. ICOs were described as being of use for offenders deserving of a short period of actual custody yet with personal circumstances justifying diversion to intensive supervision. This involves balancing retribution, deterrence and rehabilitation.

The Council's initial consultation questions regarding ICOs were:

- Do ICOs still serve a useful purpose and should they be retained?
- What improvements could be made to increase their use, flexibility and effectiveness?

There has been some difference of opinion regarding whether duration should be extended from 12 months to three years. On one side, retaining the 12 month ceiling was supported on the basis that a longer period would more appropriately fall under the Parole Board Queensland's expertise regarding consideration of release.

Flexibility and resources were the strongest points made by most stakeholders:

- ICOs are not currently flexible enough, meaning they are not realistic sentencing options for the vast majority of offenders. The fixed components, such as community service, are too rigid.
- Without proper resourcing of courses and programs, imposing an ICO risks setting offenders up to fail. Some stakeholders commented that residential rehabilitation might be utilised to a greater degree.

QCS provided a case study from the ACT ICO model, noting that it provides 'swift and certain' sanctions[391] which can include imprisonment for a number of days. QCS highlighted the distinction with the Queensland model, where breaches:

> Must be returned to court for action, providing limited opportunity for QCS to act in response to emerging risks and persistent non-compliance. Swift and certain programs aim to hold offenders accountable while assisting them to succeed in completing their order in a rehabilitative way. They recognise that a combination of minor breaches often results in a disproportionate final sanction or sentence.

6.9 Options and preliminary Council view

The Council has identified three options for ICOs for the purposes of further consultation, which must be considered in the context of the broader package of reforms:

- Option 1: Retain ICOs in their current form.
- Option 2: Abolish ICOs as a sentencing option.
- Option 3: Reform ICOs to provide greater flexibility and powers on breach.

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388 Ibid cited in Gelb, Stobbs and Hogg, above n 356, 121.

389 Gelb, Stobbs and Hogg, above n 356, 123 [4.3.3].

390 Ibid 121–122 citing C Ringland (2012), 'Intensive correction orders vs. other penalties: Offender profiles', *Crime and Justice Bulletin*, 163 (Sydney: NSW Bureau of Crime Statistics and Research, 2012) 8.

391 Based on the Hawaii Opportunity Probation and Enforcement (HOPE) program.

6.9.1 Option 1 – Retain ICOs in their current form

Option 1: Retain ICOs in their current form
No changes to maximum length, ability to combine with other orders or conditions etc.

Whether ICOs are retained in their current form, modified or removed altogether as a sentencing option in Queensland needs to be considered in the context of existing forms of orders and proposed reforms. The Council has noted that the ACT, NSW and South Australia have all retained ICOs following review; Victoria is the only jurisdiction that has abolished them.

Arguments in favour of the retention of ICOs in their current form include:

- The unique nature of the order, which combines both punitive and rehabilitative aspects within the one order.
- As ICOs are a term of imprisonment served entirely in the community, this distinguishes ICOs from CCOs and other community based orders (although this outcome can also be achieved under court ordered parole, where this is available as a sentencing option).
- Despite being punitive, a CCO is not a term of imprisonment. There is uncertainty about whether courts will use this new order in place of an ICO or court ordered parole for serious offending without express legislative direction or encouragement.
- The narrow focus of the ICO for more serious offending may complement the wide range of offending behaviour that a CCO would be required to cover. Imprisonment is, in most cases, the sentence of last resort in Queensland.
- It would ensure that a broad range of sentencing options are retained in Queensland.
- Keeping ICOs would preserve the courts' ability to respond to a narrow range of cases where a custodial order served in the community, with the punitive aspect of community work is required.
- A benefit of ICOs over court ordered parole is that ICO breaches must be returned to court. This may ensure that punitive sanctions for technical violations are used sparingly and only when absolutely required (although this same result could be achieved by combining a wholly suspended sentence with a CCO).
- The use of ICOs for sexual offences could provide an alternative to the extension of court ordered parole to sexual offences [although the Council notes that breach action through court via summons could limit responses to changes in risk for these offenders].

Arguments against retaining ICOs in their current form include:

- If other reforms result in the ability of sentencing courts to combine imprisonment (including suspended terms of imprisonment) and community service as part of a new CCO for a single offence, the ICO may be seen to be redundant.
- In their current form, these orders are rarely used, and their use is falling. The very limited circumstances where they are considered appropriate do not justify their retention.
- QGSO research indicates that Probation and Parole officers view ICOs as unrealistic, difficult to successfully complete and ineffective in bringing about behaviour change.
- QCS lacks a current ability to quickly respond to issues of non-compliance (for instance, through the use of sanctions or by amending conditions) as the order can only be varied or cancelled by a court.

Although the problems and low usage of ICOs and their lack of flexibility was one of the reasons for their abolition in Victoria and Tasmania (the substitutional nature of the sanction being another), following recent reviews, the ACT and NSW have chosen to retain and reform them. There is also evidence from NSW that ICOs can provide an effective form of intervention compared to short terms of imprisonment — particularly for offenders who are at medium to high risk of reoffending. However, there are some key differences between Queensland and NSW and the ACT:

- NSW has abolished suspended sentences as a sentencing option, meaning that ICOs are intended, together with the new CCO, to fill the place that previously would have been occupied by suspended sentences; and
- neither the ACT nor NSW has court ordered parole, and nor do these jurisdictions allow for the release of an offender on parole at the date of sentence. Arguably, any benefits of an ICO could be delivered through supervision and support provided to offenders subject to court ordered parole.

6.9.2 Option 2 – Abolish ICOs as a sentencing option and replace with CCO

Option 2: Abolish ICOs as a sentencing option and replace with the CCO (Council preferred option)
Abolish ICOs as a sentencing option in conjunction with: • expanding the availability of court ordered parole; and/or • creating a CCO; and • enabling combinations of partially or wholly suspended sentences with a community based order (either the existing community based order, or the new CCO) for a single offence.

Arguments in favour of removing ICOs as a sentencing option in Queensland include:

- The ICO would serve little practical value if the availability of court ordered parole is expanded, and/or a new CCO introduced and courts permitted to combine suspended sentences with a CCO for a single offence.
- If court ordered parole was expanded to sexual offences and/or a new CCO model introduced, punitive aspects could instead be met by conditions of the order (CCO) or the term of imprisonment imposed (court ordered parole or a suspended sentence combined with a CCO), while still allowing for other therapeutic conditions to be ordered [only 3% of sexual offences (MSO) over the 13-year data period resulted in an ICO being imposed].
- Court ordered parole has a safety net: the Board can set and alter conditions and suspend parole if required to manage dynamic risk, without a requirement to return the matter to court. However, reforming ICOs to introduce such administrative intervention powers risks removing the distinction between ICOs and court ordered parole.
- Legislative provisions creating CCO conditions would have specificity: incorporating a wide range of clearly delineated options (and limited mandatory 'core' conditions) expressly set out in legislation as opposed to the broad yet (arguably) amorphous discretion in current sections 93(1)(d), 114(1)(d), 94 and 115 of the PSA regarding probation and ICOs. This should mean greater certainty, variability, flexibility and discretion to allow more tailored orders that address risk and needs but avoid rigid application of aspects of orders which may not be required for every offender (a criticism of ICOs).

Arguments against this option include:

- The unique nature of ICOs as noted above.
- Potential for use of ICOs for sexual offences as noted above (particularly if the duration and flexibility of the ICO were expanded).
- Benefits of breaches being returned to court and therefore actioned sparingly, as noted above.
- The benefit of breaches dealt with by courts could be augmented by reform to allow administrative intervention powers otherwise noted as a 'con' above (i.e. Board could vary or activate set number of days of imprisonment as a management tool). This could provide for more 'swift and certain' responses.
- ICOs could be kept and reformed so that the specificity of conditions mentioned above applied equally to them (as the probation and CCO provisions currently reflect each other).

Option 2 is currently the preferred option of the Council on the basis of arguments set out above. The decreasing use of this order, in the Council's view, highlights the very limited utility of ICOs in their current

form and with the introduction of a new CCO, broader powers to combine orders and potential expansion of court ordered parole, the likely usefulness of this order would be further eroded.

This is consistent with the Council's preference for the introduction of broader, more flexible community based orders with a wide range of available conditions that can meet a range of sentencing purposes, rather than overly rigid and inflexible orders that are suitable only for a small group of offenders.

The Council notes that this was not the view expressed by some stakeholders with whom the Council has consulted, who favoured retaining ICOs on the basis that the intention should be to expand, rather than to limit, the sentencing options available. The Council's concern is that by retaining a number of overlapping orders that effectively meet similar sentencing purposes, with a different range of available conditions, and different powers of courts and the Board to vary and revoke orders, it could add to the overall complexity of the sentencing system in Queensland.

Further, the Council considers that in light of its preferred option to introduce a CCO in Queensland, and to allow this order to be made in combination with a suspended sentence (whether for a single or multiple offences), these forms of orders would fill any potential gap left by the removal of ICOs as a sentencing option in Queensland. At the same time, this approach would have the advantage of allowing for greater flexibility as to the conditions imposed than an ICO offers, which can be better tailored to the individual circumstances of the offence and of the offender.

The Council invites further feedback during the next stage of the review about whether its preliminary position is supported or if an alternative option is preferred.

6.9.3 Option 3 – expanding ICOs - pros and cons

Option 3: Reform ICOs

Reform ICOs to:

(a) increase the maximum length to 2, 3 or 4 years;

(b) include greater flexibility of conditions – for example, if a scheme similar to NSW was adopted, this could include:

  i. mandatory conditions: the offender must not commit any offence and must submit to supervision by a corrective services officer;

  ii. additional conditions (with requirement to impose at least one condition, unless there are exceptional circumstances, and with an ability to limit the period the condition is in force): a supervision condition, home detention condition, electronic monitoring condition, curfew condition, community service work condition, rehabilitation or treatment condition, abstention condition, non-association condition and/or a place restriction condition; and/or

(c) provide for some administrative breach powers, such as in the ACT and NSW.

The final option presented by the Council for the purposes of consultation is to retain and reform ICOs. The extent to which this may provide the better alternative to the abolition of ICOs depends on the final position reached about reforms to other orders and whether a new CCO is recommended for introduction in Queensland.

Arguments in favour of retaining and reforming ICOs include:

- The unique nature of ICOs, as noted above, combining both punitive and rehabilitative aspects within an 'imprisonment' order served in the community.
- The potential use of ICOs for sexual offences, as noted above, particularly if court ordered parole is not extended to sexual offences or if the power to combine a suspended sentence with community based orders when sentencing for a single offence is not supported.
- Many of the criticisms of ICOs are based on the rigid nature of the current form of the order, as opposed to the role the order could play in the range of Queensland sentencing order options if it were made more flexible. The ICO in Queensland has only ever existed in its current form.

- Ensuring the power to revoke these orders and resentence the person or order them to serve the unexpired period in prison, or to add conditions is used sparingly by continuing to provide that only a court can exercise these powers, while augmenting court breach powers with administrative sanctions to provide more 'swift and certain' responses to a failure to comply as noted above.

Arguments against this option are:

- The redundancy issue in the context of court ordered parole and a new CCO used with suspended sentences (including for sexual offences specifically), as noted above. [However, difference may be as per the 'pro' point above; the fact that only a court could revoke the order and re-sentence the person, add conditions or order the person to serve the whole of the remaining period in custody is arguably an advantage].
- The safety net issue regarding court ordered parole as noted above.

6.10 Conclusion

In this chapter, we have considered the current operation of and use of ICOs in Queensland and other Australian jurisdictions, and potential options for either removing ICOs as a sentencing option in Queensland or, in the alternative, their retention and reform.

In the following chapter, we explore the introduction of a new CCO in Queensland. This order could either be introduced to replace probation and community service orders (similar to NSW), or under a more expansive model, probation, community service orders and ICOs (as is the case in Victoria).

Chapter 7 Community Correction Orders

The Terms of Reference require the Council to consider flexible CBSOs used in other jurisdictions, such as the Victorian CCO regime, and advise on appropriate options for Queensland.

A number of recent reviews have recommended that a CCO model be considered for adoption including: the 2016 *Queensland Parole System Review*;[392] the 2016 Queensland Drug and Specialist Courts Review;[393] the 2017 Australian Law Reform Commission inquiry into the incarceration rate of Aboriginal and Torres Strait Islander people;[394] and the current Queensland Productivity Commission inquiry into imprisonment and recidivism.[395]

This chapter considers the use of CCOs in Victoria, and similar orders introduced in other Australian states and England and Wales, and provides a brief review of the current use of existing community based orders in Queensland that such an order might replace. It also explores how the Victorian CCO has been operating, including modifications made over time to limit duration and types of offences for which this order can be made.

7.1 What are CCOs?

CCOs are a single form of flexible intermediate CBSO.[396] In jurisdictions where they exist in Australia, they have replaced other orders that still exist in Queensland (for example, community service orders, probation orders and suspended sentences). They include the potential for judicial monitoring as a condition of the order.

A CCO has been described as:

> a non-custodial sanction with multiple elements capable of being tailored to the needs of individual offenders. It is a sanction that can contain both punitive elements such as the loss of leisure time, and rehabilitative ones, such as education and treatment. These have the goal of constraining the offender's time, behaviour and freedom of choice while still permitting the person to remain within the community.[397]

The rationale for the introduction of a single CBSO, in place of previously existing intermediate non-custodial orders generally, has been that it simplifies the range of sentencing orders, while providing flexibility to judicial officers in meeting the purposes of sentencing and responding to the individual needs of offenders and underlying causes of offending.

A key feature of CCOs are that they are a non-custodial community based order that provide an alternative to imprisonment. CCOs are a sentencing order in their own right, and are not substitutional (a term of imprisonment served in the community). They have been said to provide 'a significant and proportionately punitive response to offences falling within the mid-range of seriousness' and as capable of fulfilling a number of sentencing purposes within the one order, including deterrence and rehabilitation.[398]

In other jurisdictions (Victoria, Tasmania and NSW) CCOs have been introduced as part of new regimes which also involved phasing out of suspended sentences. Conversely, England and Wales is an example of a jurisdiction which has both.

It has been submitted that what distinguishes these orders from other forms of community based orders is that CCOs 'have a wider range of available conditions, can be imposed for longer periods and can contain [in Victoria] an "intensive compliance period".[399] Considered together, these features have been said to

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392 Queensland Parole System Review, above n 9, 97–98. The second proposal deserving consideration was introducing the ability to impose a combined suspended sentence and probation order as a sentence.

393 Freiberg et al, above n 86, Recommendation 8.

394 Australian Law Reform Commission, above n 26, 234, Recommendation 7-2.

395 Queensland Productivity Commission, above n 11, 152.

396 Sentencing Advisory Council (Tasmania), above n 67, 85 (citations omitted).

397 Freiberg, above n 117, 698 [11.10].

398 Ibid 699 [11.15]. See also *Boulton v The Queen* (2014) 46 VR 308.

399 Ibid 698 [11.10].

'consolidate characteristics of the previous intermediate sanctions and offer a flexibility that makes CCOs adaptable to a range of situations.[400]'

CCOs are available and named as such in Victoria (since 2012), NSW (since September 2018) and Tasmania (since December 2018). England and Wales has had a community order since 2005. These are the jurisdictions considered in this chapter.[401]

A CCO can often be imposed where, under the sentencing regimes they replaced, only imprisonment would have been suitable.

A cross-jurisdictional analysis of the key elements of the CCO and equivalent orders, including criteria for making of these orders, order duration, conditions, and powers and procedures to vary and on breach can be found in the document *Community based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which is accessible on the Council's website. In summary, some of the features of note are:

- Duration — Victoria: 2–5 years depending on the number of offences sentenced or 5 years in higher courts; 3 years in the other jurisdictions (Tasmania, NSW and England and Wales).
- Mandatory conditions — required to differing degrees by each jurisdiction:
    - a set list focusing on reporting conditions and conditions to ensure compliance with the order such as reporting to/receiving visits from corrective services officers, notifying changes of address, seeking permission to leave the State, and complying with lawful directions (Victoria);
    - similar to the Victorian core conditions, plus one of either supervision or community service (Tasmania);
    - selecting at least one from a wide list and imposing a general requirement on offenders to keep in contact with their probation officer and advise of a change of residence (if no residence requirement) (England and Wales); and
    - good behaviour and court attendance requirements only (NSW - not reoffend, appear before court if required).
- Further optional conditions:
    - community service;
    - treatment and rehabilitation (England and Wales break these down into different condition types);
    - supervision (NSW does not allow home detention or electronic monitoring (EM); Victorian higher courts can order EM; England and Wales have a specific EM condition and EM is mandatory if curfew or exclusion requirement set);
    - contact and area restrictions (England and Wales have place restriction only);
    - curfew;
    - alcohol abstinence;
    - judicial monitoring (Victoria, Tasmania, England and Wales [through executive power to request this to occur]); and
    - a further catch-all, discretionary 'appropriate' condition (Victoria, Tasmania, NSW).
    - England and Wales also have program, prohibited activity, residence, foreign travel prohibition and attendance centre requirements (for young offenders) as optional requirements.
- Ability to tailor condition durations within the order period (Tasmania, NSW, England and Wales; Victoria has an intensive compliance period option).

The CCO has replaced most or all of the other forms of previously-existing intermediate community based orders. In NSW, the CCO was introduced alongside a strengthened form of ICO.

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400 Ibid.

401 Two other jurisdictions have insufficiently analogous orders which have not been included in the Council's analysis of either ICOs or CCOs. New Zealand has intensive supervision (*Sentencing Act 2002* (NZ) Part 2 ss 54B – 54L; 6 months-2 years, not imprisonment) but also supervision (ss 45-54A), community work (ss 55-69A) and community detention (ss 69B-M). Western Australia has intensive supervision (*Sentencing Act 1995* (NZ) Part 10 ss 68-75; 6 months – 2 years, not imprisonment) but also a community based order (ss 61-67).

Now, in Victoria, Tasmania, NSW and England and Wales, community service and probation are effectively conditions of a CCO or equivalent order as opposed to stand-alone orders.

7.2 The introduction of CCOs and equivalent orders – a chronological summary

7.2.1 England and Wales (*Criminal Justice Act 2003* (UK))

The first jurisdiction of those examined to introduce a broad form of community order in recent years was England and Wales with the introduction of a new sentencing framework under the *Criminal Justice Act 2003* (UK). The *Criminal Justice Act* implemented reforms outlined in the Government's 2002 White Paper Justice for All, which was based on earlier recommendations made by the 2001 Halliday review.[402]

In setting out the rationale for introducing a single community sentence to replace individual community penalties, the Halliday review referred to the proliferation of community penalties over the previous 10 years as having 'both complicated the statute book and increased the risks of inconsistent sentencing'.[403] It noted: 'In spite of the growth of community penalties, they are still not viewed as being sufficiently punitive', attributing this partly to the lack of clarity in relation to the penalties' stated aims.[404] It proposed:

> In order to match a non-custodial sentence to the assessed risks of reoffending, and the measures most likely to reduce those risks, courts should have the power to impose a single, non-custodial penalty made up of specified elements, including: programmes to tackle offending behaviour, treatment for substance abuse or mental illness; compulsory work; curfew and exclusion orders; electronic monitoring; and reparation to victims and communities. Supervision would be used to manage and enforce the sentence, and support resettlement. In deciding on the elements of the sentence, the court would be required to consider the aims of punishment, reparation and prevention of reoffending. The 'punitive weight' of the chosen ingredients should be no greater than would be commensurate with the seriousness of the offences under sentence, subject to any increased severity required for previous convictions.[405]

The new community order introduced under the *Criminal Justice Act* commenced operation in April 2005[406] and provides for courts to impose up to 13 conditions (called 'requirements'). Conditions that can be attached to the order include unpaid work, participation in rehabilitation activities and programs, curfew conditions, electronic monitoring, residence conditions and treatment conditions (including mental health and drug and alcohol treatment).

7.2.2 Victoria (*Sentencing Amendment (Community Correction Reform) Act 2011 (Vic)*)

The introduction of the Victorian CCO followed an extensive review by the Victorian Sentencing Advisory Council (VSAC) of suspended sentences and changes to intermediate sentencing orders. This review resulted in multiple publications produced over several years.[407]

While in its interim report, VSAC had proposed that community based orders and ICOs be amalgamated into a new generic community order (similar to that which existed in England and Wales), it ultimately recommended retaining ICOs (while removing the substitutional aspect and increasing their maximum duration from 12 months to two years)[408] and community based orders as separate forms of sentencing orders. In changing its position, VSAC referred to strong support by stakeholders for the retention of the Victorian form of community based order in its current form, and its benefits in avoiding 'the possible fast-tracking of offenders to prison and the potential for uncertainty and disparities in sentencing outcomes should a broader range of conditions be made available under a single form of community order'.[409]

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402 John Halliday, Cecilia French and Christina Goodwin, *Making Punishments Work: A Review of the Sentencing Framework for England and Wales* ('the Halliday Report') (Home Office, 2001).

403 Ibid vi [0.17].

404 Ibid.

405 Ibid vi [0.18].

406 See *Criminal Justice Act 2003* (UK) s 336(3) and S.I. 2005/950, art. 2(1), Sch. 1 para. 7.

407 Preliminary Information Paper 2005, Discussion Paper 2005, Interim Report 2005, Final Report Part 1 2006, Final Report Part 2, 2008.

408 Sentencing Advisory Council (Victoria), above n 1, 136-140, Recommendation 5 regarding ICOs. ICOs were instead abolished.

409 Ibid xxxvi and see also xxx.

VSAC recommended that community based orders 'be retained in their current form, with only minor changes'.[410]

VSAC's final form of recommendations was ultimately not adopted, with the reforms introduced more closely resembling VSAC's earlier proposal put forward in its interim report.

The Second Reading Speech for the Sentencing Amendment (Community Correction Reform) Bill 2011 (Vic), which introduced CCOs, mentioned VSAC's Final Report – Part 2 (presenting the final recommendations discussed above), but only to the extent that the report had 'noted that the overuse of suspended sentences in Victoria is at least partly due to the failings of intermediate sentencing orders'.[411] The speech otherwise describes the mechanics of a CCO reflecting VSAC's approach from its interim report, ultimately not pursued in its Final Report – Part 2:

> The current range of community-based sentences will be replaced with a single, flexible community correction order (CCO) that will strengthen community sentencing. The new order will deliver common-sense sentences targeted directly at both the offender and the offence.[412]

The creation of Victorian CCOs was the fulfilment of an election commitment of the Liberal-National Coalition government elected in December 2010.[413] The 2011 amending Act also repealed most of two sentencing-related Acts which had been introduced by the previous government.[414] One of these Acts had given effect to recommendations in the VSAC's Final Report – Part 2[415] regarding breaches of intermediate sentencing orders no longer constituting an offence and breach proceedings commencing promptly (although provisions dealing with the abolition of suspended sentences were retained).[416]

The Second Reading Speech for the 2011 Bill explained the rationale for the introduction of the new order on the basis that:

- The existing range of community based sentences does not provide courts with sufficient flexibility to directly target the offender and the offence.
- While jailing an offender is the most serious punishment available, there must be a flexible, practical approach to community based sentencing that can be tailored to suit the very wide range of offending which, while serious, does not warrant a sentence of imprisonment.[417]

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410 Ibid xxxi. See 195, Recommendations 9-1 through 9-6 regarding community based orders.

411 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 'Second Reading – Sentencing Amendment (Community Correction Reform) Bill 2011', (Robert Clark, Attorney-General) 2.

412 Ibid 1.

413 See Judicial College of Victoria, *Overview of Sentencing Amendment (Community Correction Reform) Act 2011* (no date) 1.

414 The *Sentencing Amendment Act 2010* [assent date 7 October 2010] and the *Justice Legislation Amendment Act 2010* [assent date 8 June 2010]. See Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 'Second Reading — Sentencing Amendment (Community Correction Reform) Bill 2011', (Robert Clark, Attorney-General), 8. A Labour government was in power from 2007 until December 2010; a Liberal – National Coalition government was in power from December 2010 - March 2013.

415 Sentencing Advisory Council (Victoria), above n 1, Recommendations 12-1 and 12-2, 255.

416 Sections 9, 13, 18, and 20-22 of the *Justice Legislation Amendment Act 2010* (Vic) were repealed by s 99 of the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic). As to the former, the second reading speech included: 'The bill continues this work by implementing the Sentencing Advisory Council's recommendation that breach of an intermediate sentencing order should no longer constitute an offence. This unnecessary criminal offence has been repealed and instead an administrative procedure, similar to the one that currently applies to suspended sentences, will operate to bring the offender back before the court and allow the court to re-sentence him or her': Victoria, *Parliamentary Debates*, Legislative Council, 25 March 2011, 'Second Reading — Justice Legislation Amendment Bill 2010', (Martin Pakula, Minister for Public Transport) 3.

417 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 'Second Reading — Sentencing Amendment (Community Correction Reform) Bill 2011', (Robert Clark, Attorney-General) 2.

The Explanatory Memorandum described the CCO as:

> A new sentence for the range of offenders who previously would have received a community-based order (CBO), intensive correction order (ICO) or combined custody and treatment order (CCTO). The CCO is also intended as an alternative sentencing option for offenders who are at risk of being sent to jail. The broad range of conditions that may be attached to a CCO will give courts flexibility to graduate their response to address the needs of offenders and set appropriate punishments.[418]

The Victorian Court of Appeal issued Victoria's first guideline judgment — *Boulton v The Queen*[419] — to establish greater certainty for courts in how the CCO was to be used, including its appropriate duration and what conditions should be attached. The Court further affirmed the appropriateness of the order for offenders who previously would have received a term of imprisonment. At the time of this decision, the legislation allowed for the court to set the length of the order up to the maximum penalty for the relevant offence. This case, and the principles outlined, are discussed further below.

7.2.3 NSW (*Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW))

The introduction of CCOs in NSW followed a 2013 NSWLRC review of sentencing that found that:

- Existing community based orders were structured in an overlapping, unnecessarily rigid way
- Strong and flexible community based options are essential to ensure that imprisonment is only used as a last resort.[420]

The NSWLRC proposed three new orders be introduced:

- a single CCO (to replace community service orders and section 9 [good behaviour] bonds);
- a single conditional release order that can be imposed with or without conviction to replace s 10(1)(b) bonds [discharge without recording conviction on good behaviour bond] and s 10(1)(c) orders [discharge without recording conviction on condition of participation in intervention program]; and
- a new 'no penalty' provision that can be imposed with or without conviction in place of s 10(1)(a) and s 10A orders.[421]

It also recommended that ICOs (and home detention and suspended sentences) be replaced with a new community detention order (combining home detention and ICOs).[422]

The NSWLRC envisaged a CCO would apply to a limited range of offences compared to the Victorian model:

> It would take its place between the more serious proposed CDO [community detention order] and the less serious proposed conditional release order (CRO) … Together they would cover the same range which the Victorian order addresses, but their separate existence would help to ensure that the court sets a sentence that is appropriate to the nature, circumstances and seriousness of the offence and the offender's subjective circumstances.[423]

The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) gave effect to the NSWLRC's recommended reforms with some modifications:

- abolishing suspended sentences, good behaviour bonds, community service orders and home detention orders;
- enhancing ICOs (including permitting home detention conditions to be imposed); and
- creating community correction orders and conditional release orders (to replace community service orders and good behaviour bonds).[424]

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418 Explanatory Memorandum, Sentencing Amendment (Community Correction Reform) Bill 2011 (Vic) 5.

419 *Boulton v The Queen* (2014) 46 VR 308.

420 NSW Law Reform Commission, above n 62, 289.

421 Ibid 289, Recommendation 13.1. See 267-268 for explanations of the orders referred to by section numbers.

422 Ibid Recommendation 11.1.

423 Ibid 292.

424 Explanatory Note, Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW) 1.

In his Second Reading Speech, the NSW Attorney-General, David Clarke identified the primary benefit of the new CCO order as being its flexibility:

> The community correction order will be a more flexible order so that offenders can receive supervision to tackle their offending behaviour and be held accountable. Courts will be able to tailor the sentence to impose a range of conditions. As with the new intensive correction order, where offenders cannot work or where there is limited available work, other conditions can be imposed as part of a community correction order to hold the offender accountable.[425]

The NSW CCOs commenced operation on 24 September 2018.[426]

7.2.4 Tasmania (*Sentencing Amendment (Phasing out of Suspended Sentences) Amendment Act 2017* (Tas))

The final Australian jurisdiction to have introduced CCOs is Tasmania. In a 2016 report, *Phasing out of Suspended Sentences – Final Report No.6*, TSAC recommended the introduction of home detention and CCOs. The intention was that these new orders would be used in place of suspended sentences, which the Tasmanian Government had committed to phase out, and in the case of CCOs, replace community service and probation.[427]

TSAC was 'encouraged by the innovative approach' taken in the Victorian guideline judgment, and endorsed the Court's comment that the advent of CCOs required:

> a re-consideration of the traditional conceptions of imprisonment as the only appropriate punishment for serious offences. This in turn will require a recognition of both the limitations of imprisonment and of the unique advantages which the CCO offers.[428]

TSAC noted that the model proposed for a Tasmanian CCO had similarities to the Victorian CCO, but 'is not an identical order.'[429] Such an approach reflected the need 'to consider sentencing options that are suitable for the Tasmanian context and not simply to replicate approaches taken in other jurisdictions with different social, political and judicial contexts'.[430]

The new CCO was introduced as part of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) and commenced operation on 14 December 2018.[431]

In introducing the Bill, the Minister for Justice, Elise Archer, described the key benefits of the CCO:

> Community correction orders are likely to be an appropriate sentencing order, either alone or in combination with other orders, for a wide range of offending. These orders are likely to be imposed in a broader range of circumstances than either community service orders or probation orders. Depending on the length of the order and the specific conditions imposed, community correction orders can be a highly punitive sentencing option. However, importantly, these orders will also help offenders address the factors that led to their criminal behaviour in the first place.[432]

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425 NSW, *Parliamentary Debates*, Legislative Council, 18 October 2017 'Second Reading — Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017', (David Clarke, Parliamentary Secretary for Justice) 2.

426 *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) assented to 24 October 2017, date of commencement 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 — commencement proclamation).

427 Sentencing Advisory Council (Tasmania), above n 67, Regarding home detention, see Recommendation 14. Regarding CCOs, see Recommendations 32-46. See also page 39.

428 Ibid 85 citing *Boulton v The Queen* (2014) 46 VR 308, 311 [5] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

429 Ibid 95.

430 Ibid.

431 Proclamation under the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) 3 December 2018.

432 Tasmania, *Parliamentary Debates*, Legislative Assembly, 19 October 2017, 'Second Reading — Sentencing Amendment (Phasing out of Suspended Sentences) Amendment Bill 2017', (Elise Archer, Minister for Justice) 44.

7.2.5 National - Australian Law Reform Commission - 2017

The ALRC, reporting on its Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, recommended that, using the Victorian CCO regime as an example, state and territory governments should implement community based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending.[433] It made this recommendation on the basis that:

> Issues of accessibility and flexibility are interrelated, particularly in relation to offenders with complex needs. This is because inflexible community-based sentencing regimes are likely to either exclude offenders with complex needs or result in high rates of breach and revocation. Inflexible community-based sentencing regimes may also have the effect of preventing the imposition of treatment conditions that address the underlying causes of reoffending.[434]

Key issues drawn from the Commission's research and submissions to the inquiry highlighted by the ALRC in supporting greater flexibility include:

- Research has consistently shown that the level of intervention under a sentence served in the community should be proportionate to the risk level of the offender. To achieve this, the sentencing regime for sentences served in the community needs to be as flexible as possible so that an individual sentence can be tailored by the judicial officer.[435]
- The inflexibility of existing community based sentencing regimes may be increasing the use of sentences of imprisonment over other alternatives to full-time custody, with a suggestion that in Queensland, sentencing of imprisonment served entirely on parole (under court ordered parole) have increased as a result of both restrictions on, and the lack of flexibility of, existing community based sentencing options. This perceived lack of flexibility of community based orders in Queensland has potentially adverse consequences including increasing the size of the prison population, and the use of parole where an offender has spent no time in prison and therefore has no need for prison-to-community reintegration.[436]
- Support by many stakeholders for granting judicial officers greater flexibility to tailor community based sentences, particularly to promote greater use of alternatives to full-time imprisonment, and to allow for the imposition of treatment and programs which aim to address underlying criminogenic factors (with the ALRC noting the NSWLRC had made similar observations in its 2013 Sentencing report).[437]

7.3 Data sources

As CCOs are not a sentencing option in Queensland, data in this chapter was drawn from publications from other jurisdictions which have implemented CCOs as a sentencing option.

Data is limited to CCOs issued in Victoria.[438] NSW and Tasmania have only recently implemented CCOs and data is not available from these jurisdictions. In England and Wales, data on 'community sentences' was obtained as a comparable order to CCOs.

7.4 The potential impact of a Queensland CCO

If CCOs were to be introduced in Queensland, given the Council's position that suspended sentences should be retained, they could be used either in place of community service orders and probation (the model adopted in NSW, and similar to that existing in England and Wales), or in place of community service, probation and ICOs (as in Victoria).

Figure 7-1 illustrates the composition of community based orders imposed for the most serious offence (MSO) in all Queensland courts from 2005–06 to 2017–18. In 2017–18, 9.2 per cent of sentencing orders

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433 Australian Law Reform Commission, above n 26, 234, Recommendation 7.2.

434 Ibid 234–5.

435 Ibid [7.59].

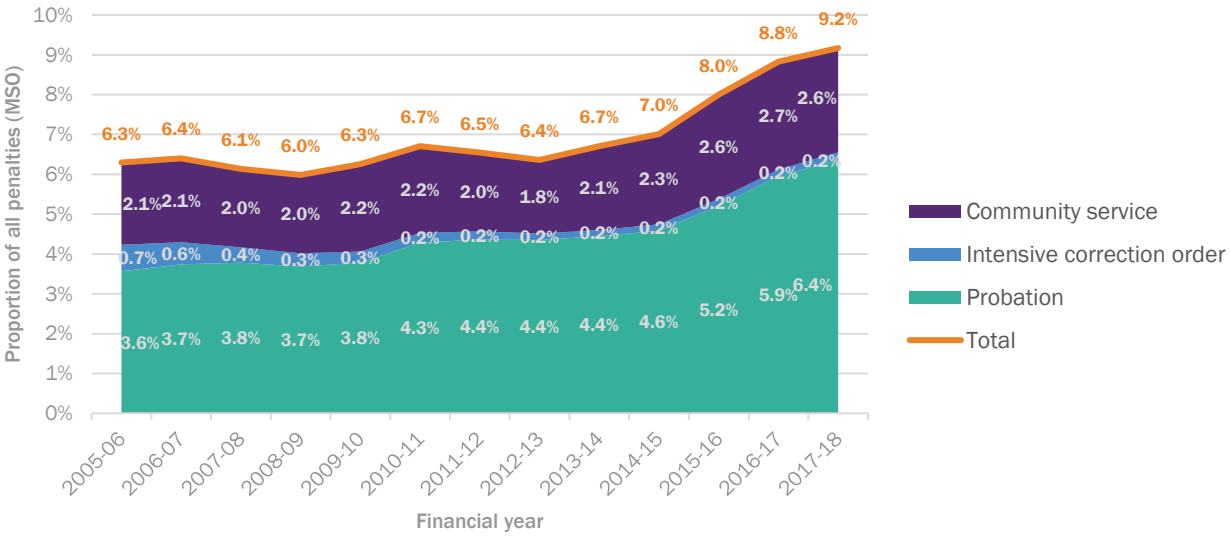
436 Ibid [7.60]–[7.62].

437 Ibid 247–248 [7.68]–[7.70].

438 No data was available to allow a comparison of youth offenders as a cohort distinct from adult offenders. The Council has also scoped out juvenile sentencing orders from its review.

were community based orders. The majority of these were probation orders, followed by community service orders (6.4% and 2.6% respectively). ICOs accounted for only 0.2 per cent of sentencing orders.

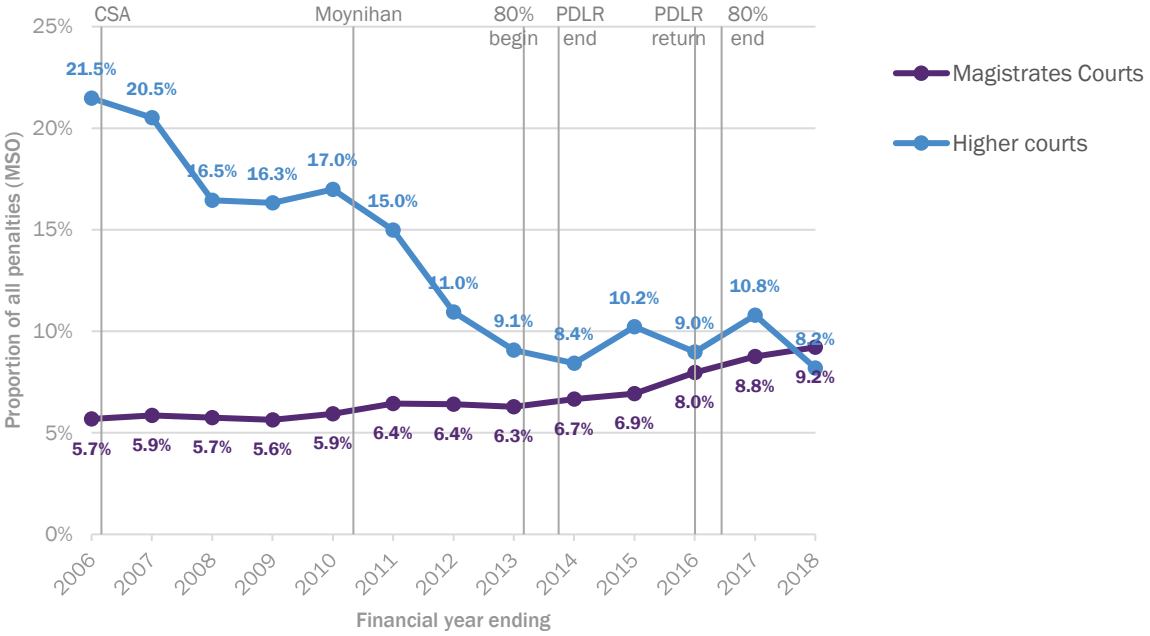
Figure 7-1: Composition of community based orders (MSO),[439] 2005-06 to 2017-18



Source: QGSO, Queensland Treasury - Courts Database, extracted November 2018

The trend in use of community based orders over time is different in the Magistrates Courts and higher courts (see Figure 7-2). In the Magistrates Courts, the use of CBSOs has increased steadily over the past decade, reaching a high of 9.2 per cent in 2017–18. However, in the higher courts, CBSOs accounted for 21.5 per cent of sentencing orders in 2005–06, with their use declining to 8.4 per cent in 2013–14. From 2013–14, the proportion of CBSOs in the higher courts was relatively stable, increasing to 10.8 per cent in 2016-17, before dipping back to 8.2 per cent in 2017–18.

Figure 7-2: Composition of community based orders (MSO) by court type, 2005-06 to 2017-18[440]



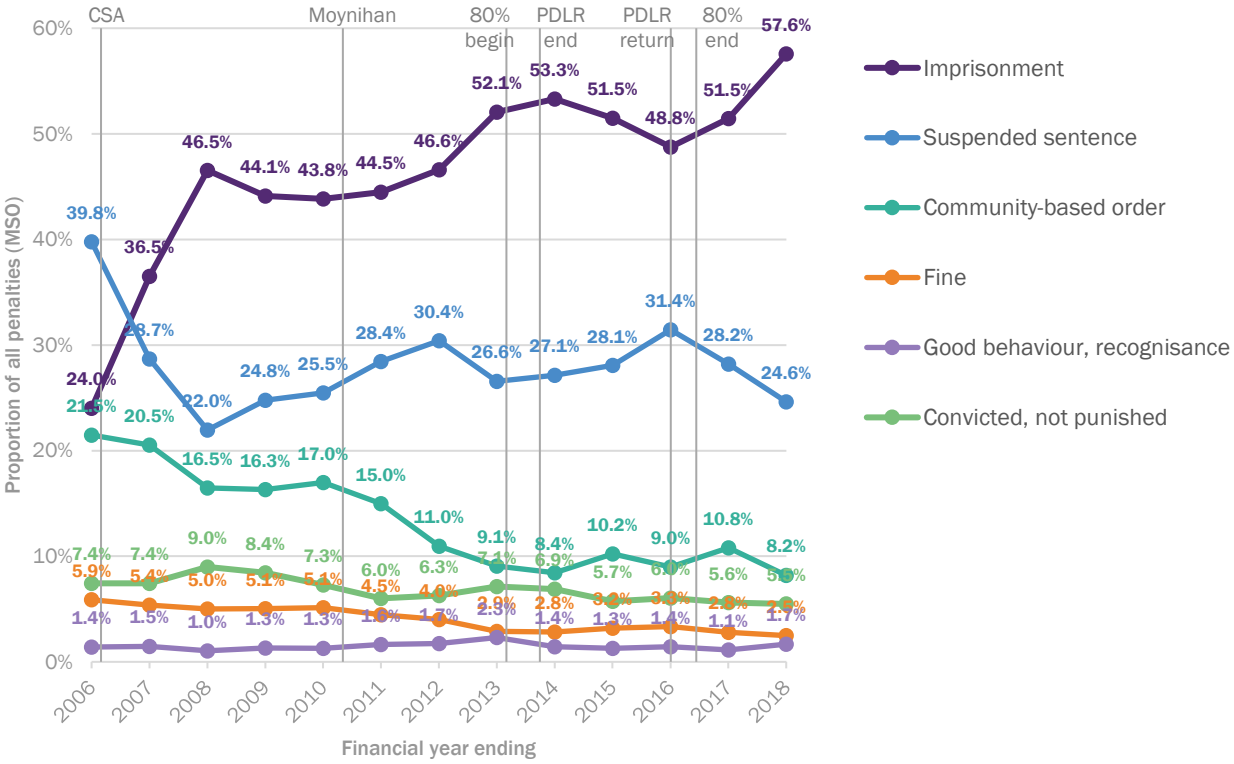
Source: QGSO, Queensland Treasury - Courts Database, extracted November 2018

439 'MSO' means most serious offence.

440 The lines depict various reforms which could impact on the data:

Figure 7-3 shows that in the higher courts, the decrease in the proportion of CBSOs coincides with an increase in the proportion of custodial penalties. Imprisonment and suspended sentences accounted for a combined total of 63.8 per cent of penalties in 2005–06; this figure increased to 82.2 per cent in 2017–18.

Figure 7-3: Breakdown of sentencing orders in the higher courts (MSO), 2005-06 to 2017-18[441]



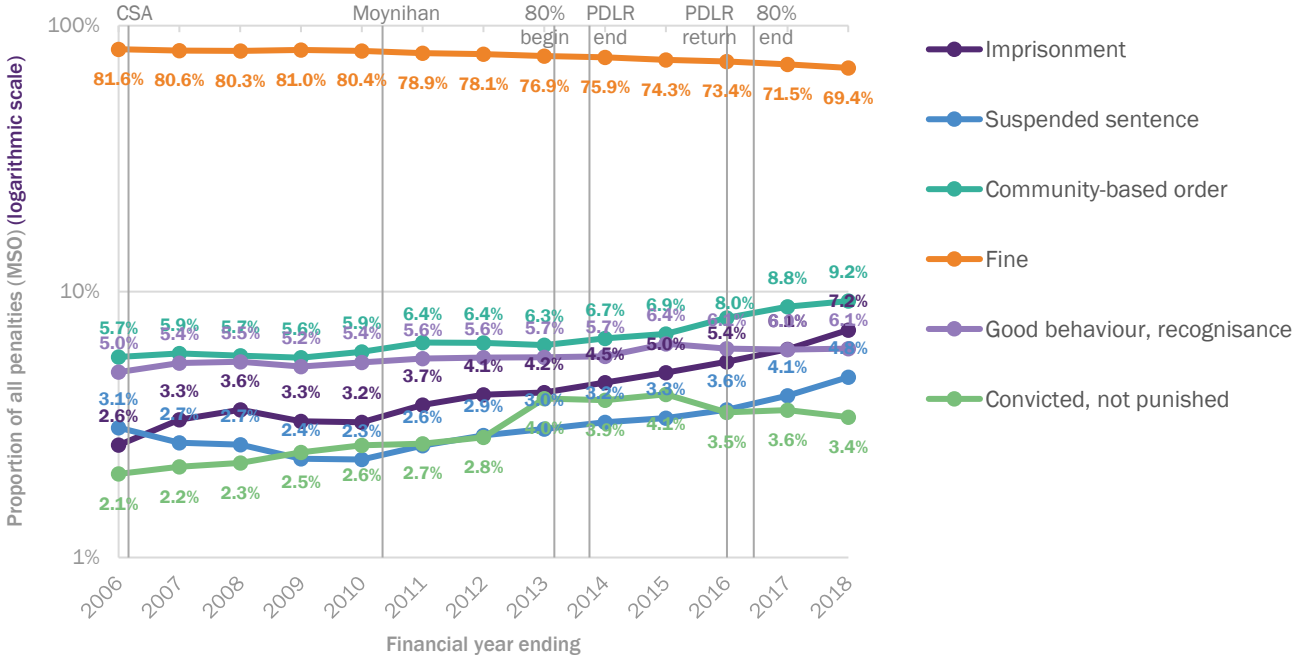
Source: QGSO, Queensland Treasury - Courts Database, extracted November 2018

Figure 7-4Figure 7-3 shows that in the Magistrates Courts, the proportion of fines issued (by MSO) decreased substantially, from 81.6 per cent in 2006–07 to 69.4 per cent in 2017–18. As a result, the proportional use of all other penalties increased over this period.

- 'CSA': *Corrective Services Act 2006* (Qld); parole regime (*Penalties and Sentences Act 1992* (Qld) Part 9, Div 3). Commenced 28/08/2006.
- 'Moynihan': amendments commenced 1/11/2010. Magistrates Courts' jurisdiction expanded: indictable offences in *Criminal Code* (Qld) and *Drugs Misuse Act 1986* (Qld). District Court's criminal jurisdiction increased: offences with maximum penalty of 20 years or less (up from 14 years or less).
- '80%' drug trafficking rule – commenced 29/08/2013; removed 9/12/2016. This required drug traffickers sentenced to immediate full-time imprisonment (not ICOs or suspended sentences) to serve a mandatory minimum non-parole period of 80% of their sentence in detention.
- 'PDLR': prison last resort. Removed 28/03/2014; reintroduced I/07/2016. *Penalties and Sentences Act 1992* (Qld) s 9(2)(a): imprisonment as last resort; preference for sentence served in community. Exceptions regarding violence, child sexual offending/child exploitation material remain.

441 For an explanation of lines representing key legislative reforms, see n 440 above.

Figure 7-4: Breakdown of sentencing orders in Magistrates Courts (MSO), 2005-06 to 2017-18[442]



Source: QGSO, Queensland Treasury - Courts Database, extracted November 2018

7.5 The Victorian CCO model - Parts 3A and 3C *Sentencing Act 1991* (Vic)[443]

As the Victorian CCO is the best established and evaluated form of Australian CCO, analysis of it forms the focus of this chapter. It is also the order which has gone through the greatest measure of reform and amendment since its introduction in 2012 — including the most recent restrictions on use (effective from 28 October 2018).

While it is the sole 'mainstream' community based order available in that State, Victorian CCOs have nonetheless been pared back somewhat since introduction. Also, the other jurisdictions analysed (Tasmania, NSW, England and Wales) do not share Victoria's legislated schedule of offences to which CCOs cannot apply.

7.5.1 Reforms to the CCO regime

VSAC recently summarised the history of changes made to the CCO regime over time as follows:

> The CCO became available to the courts in Victoria on 16 January 2012. At the same time, a number of other orders were abolished, including the community-based order, the intensive correction order, the combined custody and treatment order and the home detention order. Since its introduction, the CCO has been affected by a number of amendments to the Sentencing Act 1991 (Vic):
>
> The courts were encouraged in September 2014 to use a CCO in place of a suspended sentence.
>
> Initially, the maximum length of a CCO in the higher courts was equal to the maximum term of imprisonment available for the offence, but in **March 2017** the maximum length of a CCO was set at five years for all offences.
>
> Initially, the maximum term of imprisonment that could be combined with a CCO was set at three months, but it was increased to two years in September 2014 and reduced to one year in March 2017.
>
> The courts' use of CCOs was limited in March 2017 for two classes of serious offences, described as Category 1 offences and Category 2 offences [further limitations were added in October 2018].

442 For an explanation of lines representing key legislative reforms, see n 440 above.

443 This summary is based on the following Victorian Sentencing Advisory Council resources and relevant provisions of the *Sentencing Act 1991* (Vic).

In addition to these legislative changes, the Victorian Court of Appeal's first guideline judgment offered guidance to the courts on the purposes, strengths and limitations of the CCO.[444]

7.5.2 The guideline judgment - *Boulton v The Queen*[445]

The Victorian Court of Appeal's guideline judgment on the proper use of CCOs highlighted a number of features of the CCO model. Some of the points made by the Court of Appeal in issuing this judgment were:

- CCOs may be appropriate for relatively serious offences that would previously have attracted a medium term of imprisonment.
- There is now a very broad range of cases in which it will be appropriate to impose a suitably structured CCO, either alone or in conjunction with a shorter term of imprisonment, including cases where imprisonment would formerly have been regarded as the only option.
- They offer courts the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and their dependants.
- A CCO should not be refused on the basis that the offence is of such seriousness that it had always resulted in imprisonment.
- The overarching principles for the imposition of the CCO are proportionality and suitability.
- In determining suitability, imprisonment must not become the default in difficult cases involving mental illness, drug addiction and/or homelessness with anticipated compliance difficulties. Such concerns should not bar a CCO where there is a positive assessment of suitability for treatment/rehabilitation conditions. The court should proceed on the assumption that — whatever difficulties of compliance there may be initially — they are likely to abate once the treatment process gets under way (accepting that relapses are common occurrences during the beginning stages of treatment).
- CCOs are likely to be a particularly important sentencing option for young offenders, given the flexibility to allow a court to fashion an order that simultaneously achieves the purposes of rehabilitation and punishment.

The Court declined to define any outer limits of any offences for which a CCO would be unsuitable (although legislation has since done so — see section 7.5.4 below).

7.5.3 Sentencing trends

In early 2012, the CCO replaced a number of sentencing orders, including the ICO, home detention and the community based order. Figure 7-5 and Figure 7-6 show the superseded community based orders for sentences imposed prior to January 2012.

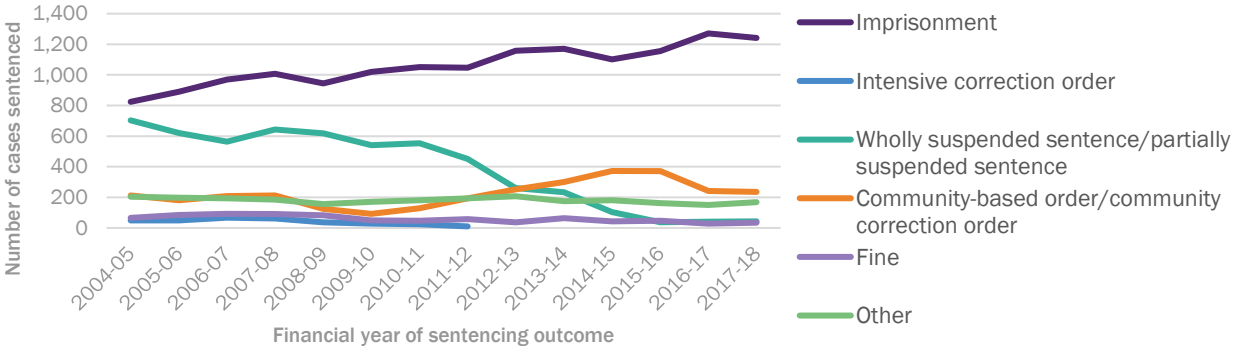
In 2017-18, CCOs were the second most frequently imposed sentence in the Victorian higher courts (13.7%), following sentences of imprisonment (72.1%). The percentage of cases sentenced to a CCO peaked at 20.9 per cent in 2015–16, before decreasing to 13.7 per cent in 2017-18.[446]

444 Sentencing Advisory Council (Victoria), *Serious Offending by People Serving a Community Correction Order: 2017–18* (2019) 2–3 (citations omitted).

445 *Boulton v The Queen* (2014) 46 VR 308.

446 Sentencing Advisory Council (Victoria), *Sentencing Outcomes In The Higher Courts* (2018).

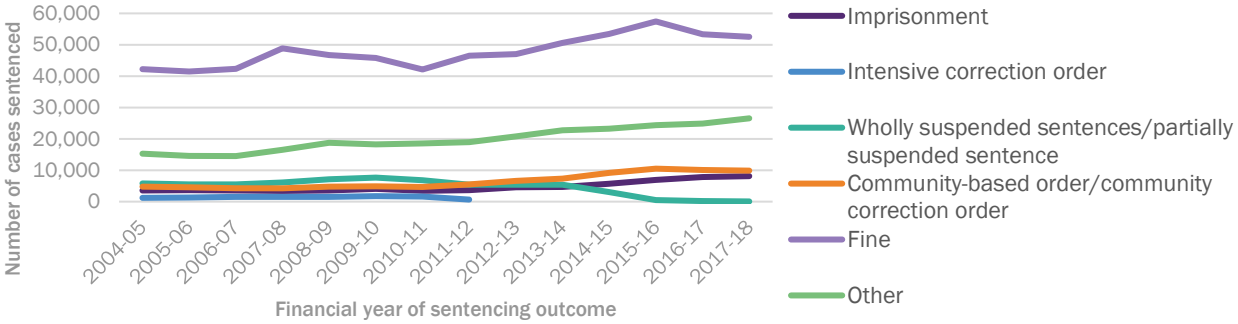
Figure 7-5: Sentencing outcomes in Victoria's higher courts, 2004-05 to 2017-18



Source: Court Services Victoria, unpublished data, via Sentencing Advisory Council (Victoria)[446]

In 2017–18, CCOs accounted for 10.2 per cent of all sentences in the Victorian Magistrates' Court. When CCOs where introduced in Victoria in 2012, they accounted for 7.9 per cent of sentences — this proportion rose to 10.5 per cent in 2015-16 where it remained relatively stable until 2017–18.[447]

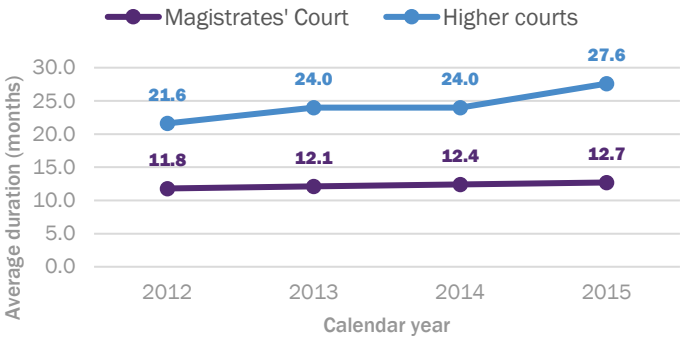
Figure 7-6: Sentencing outcomes in Victoria's Magistrates' Court, 2004–05 to 2017–18



Source: Court Services Victoria, unpublished data, via Sentencing Advisory Council (Victoria)[447]

The average duration of Victorian CCOs increased steadily over the four years following their introduction in 2012 (see Figure 7-7). In the Magistrates' Court, average duration increased from 11.8 months in 2012 to 12.7 months in 2015.[448] In the higher courts, the average duration increased from 1.8 years to 2.3 years in 2015.[449]

Figure 7-7: Duration of community correction orders in Victorian courts, 2012-2015



Source: Court Services Victoria, unpublished data, via the Victorian Sentencing Advisory Council[448]

447 Sentencing Advisory Council (Victoria), *Sentencing Outcomes In The Magistrates' Court* (2018).

448 Sentencing Advisory Council (Victoria), *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) 16.

449 Ibid 20.

7.5.4 Restrictions on use

Category 1 offences

A Victorian court must make a custodial order for any 'Category 1' offence (committed on or after **20 March 2017** ((s 5(2G)) and after the 2014 guideline judgment. The Category 1 list contains:

- murder;
- causing serious injury intentionally in circumstances of gross violence;
- causing serious injury recklessly in circumstances of gross violence;
- rape / rape by compelling sexual penetration;
- incest (victim under 18) / incest – de facto (victim under 18);
- sexual penetration with a child under 12;
- persistent sexual abuse of a child under 16;
- sexual penetration of a child or lineal descendant under 18;
- sexual penetration of a step child under 18;
- trafficking in a large commercial quantity of a drug of dependence; and
- cultivation of a large commercial quantity of a narcotic plant.

Further offences committed on or after 28 October 2018 were added to this list from that date:

- causing serious injury intentionally, serious injury recklessly and injury intentionally or recklessly, if the victim was an emergency worker, custodial officer or youth justice custodial worker on duty and the offender knew or was reckless as to whether the victim was such a person;
- aggravated home invasion;
- aggravated carjacking; and
- a simpliciter or aggravated offence of intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving if, in the commission of the offence, such a person is on duty and is injured.[450]

A new subsection[451] qualifies s 5(2G) by making a special-reason exemption for the five new Category 1 emergency worker offences only. These offences also carry a statutory minimum non-parole period or term of imprisonment, unless a court finds a special reason, which then mandates other sentence types as fixed alternatives, subject to assessment of causally-linked impaired mental functioning.[452]

Relevantly, one of the mandated alternative sentences in this context is a new mandatory treatment and monitoring order (s 44A, effective 28 October 2018), being a CCO with mandatory judicial monitoring and either treatment and rehabilitation or justice plan[453] conditions, which cannot be cancelled.[454]

In addition, certain repealed sexual offences committed on or after 20 March 2017 and before 1 July 2017 have been added. These offences are analogous to the sexual offences already listed in the definition of Category 1 offence. This amendment came into effect on 26 September 2018.[455]

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450 Amendments to the *Sentencing Act 1991* (Vic) s 3, as amended by the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73.

451 New s 5(2GA) introduced by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 75 – commenced 28 October 2018.

452 Being beyond the scope of this paper. See *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 78, amending *Sentencing Act 1991* (Vic) ss 10AA and 10A. See also explanatory notes to the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic), 41-43.

453 A 'justice plan condition' is a special condition available for offenders with an intellectual disability. It requires offenders to comply with a plan of available services designed to reduce the likelihood of reoffending, which is in accordance with principles and objectives set out under Part 2 of the *Disability Services Act 2006* (Vic).

454 See *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 80.

455 See *Sentencing Act 1991* (Vic) new s 3(1)(l), 'category 1 offence' and s 168(3), Explanatory Memorandum, Justice Legislation Miscellaneous Amendment Bill 2018 (Vic), 40 (cl 72(2)) and *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73(2).

Category 2 offences

There is also a list of 'Category 2' offences (committed on or after 20 March 2017 and a second tranche on or after 28 October 2018) for which imprisonment must be imposed,[456] unless a statutory exception is established (including because the person has impaired mental functioning, which has been restricted in recent amendments):[457]

- manslaughter;
- child homicide;
- causing serious injury intentionally, other than a category 1 offence;
- kidnapping / kidnapping (common law);
- arson causing death;
- trafficking in a commercial quantity of a drug of dependence;
- cultivation of a commercial quantity of a narcotic plant;
- providing documents or information facilitating terrorist acts;
- aggravated offence of intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving other than a category 1 offence; and
- aggravated offence of recklessly exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving.

As with the Category 1 offences, further offence types committed on or after 28 October 2018 have since been added:[458]

- armed robbery if the offender has a firearm or the victim suffers injury as a direct result of the offence or the offence was committed in company;
- home invasion;
- carjacking;
- culpable driving causing death; and
- dangerous driving causing death.

Table 7-1 shows the outcomes of VSAC analysis over time of the five most common (principal) offence categories attracting CCOs.

Table 7-1: Five most common principal offence categories for Victorian CCOs

January 2012 - June 2013[459]		2014 - 2015[460]	
Higher courts	**Magistrates' Court**	**Higher courts**	**Magistrates' Court**
Assault (36.4%)	Assault (20.3%)	Assault (30.8%)	Assault (30.7%)
Non-rape sexual offences (18.5%)	Traffic (16.6%)	Sexual offences (20.9%)	Traffic (19.2%)
Robbery (14.2%)	Theft (15.7%)	Robbery and burglary (19.6%)	Theft and deception (13.8%)
Aggravated burglary (7.1%)	Justice procedures (13.3%)	Drugs (cultivate, traffick or manufacture) (9.2%)	Drugs (cultivate, traffick or manufacture)(8.9%)
Drugs (court mandated treatment) (4.1%)	Handling stolen goods (9.2%)	Theft and deception (8.1%)	Other (6.6%)

Source: Sentencing Advisory Council (Victoria), *Community Correction Orders Monitoring Reports*.

456 *Sentencing Act 1991* (Vic) s 5(2H).

457 See *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76.

458 Amendments to the *Sentencing Act 1991* (Vic) s 3, as amended by the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 74.

459 Sentencing Advisory Council (Victoria), *Community Correction Orders Monitoring Report* (2014) 14, 36.

460 Sentencing Advisory Council (Victoria), above n 448, 15, 19.

7.6 Evaluations of the Victorian CCO model

7.6.1 Victorian monitoring reports

The VSAC published a series of three monitoring reports in 2014,[461] 2015[462] and 2016[463] examining how CCOs had been used by Victorian courts.

The first monitoring report covered the 18 months following the introduction of CCOs in Victoria (January 2012 to June 2013). The report found that CCOs in the Magistrates' Court were primarily being used in place of the repealed community based orders and ICOs. In the higher courts, CCOs were additionally being used in place of suspended sentences, to a limited extent.[464]

The second monitoring report covered an additional 18 months, from January 2012 to December 2014. Following the abolition of suspended sentences in the Victorian Magistrates' Court from 1 September 2014, it found the Magistrates' Court was increasingly using CCOs in place of suspended sentences.[465]

Legislative changes were introduced in September 2014, increasing the maximum imprisonment term a CCO may be combined with from three months to two years. This change saw a drastic increase in the number of combined imprisonment and CCO sentences (a 62.3% increase in the Magistrates' Court, and a 238.9% increase in the higher courts, in the final quarter of 2014).[466]

The third monitoring report examined how Victorian courts used CCOs from their introduction in 2012, with a particular focus on the 2015 calendar year. The report found that from 2014 to 2015, the number of offenders who received a CCO as the head sentence increased by 36 per cent in the Magistrates' Court, and 15 per cent in the higher courts. Following the abolition of suspended sentences in the higher courts from 1 September 2014, the number of combined imprisonment and CCO sentences rose by over 370 per cent in the higher courts in 2015. The number of combined sentences imposed in the Magistrates' Court increased by 100 per cent in 2015.[467]

7.6.2 Victorian Auditor-General's report

A February 2017 Victorian Auditor-General's report found that in 2014–15,[468] daily CCO management costs per person were $27.55 per day ($10,000/year), substantially less than $360.91 for a prisoner ($131,700/year).

By way of comparison, Australian Government data shows that the real net operating expenditure per prisoner per day in Queensland in 2017-2018 was $181.55 (in Victoria it was $323.82). In contrast, the real net operating expenditure per offender per day for supervising an offender in the community in Queensland in 2017-2018 was $13.79 (in Victoria it was $32.40).[469]

The Victorian data for 2014-15 showed that offenders on Victorian CCOs had a significantly reduced risk of reoffending (24.9% reoffended and went back through the correctional system within two years) compared to those imprisoned (53.7% reoffended and either returned to community corrections or prison within two

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461 Sentencing Advisory Council (Victoria), above n 459.

462 Sentencing Advisory Council (Victoria), *Community Correction Orders Second Monitoring Report (Pre-Guideline Judgment)* (2015).

463 Sentencing Advisory Council (Victoria), above n 448, 460.

464 Sentencing Advisory Council (Victoria), above n 459.

465 Sentencing Advisory Council (Victoria), above n 462, 20.

466 Ibid.

467 Sentencing Advisory Council (Victoria), above n 448.

468 Victorian Auditor-General, above n 299, vii.

469 Productivity Commission, above n 44, Table 8A.18. 'Prisoner' means a person held in full time custody under the jurisdiction of an adult corrective services agency. This includes sentenced prisoners serving a term of imprisonment and unsentenced prisoners held on remand, in both public and privately operated prisons. 'Offender' means an adult person subject to a non-custodial order administered by corrective services, which includes bail orders if those orders are subject to supervision by community corrections: 8.28.

years of release). However, those on CCOs tended to come from a lower-risk cohort, so the report cautioned that the link may not always be causal.[470]

The report also found:

- the number of offenders on CCOs almost doubled from 2013 to 2016 (to 11,730);
- a rise in high risk offenders on CCOs (27%; no historical comparison available);
- strain on corrections staff;
- significant waiting times for accessing programs;
- between 2013–14 and 2015–16, the number of combined CCO imprisonment orders imposed on offenders increased by more than 400 per cent.[471]

It concluded that:

- Corrections Victoria had a comprehensive reform program addressing key challenges arising from a rapid overall increase in offenders on CCOs, including a fast-growing high-risk offender cohort.
- If implemented effectively, the reforms, along with a significant Corrections Victoria recruitment exercise, should reduce high caseloads and improve overall management of offenders.
- However, practices for managing offenders on CCOs were not effective, and much of the effort to fully implement these reforms lay ahead.
- There was a shortage of adequately trained staff to meet the increase in offenders on CCOs, business processes were inefficient, and a fragmented information management environment impeded timely decision-making and effective coordination.
- To better manage risks to community safety, Corrections Victoria needed to review its process for managing con-compliant offenders on CCOs, especially the process for taking offenders back to court for breaches of conditions.
- The growing number of higher-risk offenders on CCOs added extra complexity to a system already struggling with high growth and high caseloads.
- Corrections Victoria needed to better understand these more challenging cohorts, improve its risk assessment completion rates and improve communication with Victoria Police about higher-risk offenders.[472]

7.6.3 Contravention of orders

In July 2017, VSAC published the report, *Contravention of Community Correction Orders*, which analysed offenders sentenced to a CCO from 1 July 2012 to 30 June 2013 (7,645 offenders).[473]

In the higher courts, 59 per cent of offenders complied with the CCO, compared to 49 per cent in the Magistrates' Court. A small group failed to comply with a term or condition of the CCO (13% in the higher courts, 15% in the Magistrates' Court); whereas a larger group contravened their CCO by committing a new imprisonable offence (28% in the higher courts, and 36% in the Magistrates' Court).[474] These findings are shown in Figure 7-8 below.

470 Victorian Auditor-General, above n 299, 2, citing Department of Justice and Regulation data.

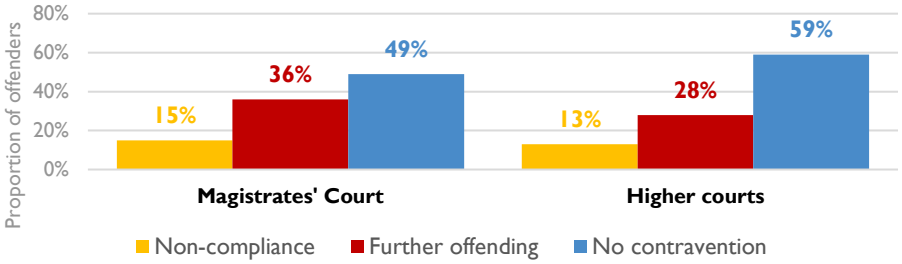
471 Ibid.

472 Ibid, viii.

473 Sentencing Advisory Council (Victoria), above n 300.

474 Ibid 31.

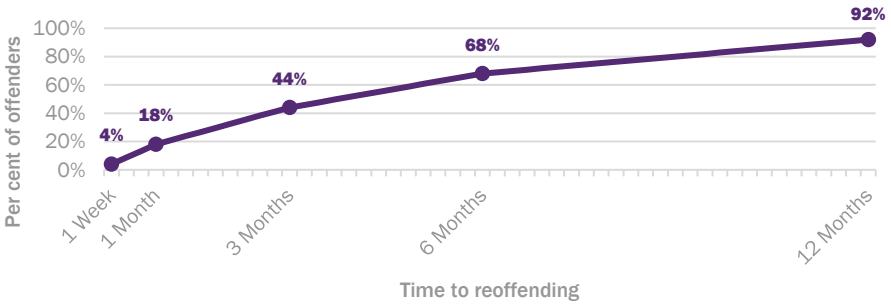
Figure 7-8: Compliance with community correction orders in Victoria, July 2012 to June 2013



Source: Court Services Victoria, unpublished data, via the Victorian Sentencing Advisory Council[475]

Figure 7-9 shows that offenders who contravene a CCO by reoffending are much more likely to do so within the first few months. Almost half of all reoffending occurred within the first three months (44%; 4% in the first week, 18% in the first month, 68% in the first six months); almost all offenders who reoffended did so within the first year (92%).[476]

Figure 7-9: Time to offending by offenders on a of a community correction order in Victoria, July 2012 to June 2013[477]



Source: Court Services Victoria, unpublished data, via the Victorian Sentencing Advisory Council

The VSAC 2017 report found that offenders with the following factors were more likely to commit an offence while on a CCO:[478]

- Offenders with prior convictions were much more likely to contravene their CCO by reoffending (five times more likely if sentenced in the higher courts, and three times more likely in the Magistrates' Court).
- Just under half (49%) of young adult offenders contravened their CCO by further offending, compared with 28 per cent of offenders aged 25 and over.
- In the Magistrates' Court, CCOs longer than 12 months were more likely to be contravened by reoffending; in the higher courts the likelihood of reoffending was increased for CCOs longer than two years.
- In the Magistrates' Court, CCOs with conditions other than community work were more likely to be contravened.
- In the Magistrates' Court, CCOs combined with a sentence of imprisonment were more likely to be contravened.

Of the 7,645 offenders who received a CCO in 2012–13, fewer than one in seven (13.6%; 1, 042) were imprisoned for contravention of the order, with 92 per cent of these cases (n=959/1,042) involving the person being imprisoned after a breach of the order by further offending. Where breach was of the conditions only, courts were more likely to make use of non-imprisonment orders, such as by imposing another CCO or a fine.

475 Ibid.

476 Ibid 35.

477 Ibid.

478 Ibid 44–45.

Based on this data, it appears that CCOs are operating relatively successfully in diverting offenders from prison.

More specific breakdowns of the report's findings are set out in Table 7-2 and the discussion below. The report analysed four types of court orders that are associated with the contravention of a CCO. These are broken down, with specific outcome types listed by jurisdiction.

Table 7-2: Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders* (2017) – outcomes of contraventions

Court	Outcome
1.Orders made in relation to the original CCO (was it confirmed, varied or cancelled?)	
Magistrates' Court	56 per cent of contravened CCOs were cancelled (and the original offence was resentenced), 23 per cent were confirmed, 11 per cent were varied, and 10 per cent were cancelled with no further order.[479]
Higher courts	40 per cent of contravened CCOs were confirmed, 38 per cent were cancelled and resentenced, 17 per cent were varied, and 4 per cent were cancelled with no further order.[480]
2. Resentencing of original offence (in cases where the CCO was cancelled)	
Magistrates' Court	31 per cent resulted in imprisonment, 28 per cent in a wholly suspended sentence (although suspended sentences were later removed as a sentencing option in Victoria from 1 September 2014),[481] 20 per cent in a fine, and 15 per cent in a CCO.[482]
Higher courts	57 per cent resulted in imprisonment, 25 per cent in a CCO.[483]
3. Sentencing for new offences (in cases where the CCO was contravened through further offending)	
Magistrates' Court	32 per cent resulted in imprisonment, 23 per cent in a fine, 19 per cent in a CCO, and 17 per cent in a wholly suspended sentence.[484]
Higher courts	32 per cent resulted in a fine, 31 cent per in imprisonment, and 19 per cent in a CCO.[485]
4. Sentence for the offence of contravening a CCO (in cases where the offender was charged with this as a separate offence)	
Magistrates' Court	82 per cent of cases were proven and dismissed, and 13 per cent of cases resulted in a fine.[486]
Higher courts	86 per cent of cases were proven and dismissed.[487]

Taking all four types of court orders into consideration, the most severe outcomes imposed were as follows:

479 Ibid 62 [6.15], Figure 35.

480 Ibid 69 [7.9], Figure 42.

481 This analysis therefore would be most useful from a Queensland perspective, given that suspended sentences will remain in Queensland. Note, for instance, Sentencing Advisory Council (Victoria), above n 300, x: 'Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates' Court for all offences committed on or after 1 September 2014' and at xv, fn 1: 'As suspended sentences are no longer available in Victoria, subsequent studies of contravention of CCOs will find a different distribution of sentence outcomes'.

482 Ibid 63 [6.18], Figure 36.

483 Ibid 70 [7.10], Figure 43.

484 Ibid 65 [6.21]-[6.22], Figure 38.

485 Ibid 71 [7.12], Figure 44.

486 Ibid 66 [6.23], Figure 39.

487 Ibid 72 [7.13], Figure 45.

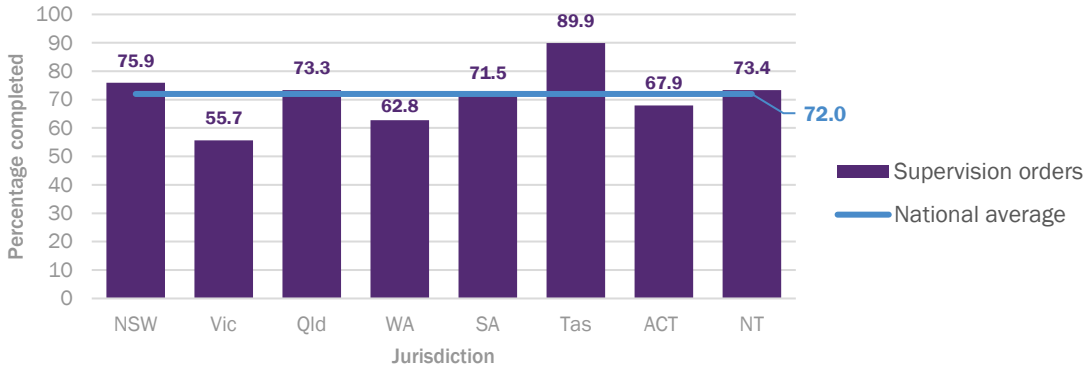
- In the Magistrates' Court, the most severe sentence associated with contravention by further offending was most commonly imprisonment (35%), followed by a CCO (27%),[488] a wholly suspended sentence (20%) or a fine (12%).[489]
- The most severe sentence for contravention by non-compliance was a CCO (46%) followed by a fine (19%), a wholly suspended sentence (18%), imprisonment (7%) or the contravention being proven and dismissed (7%).[490]
- In the higher courts, the most severe sentence associated with contravention by further offending was most commonly imprisonment (49%), followed by a CCO (40%).[491]
- The most severe sentence for contravention by non-compliance was a CCO (63%) followed by the contravention being proven and dismissed (23%), followed by imprisonment (10%).[492]

7.7 *Report on Government Services 2019*

The Productivity Commission's *Report on Government Services 2019* provides a comparison of completion rates for supervision orders across each jurisdiction. This data includes all community correction orders which do not restrict a person's liberty (e.g., home detention), and does not include community service bond/order or fine option orders which require offenders to undertake unpaid work. On this basis, the following data are broader than CCOs and ICOs.[493]

Figure 7-10 shows that nationally in 2017–18, 72.0 per cent of supervision orders were completed. Tasmania had the highest percentage of completed supervision orders at 89.9 per cent. In Queensland, 73.3 per cent of supervision orders were completed successfully, which was similar to the outcome obtained by NSW, SA and NT. Victoria and WA had the lowest percentages of successful completions at 55.7 per cent and 62.8 per cent respectively.

Figure 7-10: Completion of community corrections orders (supervision orders), 2017-18



Source: Australian Government. Productivity Commission, *Report on Government Services 2019*[494]

Figure 7-11 shows the national average for completion of supervision orders has increased by two percentage points, from 70.0 per cent in 2016-17 to 72.0 per cent in 2017-18. Queensland's completion rate increased to 73.3 per cent, up from 71.2 per cent. Victoria, Tasmania and the ACT all saw a decrease in completion rates. In the following chart, bars shaded red indicate a decline in completion rates from the previous year, and bars shaded green indicate an increase from the previous year.

488 Note that if a CCO was the most severe sentence, it may indicate that the original CCO was confirmed.

489 Ibid 61 [6.10], Figure 34.

490 Ibid.

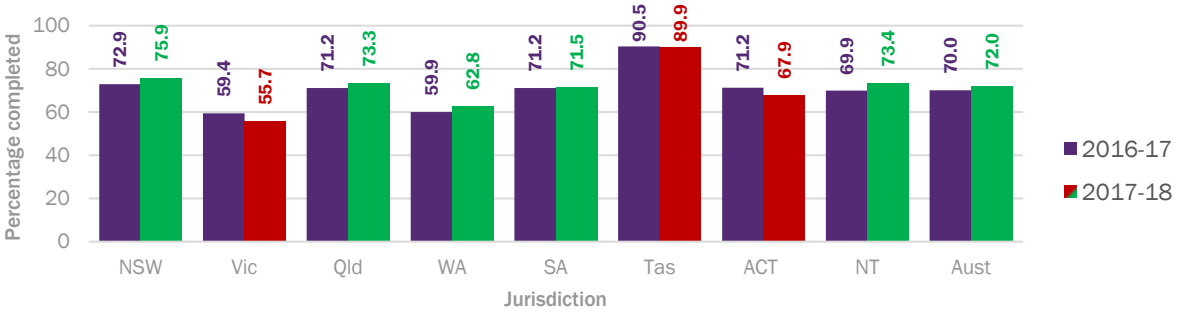
491 Ibid 68 [7.3]–[7.4], Figure 41.

492 Ibid.

493 Note that this will reflect the old systems in NSW (CCO and new scheme active since September 2018) and Tasmania (CCO and new scheme active since December 2018).

494 Australian Government, Productivity Commission, above n 44, Table 8A.19.

Figure 7-11: Completion of community corrections orders (supervision orders), 2016-17 to 2017-18



Source: Australian Government. Productivity Commission, *Report on Government Services*, 2018, 2019[495]

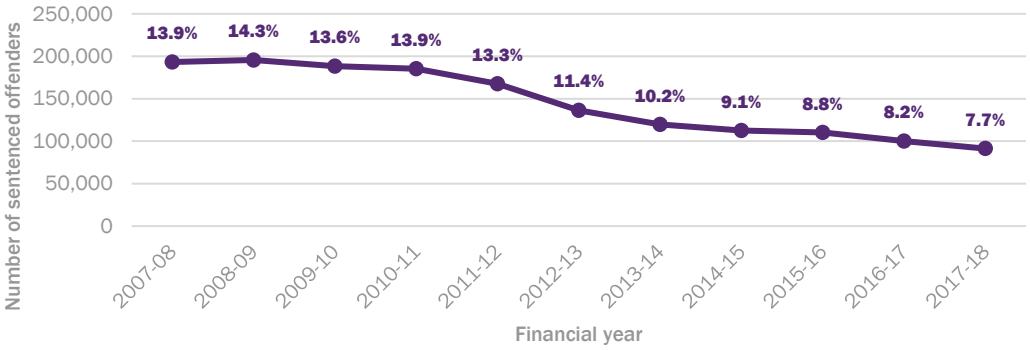
Comparing data across jurisdictions has a number of limitations. First, it may reflect different counting rules that apply to whether community orders are recorded as 'completed'. Secondly, it does not take into consideration the different offending and risk profiles of those being place on community orders. For example, if the majority of those placed on such orders are low to moderate risk offenders, then completion rates can be expected to (on average) be high, whereas if those placed on community orders also include a number of offenders with complex needs who are at higher risk of reoffending (including those who would otherwise have been sentenced to a period of imprisonment), the completion rates could be expected to be lower.

Completion rates alone, therefore, are an imperfect measure of how effectively these orders are operating.

7.8 Community orders in England and Wales

Figure 7-12 shows a marked decrease in community sentences over the past decade as a proportion of all sentences, from 193,298 sentences in 2007-08 (13.9% of cases) to 91,293 sentences in 2017-18 (7.7% of cases).[496]

Figure 7-12: Community sentences as a proportion of all sentences in the England and Wales, 2007-08 to 2016-17



Source: United Kingdom Ministry of Justice Court Proceedings Database[497]

Figure 7-13 shows the number of sentencing orders used in England and Wales from 2007–08 to 2017–18. Community sentences have seen a marked decline over the decade, while sentences of imprisonment showed a small decline, and suspended sentences showed a small increase over the same period.

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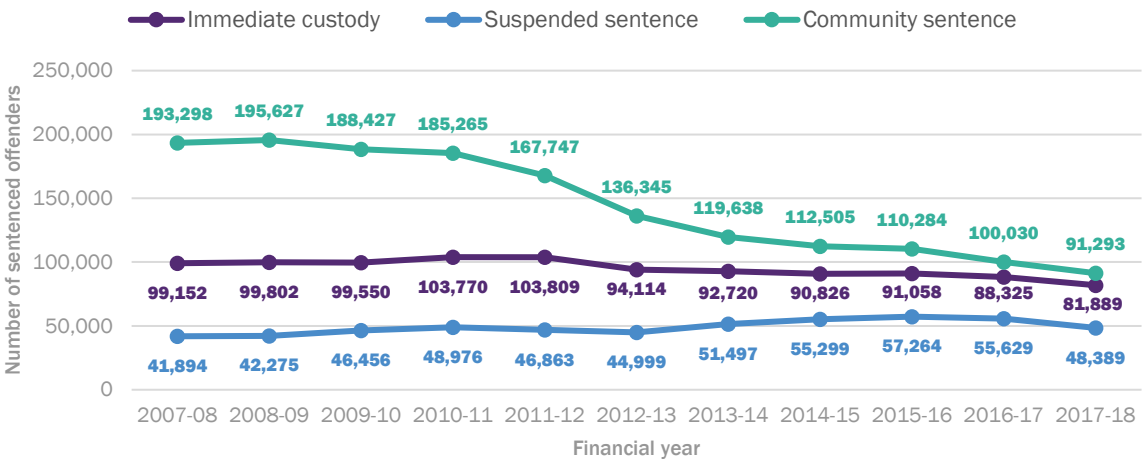
495 Ibid.

496 'Community sentence' means community orders for adults and youth rehabilitation orders for youths (ss 147(1) and 305 of the *Criminal Justice Act 2003* (UK) at ss 37, 40 and 50.

497 Criminal Justice Statistics – Quarterly update: the year ending June 2018; UK Ministry of Justice Court Proceedings Database, Table Q5.1b, accessed online 23 January 2019.

Figure 7-13: Sentencing outcomes in England and Wales, 2007-08 to 2017-18



Source: UK Ministry of Justice Court Proceedings Database[498]
Notes:
Data is given on a principal disposal basis - i.e. reporting the most severe sentence for the principal offence.
Life sentences and other indeterminate sentences are excluded from the data.
Offenders who are not persons (e.g., companies, public bodies, etc.) are excluded from the data.
The following sentencing outcomes were not included in this figure: fine, absolute discharge, conditional discharge, compensation, otherwise dealt with.

The fall in the use of community orders has been attributed to factors including the increased use of suspended sentences, as well as a drop in the offence types that most commonly attracted these orders (theft and drug offences).[499] A lack of confidence of magistrates as use of the order as an effective alternative to imprisonment, or as reducing crime, was also cited.[500]

In 2015, a study undertaken by the UK Ministry of Justice which analysed the reoffending of offenders on community orders, found that 35 per cent of offenders reoffended within 12 months of the start of their community order. Of those individuals who were convicted of subsequent offences within 12 months of the start of their order, 36 per cent were convicted of an acquisitive offence (theft, burglary or fraud) and 20 per cent were convicted of a violent offence.[501]

An earlier 2013 study, which matched offenders on offender and offence-based characteristics (such as age, gender, ethnicity, number of prior criminal convictions and offence type) known as 'propensity score matching', found that offenders sentenced to less than 12 months in custody had a higher one year reoffending rate of 6.4 percentage points than similar, matched offenders receiving a community sentence.[502] Offenders sentenced to a community sentence who reoffended had a lower number of proven offences (a mean of 2.4 per offender for community orders, versus 3.4 for offenders sentenced to immediate custody of 12 months or less). Those who reoffended on a community order were less likely to be given a custodial sentence than those reoffending subject to other orders (44.4% custody rate for those previously sentenced to immediate custody of 12 months or less, versus 55.5% for those subject to a suspended

498 Ibid.

499 Danny Shaw, 'Why are the numbers of community sentences failing?, *BBC News*, 16 January 2018.

500 Ibid. The following study which included interviews of magistrates was cited: Sophie du Mont and Harvey Redgrave, *Where did it all go wrong? A Study into the Use of Community Sentences in England and Wales* (Crest Advisory, 2017). Over a third of magistrates (37%) surveyed were not confident that community sentences are an effective alternative to custody, and two thirds (65%) were not confident that community sentences reduce crime,

501 UK Ministry of Justice, *Re-offending by Offenders on Community Orders* (2015) [3.1] 15.

502 UK Ministry of Justice, *2013 Compendium of Re-Offending Statistics and Analysis* (2013) 14 (Table 1.1).

sentence; and 33.3% for those on a community order).[503] Important differences from Queensland at that time include:

- offenders in the UK sentenced to custodial sentences of less than 12 months when the study was undertaken were not subject to post-release supervision by the probation service upon their release;
- suspended sentence orders in the UK provide for a range of conditions (including supervision) to be attached to the order.

The reduced reoffending of people serving community orders has been attributed to factors such as stable employment, suitable accommodation and personal relationships that can be supported and sustained by a community sentence than a sentence of imprisonment.[504] Building social bonds and positive personal relationships, are also more able to be achieved as part of a community order than a sentence of immediate custody.[505]

7.9 Issues

The Council has specifically been requested under its Terms of Reference to consider reforming community based orders to introduce a Victorian-style CCO.

There are a range of arguments both for and against introduction of a CCO in Queensland.

7.9.1 Arguments in favour of a CCO model

The primary argument in favour of the adoption of CCOs and bringing a number of current orders within the umbrella of a single form of community order concern is this order's flexibility.

While the current forms of probation and community service orders are theoretically flexible, the conditions that can be attached have not been well defined, so courts have created their own packages of conditions. A CCO could better define packages of conditions that can potentially respond better to the circumstances of individual offenders. If the CCO is introduced alongside an ability to combine orders for a single offence (e.g. imprisonment or a suspended sentence with a CCO), this would achieve maximum sentencing flexibility.

Depending on what orders are brought within the new CCO (probation and community service only, or these two orders plus ICOs) and the additional conditions provided for, the order could potentially allow for a high level of flexibility in relation to the conditions ordered and how the order is managed. It could allow punitive elements (such as community service) to be combined with rehabilitative components (such as participation in treatment and other interventions).

The Victorian Court of Appeal in *Boulton v The Queen* identified a number of 'unique advantages' which the CCO offers.[506] First, '[t]he availability of the CCO dramatically changes the sentencing landscape'.[507] With the introduction of this new order, the Court found, the sentencing court could 'now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence'.[508]

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503 The higher re-offending custody rate for suspended sentences can be understood in light of the operation of the relevant breach provisions which require a court to activate a suspended sentence on breach 'unless of the opinion that it would be unjust to do so *Criminal Justice Act 2003* (UK) sch 12, paras 8(3)–(4).

504 Du Mont and Redgrave, above n 500, 18.

505 Ibid.

506 *Boulton v The Queen* [(2014) 46 VR 308, 311 [5] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

507 Ibid 335 [113].

508 Ibid.

Secondly, 'the CCO option offers the court something which no term of imprisonment can offer'.[509] That is, 'the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) … pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places'.[510] Thirdly, by allowing the offender to remain in the community, it 'enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide'.[511]

The Court concluded: 'In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her'.[512]

The introduction of a new order also provides the opportunity to recalibrate the way existing CBSOs are viewed in terms of providing a serious alternative to a sentence of imprisonment.[513] Reasons for the rise in the use of imprisonment in Queensland are complex. But in part, this increase in the use of custodial sentences may be due to concerns that only imprisonment will meet the community's need for denunciation and just punishment, and sufficiently deter future offending.

With the introduction of the CCO in Victoria, the Court of Appeal found that the fact an offence had previously been considered so serious that only a sentence of imprisonment was appropriate, 'should mark the beginning, not the end, of the court's consideration'.[514] In making this finding, the Court agreed with statements made by the Attorney-General that the CCO has 'the robustness and flexibility to be imposed in a wide variety of circumstances'.[515]

A new CCO could potentially reduce reliance on imprisonment where the purposes can be achieved by a higher-level CCO.

Adopting a CCO model would also be an important step to moving towards national consistency in the range of CBSOs available. While there are variations in the types of orders that exist at a state level, CCOs are now available in Victoria, NSW and Tasmania. With the introduction of a CCO in Queensland, it is possible other jurisdictions would follow — particularly given the CCO model was recommended for consideration for introduction by the ALRC.

7.9.2 Arguments against adoption of a CCO model

The major barrier to the introduction of a new order, assuming it allows for a broader range of conditions than existing orders, is likely to be the issue of resourcing. As the Court of Appeal in Victoria cautioned in considering the likely use of this order in Victoria:

> the readiness of sentencing courts to impose CCOs for serious offences will depend on these orders being shown to be effective. And they will not be effective unless they are properly supported and resourced … Proper resourcing is essential to enable courts to attach conditions — both punitive and rehabilitative — in the knowledge that compliance with the conditions is likely to produce meaningful results. Otherwise, this new sentencing option will simply not realise its potential.[516]

509 Ibid 335 [114].

510 Ibid.

511 Ibid.

512 Ibid 335 [115].

513 On this issue, see for example, *Boulton v The Queen* (2014) 46 VR 308, 311 [5] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

514 Ibid 335 [115].

515 Ibid 335–336 [116].

516 Ibid 339 [134].

TSAC voiced a similar concern in supporting the introduction of a CCO in Tasmania:

> The challenge will be for the judiciary to feel confident in using the conditions attached to the order on the basis that offenders are effectively supervised, that drug and alcohol testing is available, that curfews and exclusions are monitored and that appropriate programs for treatment are available. This is a matter of resourcing and training for Community Corrections staff and the judiciary, and the failure to provide adequate resources to support compliance monitoring and treatment has been a factor identified elsewhere as leading to a lack of confidence in particular sanctions.[517]

In 2009–10, the real net operating expenditure per offender per day was $10.59 in Queensland, and $18.50 in Victoria.[518] By 2017–18, this had increased to $13.79 in Queensland and $32.40 in Victoria. While Victoria has had a 75 per cent increase in funding over this period, there has been only a 30 per cent increase in funding in Queensland, starting from a much lower funding base.[519]

The Victorian Auditor-General report in February 2017 highlighted a number of areas for improvement in the management of these orders in Victoria. Since the delivery of this report, there has been a significant investment in community correctional services in that state. In the current financial year, 2018–19, $279.8 million has been committed by the Victorian Government to support community based supervision services, up from $199.2 million in 2016–17.[520] As at June 2018, the Department of Justice and Regulation reported there were 999 (FTE) Community Corrections Practitioners employed.[521] In 2017, a commitment to bring the total number to 950, was said to represent an increase of more than 300 staff over the previous two years.[522] Victorian offender to staff ratios are now the lowest in the country (12.2 offenders per community services officer compared to 29.1 offenders per officer in Queensland).[523]

At the same time, it might be possible to adopt a model that allows the progressive rollout of conditions as more funding becomes available. If such an order is successful in diverting some offenders from prison, and in reducing risks of reoffending, the initial investment might yield significant benefits.

Apart from ensuring the availability of appropriate resourcing, concerns in other jurisdictions about the introduction of similar reforms have primarily been framed in terms of reducing the number of community based sentencing options available to courts, the risks of penalty escalation and 'offenders moving more quickly up the hierarchy to a prison sentence'.[524] Similar concerns have been raised with the Council.

Introducing an ability to combine existing orders (probation and community service) with a suspended sentence when sentencing for a single offence might address some of the concerns about the flexibility of existing orders without the need to introduce a new form of order.

Keeping probation, community service and ICOs as distinct forms of orders also has the advantage of these orders retaining a distinct identity based on the types of conditions attached, which also clearly indicates the level of sentence imposed on an offender's criminal history. Stakeholders have suggested that if CCOs are introduced, there should be some way of quickly and clearly identifying, on an offender's criminal history, where on the scale of offence seriousness the offence for which the CCO was imposed lies.

The introduction of CCOs may require pre-sentence reports or court advice on the appropriate conditions to be imposed, which would inevitably result in court delays and holds potentially significant resource implications for QCS. This is discussed further in section 11.1 of this report.

At the same time, the option of introducing CCOs has attracted significant (albeit cautious) support by a number of those consulted.

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517 Sentencing Advisory Council (Tasmania) above n 67, 98.

518 Australian Government, Productivity Commission, *Report on Government Services 2011* (2011) Corrective Services – Attachment, Table 8A.11.

519 Australian Government, Productivity Commission, above n 44, Corrective Services – Attachment, Table 8A.17.

520 Victorian Government, *Victorian Budget 18/19, Budget Paper 3 – Service Delivery* (2018) 277.

521 Department of Justice and Regulation (Victoria), *Annual Report 2017–18* (2018) 174.

522 Minister for Corrections, Media Release, 'Stronger Community Corrections System to Keep Victorian Safe', 16 January 2017.

523 Australian Government, Productivity Commission, above n 14, Table 8A.7.

524 NSW Law Reform Commission, above n 62, 290 [13.8].

7.10 Stakeholder views

There was support from some stakeholders for exploring the potential benefits of introducing CCOs in Queensland.

Points of support included:

- A CCO of potentially longer duration, and with more flexible and varied conditions, than current community based orders could be a more effective alternative for offenders who are on the cusp of imprisonment.
- CCOs may divert some short-sentence prisoners from custody where it is appropriate for them to be managed in the community.
- A CCO duration reflecting the Victorian model (five years, or three years in the Magistrates Courts) would maximise the range of offences a CCO could be used for (although other views expressed concern about net widening and longer order lengths exposing offenders to greater risk of breach on monitoring or surveillance grounds)
- The benefits of flexibility was seen in the range of conditions possible that can be included on a CCO. These can address the overarching purposes of sentencing and the needs of the individual offender and victims of crime.
- CCOs may also increase flexibility in how corrective services is able to manage an offender's rehabilitation needs and risk to the community.

The Council's Aboriginal and Torres Strait Islander Advisory Panel was among those stakeholders who supported greater flexibility in conditions made under community based orders, as recommended by the ALRC in its 2018 *Pathways to Justice* report (see discussion in section 4.5 of this paper). The difficulties in complying with orders with a number of inflexible conditions, including reporting conditions, was highlighted as particularly difficult for offenders with mental health issues, cognitive impairment including Fetal Alcohol Spectrum Disorders (FASD) and other forms of disability. These issues were also highlighted by the ALRC in its report.[525]

Caution, or in some cases, opposition, was expressed in the following contexts:

- Resourcing was widely recognised as a major consideration.
- There would be restrictions on such orders in remote Queensland where offenders are difficult to treat and monitor.
- Net widening concerns were raised, regarding more people being subject to higher levels of intervention, surveillance and, therefore potential further punishment.
- If CCOs subsumed all other community based orders, they may limit the sentencing options available to courts.
- The interplay with court ordered parole would need to be further considered. There was some questioning of how CCOs would operate differently from court ordered parole.
- Administrative breach powers were opposed by some because of the loss of court oversight and ability for offenders to be represented through such proceedings.
- The use of imprisonment as a sanction in the event of breach necessarily impacts upon prison numbers, which increases the State's prison costs. However, the capacity to intervene in minor rule breaking prior to behaviour escalating is an important factor in community management, with delays and lengthy court processes potentially undermining the effectiveness of the sanction.
- The best model to adopt for breach outcomes and non-compliance would need to be considered.
- Compliance-based sentences pose significant difficulties for people with complex health needs, including unrecognised cognitive/intellectual impairments and severe mental health issues.
- It would be useful for sentencing courts to receive reports about the person's criminogenic needs. There could be a legislative recognition of these reports. While psychiatrists and psychologists rely on client self-reporting (which would also be the case in this instance), in the

525 Australian Law Reform Commission, above n 26, 42 [1.24]).

case of current specialist reports, this assessment process is aided by lawyers and background material.

7.11 Options and preliminary Council views

The Council has developed three options for the purpose of further consultation:

- Option 1: Retain probation and community service orders with no or minor changes only.
- Option 2: Introduce a limited form of CCO, replacing probation and community service orders.
- Option 3: Introduce CCOs, replacing probation, community service orders and ICOs.

7.11.1 Option 1 – Retain probation and community service orders with no or minor changes only

Option 1: Retain probation and community service orders with no or minor changes only

Under this option, probation and community service orders would be retained with no, or minor reforms only. For example:

- additional condition types could be specified in addition to the additional requirement contained in section 94 of the *Penalties and Sentences Act 1992* (Qld) to 'submit to medical, psychiatric or psychological treatment';
- greater clarity could be provided about what types of 'reasonable directions' a corrective services officer can issue through amendments to the *Penalties and Sentences Act 1992* (Qld) and/or *Penalties and Sentences Regulation 2015* (Qld).

This option could work in conjunction with the option to allow both a probation order and community service order to be made with a suspended sentence of imprisonment when sentencing an offender for a single offence (see further, section 5.2.6).

Option 1 is likely to represent the lowest cost option, requiring minimal changes only to the structure of the order. Under this option, changes could still be introduced to enable courts to combine a suspended sentence with a probation or community service order when sentencing an offender for a single offence.

7.11.2 Option 2 – Introduce a limited form of CCO, replacing probation and community service orders

Option 2: Introduce a limited form of CCO, replacing probation and CSOs

Under this option, a new CCO would be created with two packages of conditions available:

- probation/supervision; and
- community service.

Core conditions (referred to as 'general requirements' under *the Penalties and Sentences Act 1992* (Qld), would be aligned with those that current exist for a probation and community service order, requiring that the offender:

- not commit another offence during the period of the order;
- report to an authorised corrective services officer at the place, and within the time, stated in the order;
- report to, and receive visits from, an authorised corrective services officer as directed;
- take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order;
- notify an authorised corrective services officer of every change of their place of residence or employment within 2 business days after the change happens;
- not leave or stay out of Queensland without the permission of an authorised corrective services officer; and
- must comply with every reasonable direction of an authorised corrective services officer.

Option 2 may overcome potential problems with the introduction of a full CCO regime, which involves introducing a modified CCO. If this option were adopted, it would also be at lower cost than rolling out a new order with a broader range of available conditions, while moving to consistency with Victoria, Tasmania and NSW, although it would still require legislative reform and change to administrative IT systems, policies and procedures, and associated training. It may allow time to assess how a generic community based order might operate, without committing to a full reform model.

Option 3 draws on elements of other CCO models operating elsewhere and would establish a full legislative reform framework that can then be built on and rolled out over time, rather than requiring significant future legislative reform. Despite current fiscal challenges, an investment in this model has potential to more effectively build confidence in CBSOs by allowing for a broad range of conditions to be attached to the order, increase flexibility and reduce reliance on immediate imprisonment, thereby assisting to reduce the growth in prisoner numbers.

7.11.3 Option 3 – Introduce CCOs, replacing probation, community service orders and ICOs

Option 3: Introduce CCOs, replacing probation, community service orders and ICOs (Council preferred option)

A single, flexible community based order to replace existing community orders as well as, potentially, ICOs

Maximum length: 3 years (proposed) to align with current maximum duration of probation and Magistrates Courts' jurisdiction, and with the maximum length of CCOs/community orders in Tasmania, NSW and UK [Alternative: up to 5 years (Victoria)]

Maximum community service hours: 600 hours, (no more than 20 hours in 7 days; can be 40 hours on offender request) and 300 hrs if it is the only condition (Victorian model)
[cf. 240hours for community service orders currently and, up to 416 hours for a 12 month ICO]

Combination order (single offence):
Imprisonment (up to 12 months) + CCO (Victorian model, and aligns with current s 92(1)(b) *Penalties and Sentences Act 1992* (Qld) orders), suspended imprisonment + CCO, fine + CCO

Core/standard conditions
Minimal core conditions:

- not commit an offence during the period of the order (NSW model);
- appear before the court if called on to do so at any time during the term of the order (NSW model); and
- comply with any direction given by the chief executive that is necessary to ensure the offender complies with the order (Victorian model).

Additional requirements/standard conditions would attach to specific condition types — e.g. for supervision condition, to notify change of residence, contact details or employment if practicable, before the change occurs or if not, within 7 days (see *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 188).

Additional conditions
Packages of conditions to be developed. Possible condition packages (based on Victorian model) – court must attach at least one:

- community service (up to 600hours, but not exceeding 20 hours per week):
  (i) If community service is the sole condition, it is capped at 300 hours and the order would expire when hours satisfactorily completed];
  (ii) If the order has both unpaid community work and treatment and rehabilitation conditions, court may determine some or all hours to be counted towards community work hours – otherwise all hours are counted towards community service hrs ordered (see *Sentencing Act 1991* (Vic) ss 48C and s 48CA);
- treatment and rehabilitation (as directed by chief executive) and can include testing, mental health or drug treatment, employment, educational, cultural and personal development programs –includes, in UK model, requirement to attend appointments etc (see *Sentencing Act 1991* (Vic) s 48D);

Option 3: Introduce CCOs, replacing probation, community service orders and ICOs (Council preferred option)

- supervision (for period of order or lesser period) (see *Sentencing Act 1991* (Vic) s 48E). This could incorporate a requirement not to leave the State without permission (currently a standard condition for Victorian and Tasmanian forms of CCOs, and all Queensland community based orders, optional in United Kingdom, mandatory only for NSW ICO supervision condition). Alternatively, this condition could require compliance with directions regarding residence, allowing access and advising of move, as per NSW CCO supervision condition (see *Crimes (Administration of Sentences) Regulation 2014* (NSW) ss 187, 188);
- non-association condition (for period of order or lesser period) (see *Sentencing Act 1991* (Vic) s 48F);
- residence restriction or exclusion condition (for period of order or lesser period) (see *Sentencing Act 1991* (Vic) s 48G);
- place or area exclusion condition (for period of order or lesser period) (see *Sentencing Act 1991* (Vic) s 48H);
- curfew condition (2-12 hours for up to 6 months) (see *Sentencing Act 1991* (Vic) s 48I) (consideration would need to be given to how this is to be monitored, and proving breaches may be difficult without the use of GPS technology);
- alcohol exclusion condition (see *Sentencing Act 1991* (Vic) s 48J);
- bond condition (pay amount of money forfeited for non-compliance) (see *Sentencing Act 1991* (Vic) s 48JA);
- judicial monitoring condition (see *Sentencing Act 1991* (Vic) s 48K);
- electronic monitoring condition, with ability for court, if it is the decision maker, to take timely breach action should a device be removed (purpose in Victoria is to monitor compliance with other conditions) (see *Sentencing Act 1991* (Vic) s 48LA);
- treatment and program plan for intellectually impaired offenders (called a 'Justice Plan' in Victoria) (see *Sentencing Act 1991* (Vic) s 47(2) - condition under Div 2 of Pt 3BA); and
- any other condition the court thinks fit (other than about restitution or payment of compensation, costs or damages) (see *Sentencing Act 1991* (Vic) s 48).

Court must also take into account the principle of proportionality, the purposes of sentencing, and the purposes of a CCO (Vic model) (see *Sentencing Act 1991* (Vic) s 48A).

Other conditions

- abstention condition (from alcohol, drugs or both) (NSW and UK): in the UK, alcohol abstinence and monitoring condition can be up to 120 days. Offender must not be alcohol dependent and alcohol must be a contributing factor to offending (see *Criminal Justice Act 2003* (UK) s 212A).

Period of compliance (other than core conditions)

Limit by condition type (e.g. curfew for no more than 6 months, exclusion condition for no more than 2 years and rehabilitation activity –whole period order is in force up to 3 years). Option to include court power to fix intensive compliance period for longer sentences of 6 months or more (Victorian model, *Sentencing Act 1991* (Vic) s 39). There would need to be clarity about the interplay with any administrative power to suspend conditions or action minor breaches, to avoid conflict/uncertainty.

Failure to comply (administrative actions other than court application set out in legislation)

Option to provide chief executive with limited powers that are condition specific based on Victorian model – e,g, if failure to comply with curfew condition, can order hours per day be increased by up to 2 hrs or the period it applies be increased by up to 14 days (see *Sentencing Act 1991* (Vic) s 83AV). While the ability to monitor curfew conditions may be limited (see above), these powers could improve flexibility and response to risk and save costs of returning order to court. In Victoria, if a community service condition applies, the person can be ordered to perform up to 16 hours in a 12 month period addition to existing hours (see *Sentencing Act 1991* (Vic) s 83AU). An offender may apply to a court to review decision (see *Sentencing Act 1991* (Vic) s 83AY) and court may confirm, vary or revoke decision (see *Sentencing Act 1991* (Vic) s 83AZ.

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Court powers to vary/cancel on application
Sentencing Act 1991 (Vic) s 48M: Grounds – change of circumstances/wrongly stated at sentence and cannot comply, offender consent withdrawn, rehabilitation/reintegration advanced by variation, continuation of sentence no longer necessary in community/offender interest. Powers - court can confirm, cancel and resentence, cancel with no further order, vary order or cancel/suspend/vary/reduce/add a condition or program.

Court powers on breach

- Revoke order and resentence the offender (taking into account prior compliance with order)
- Vary or revoke non-standard conditions
- Impose additional conditions, including new program conditions
- Vary the order
- Take no action

For example: *Sentencing Act 1991* (Vic) s 83AS: On breach for contravention (max 3 months' imprisonment – s 83AD), court must also vary order, cancel/suspend/vary/reduce/add a condition or program; cancel order and resentence or cancel with no further order.

Administrative powers to recognise progress (NSW model)
A corrective services officer may suspend a supervision condition, a curfew condition, non-association condition or place restriction condition for a period, periods or indefinitely either unconditionally or subject to conditions (failure to comply treated as failure to comply with the obligations of the order): *Crimes (Administration of Sentences) Act 1999* (NSW) s 107E. Could improve flexibility and supervision; policy regarding consistent, fair implementation and authorisation would be required.

Under regulation, a corrective services officer must take into account in deciding whether to suspend conditions, factors including the risk of the offender reoffending, the seriousness of the person's criminal history, the likely benefits of the condition continuing to apply, and the resources available to supervise the offender and other offenders at higher risk of reoffending [must be approved by more senior officer, and offender must still notify of change of residence or contact details during suspension period]: *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 189.

There is also an ability (under regulation) for a corrections officer to vary or waive particular requirements – e.g. under a supervision condition, the obligation to report: *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 188(2). Could increase flexibility in regional, remote locations and particular circumstances (e.g, offender in rehabilitation or treatment facility or cannot physically report due to full-time employment).

Court powers to respond to progress (UK model)
On application, court can cancel the order and make no further order (e.g. if order no longer required to meet purposes for which it was made) or vary (including reducing hours of community work), cancel or reduce other program requirements (can also increase): *Criminal Justice Act 2003* (UK) sch 8, para 13.

7.11.4 Preliminary Council view

The Council's preliminary view is that the ability to provide for different packages of conditions that can be combined within the one order has potential to improve the ability of such an order to respond to the individual factors contributing to offending, making Option 3 the most promising long-term model for Queensland.

The Council considers that the structuring and resourcing of the order is likely to be key to the success of such a model.

The Council considers one of the distinct advantages of this order is the range of conditions potentially available under a CCO which means it can potentially meet a wide range of sentencing purposes within the

one order.[526] These purposes can be achieved without the need for the court to impose a sentence of imprisonment. As noted by TASC in recommending the adoption of a CCO model in Tasmania:

> [A CCO] punishes an offender through the requirement to perform unpaid community work, the restrictions imposed on movement, association and leisure time, the reporting requirements and the requirement to comply with the order. The length of the order may also meet the need for punishment. Similarly, a CCO can provide substantial general deterrence on the basis of the punitive effect of the order. The requirements for an offender to participate in treatment programs and submit to judicial monitoring addresses specific deterrence as well as rehabilitation concerns. Specific deterrence can also be fulfilled by supervision, the restriction on liberty and the need to give up leisure time and the use of an intensive compliance period. The fact that a CCO is a real punishment and the consequences for breach of the order also act as a specific deterrent. Rehabilitation can also be met through any of the conditions imposed to the extent that they address the factors that have contributed to offending. The onerous nature of the order (its length and conditions) fulfils the requirement for denunciation. Non-association, residence restrictions or exclusions, place or area exclusions, curfews and electronic monitoring incapacitate the offender as well as providing community protection. The community is also protected to the extent to which the assessment and treatment condition addresses the underlying causes of the offender's behaviour.[527]

While funding and resourcing is likely to prove a challenge, it is possible that conditions could be rolled out over time as more funding is made available. This aspect of implementation is discussed in Chapter 11 of this paper.

It is likely, based on the Victorian experience, that in the immediate years following this order's introduction, courts will be most likely to attach conditions that resemble the existing probation and community service orders. VSAC found in its 2014 monitoring report exploring the use of CCOs, that in the Magistrates' Court, the most common conditions imposed were supervision, unpaid community work and assessment and treatment (imposed together in close to one-third of CCOs).[528] Further:

> Of the 7,571 CCOs that included unpaid community work, over three-quarters (77.0%) had at least one other condition type, most commonly supervision (63.5%). A higher proportion of the 7,832 CCOs that included assessment and treatment also included other conditions (87.9%), most commonly unpaid community work (72.6%). Virtually all of the supervision conditions are coupled with at least one other condition (99.5%), with the vast majority combined with assessment and treatment (97.3%) and nearly two-thirds (64.4%) combined with unpaid community work.[529]

This same trend was apparent in the use in the Victorian higher courts.[530]

A similar finding has been made with the use of community orders in England and Wales. In the first three years following the community sentence being introduced in 2005, five requirements constituted 90 per cent of community orders imposed: supervision and unpaid work (each being ordered in about a third of cases); an accredited program requirement (between 12 to 18% of cases), drug treatment (5–6% of cases); and a curfew requirement (in 3% of cases immediately following introduction, rising to 7% by 2008).[531]

The Council also notes potential concerns that the introduction of such an order could lead to courts imposing more conditions than are warranted, thereby setting offenders up to fail. This has not been the experience in Victoria or in England and Wales. Research from Victoria shows that two-thirds (66.5%) of CCOs have either two or three conditions, with a further 26.6 per cent having only one condition imposed.[532] Less than one per cent (0.8%) had more than four conditions attached.[533] In England and Wales, a 2009 monitoring report found that about half of orders had only one requirement, a further 35 per cent had two

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526 Freiberg, above n 117, [11.15]; *Boulton v The Queen* (2014) 46 VR 308, 330–332 [85]–[98] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

527 Sentencing Advisory Council (Tasmania), above n 67, 89.

528 Sentencing Advisory Council (Victoria),above n 459, 16

529 Ibid.

530 Ibid.

531 George Mair and Helen Mills, *The Community Order and the Suspended Sentence Order Three Years On: The Views and Experiences of Probation Officers and Offenders* (Centre for Crime and Justice Studies, 2009) 11.

532 Sentencing Advisory Council (Victoria), above n 459, 16.

533 Ibid.

requirements, and between 12 to 14 per cent, three requirements.[534] Fewer than one per cent of orders made had five or more requirements.[535]

The Council does not consider that a pre-sentence report should be required in all cases (as in Victoria) but supports pre-sentence advice being made available to a court on request. This is discussed in Chapter 11 of this paper.

7.11.5 Principles guiding the use of CCOs

The Council notes in Victoria section 5(4C) of the *Sentencing Act 1991* (Vic), and subject to some specified exceptions, a court is directed that it: 'must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order to which one or more of the conditions' permitted to be attached to the order are attached.

This is distinct from the general principle of imprisonment as a last resort. It focuses on the preference for a court to impose a CCO over actual imprisonment in appropriate cases.

The Victorian Court of Appeal considered the effect of section 5(4C) in *Boulton* discussed above. The Court remarked:

> What is most powerful about s 5(4C) is that it prohibits the imposition of a sentence of imprisonment unless the sentencing court has paid specific and careful attention to:
>
> (a) the purposes for which sentence is to be imposed on the offender; and
>
> (b) whether those purposes can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached.
>
> The process of deliberation which this provision requires should assist in the reconceptualisation of sentencing options to which we have referred. In particular, that process will throw into much sharper focus the distinction we have sought to draw, between the narrow punitive purpose (and effect) of imprisonment, on the one hand, and the multi-purpose character of the CCO. The sentencing court should ask itself a question along the following lines:
>
> Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?[536]

In the later decision of *Sherritt v The Queen*, Maxwell P stated that:

> The Court in Boulton emphasised that, if the CCO is to serve the purpose which Parliament quite clearly envisaged for it, sentencing courts (including this Court) need to rethink the conventional wisdom about whether prison is really the only option.[537]

Section 36 of the *Sentencing Act 1991* (Vic) goes on to provide that the purpose of a CCO 'is to provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender' and that:

> Without limiting when a community correction order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment.

There is a similar provision in NSW that guides the making of CCOs which provides: 'Instead of imposing a sentence of imprisonment on an offender, a court that has convicted a person of an offence may make a community correction order in relation to the offender'.[538]

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534 Mair and Mills, above n 531, 10, Table 3.

535 Ibid 9.

536 *Boulton v The Queen* (2014) 46 VR 308, 336–337 [120]–[121] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

537 [2015] VSCA 1 (28 January 2015).

538 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(1).

The Victorian legislation also includes a general statement that directs courts that they must attach conditions to a CCO in accordance with the principle of proportionality, the purposes of sentencing, and the specific purposes of a CCO (as set out above).[539]

The Council invites views on whether similar provisions should be incorporated into any future Queensland scheme.

As also discussed in section 5.1.3 of this paper, a factor which can impact on the use of imprisonment for less serious forms of offending which would not otherwise have warranted a term of imprisonment is repeat offending. The failure of a person to comply with the conditions of a CBSO can also be taken as evidence that they will not comply with such an order in future.

The Council is aware that such a risk also exists in Queensland whereby a court may impose increasingly more severe penalties on the basis of these factors, rather than by reference to the appropriate penalty for the present offence (i.e. a fine for a first offence, probation for a second offence, a suspended sentence for a third offence, moving then to an immediate term of imprisonment).

The High Court has stated that an offender's antecedent criminal history may be taken into account on sentence, 'but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences'. It is relevant to show whether the offence 'is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law'.[540]

The Queensland Court of Appeal has stated that sentencing requires the imposition of an appropriate sentence in relation to the particular offence.[541] There is no arithmetic or logical progression that requires imposition of progressively heavier sentences.[542] Further;

> Evidence of convictions and the sentences imposed for offences committed both before and after the offence for which sentence is to be imposed is both relevant and admissible when the sentencing discretion is to be exercised. Evidence of later convictions may be used to determine whether leniency ought to be exercised … Such evidence may also be used to determine the risk of recidivism, the prospect of rehabilitation, and, the connection, if any, between the offence for which the offender is being sentenced and the later offences for which the offender has been earlier sentenced.[543]

Similarly, the NSW Court of Criminal Appeal has rejected a proposition that 'it is a principle of sentencing for criminal convictions that there should be a graduation in sentences imposed, so that no gross disparity appears between previous and present sentences'. Instead:

- In determining the appropriate sentence in any given case, it will always be relevant to have regard to both the accused's record of convictions and prior sentences (particularly if they are for the same or similar offences).
- There is no graph-like pattern to be followed when determining the proper sentence in any given case.
- There is no principle requiring a later sentence on a similar offence to bear any particular relationship or proportion to an earlier sentence. The earlier sentence is no more than one of a congeries[544] of relevant matters to be taken into account when determining the sentence on the later occasion.[545]

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539 *Sentencing Act 1991* (Vic) s 48A.

540 *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 477–478 Mason CJ, Brennan, Dawson & Toohey JJ. See also *Baumer v The Queen* (1988) 166 CLR 51, 57; *Weininger v The Queen* (2003) 212 CLR 629; 140 A Crim R 184, [32] as cited in *R v Kirby* (2009) 193 A Crim R 357, 364 [26] (Fraser JA).

541 *R v Aston (No 2)* [1991] 1 Qd R 375, 380 (Cooper J, Kneipp and Shepherdson JJ agreeing). Applied in *R v CBG* [2013] QCA 44 (15 March 2013) 8 [30]-[32] (Atkinson J, White and Gotterson JJA agreeing) and *R v McCusker* [2015] QCA 179 (29 September 2015) 7-8 [50] (McMeekin J, Morrison and Philippides JJA agreeing).

542 Ibid 382.

543 Ibid 382 (citations omitted).

544 A disorderly collection; a jumble: *Oxford English Dictionary* (online at 14 April 2019) 'congeries'.

545 *R v Breasley* [1974] NSWLR 736, 738 (Street CJ, Nagle and Taylor JJ).

The Queensland Court of Appeal has also commented on a short period of one months' actual custody imposed (which it replaced with a 12-month ICO) as 'a short sharp lesson' for a youthful offender:[546]

> Clearly that could have been the only purpose of such a short term of imprisonment. It would be most unlikely to have any rehabilitative effect. On the other hand it is potentially harmful; it may introduce him to hardened criminals whom he might not otherwise meet and to hard drugs and it may subject him to the risk of injury or degrading conduct.
>
> In our view the imprisonment imposed in this case was not a satisfactory means merely of imposing a short sharp lesson upon a youthful first offender, primarily because of the potential harm it may cause. That is not to say that offences of this seriousness can never justify the imposition of a term of imprisonment. But in our opinion the facts in this case did not justify the imposition of such a short term on this applicant for that purpose only and it seems to us a sentence of so short a term can have no other purpose.[547]

QUESTION 3: LEGISLATIVE GUIDANCE ON USE OF CCOS AND IMPRISONMENT

3.1 If introduced, what legislative guidance should be given to courts when considering imposing either a CCO or a term of imprisonment (including a suspended term of imprisonment)? For example:
- (a) Should it be a requirement for a court to consider the availability of a CCO prior to considering imprisonment?
- (b) Should there be legislative guidance that provides no more conditions are to be ordered than are necessary to meet the purposes of the order?
- (c) In imposing a CCO and considering appropriate additional conditions, should a court be required to have regard to the vulnerabilities of the defendant in complying with that order, including for example, any geographical constraints in complying and/or limitations on service delivery in that region?

3.2 Should additional legislative guidance be provided that makes clear that the fact a CCO has been imposed previously, including upon a breach, should not inhibit the further imposition of a CCO (taking into account the broad range of conditions that can be attached)?

7.11.6 Home detention as a condition of a CCO

Home detention as a sentence or post-sentence option is currently available in three Australian jurisdictions:[548] Tasmania, South Australia and the Northern Territory.[549] In NSW, home detention is no longer a discrete sanction, but may be incorporated as a component of an ICO.[550] It is also available as a separate sentencing order in New Zealand,[551] and in Canada as a condition of conditional sentences.[552]

Until 2006, home detention was available as a 'back end' option in Queensland as part of a post-prison community release scheme. Under the former scheme, a prisoner could apply to a Community Corrections Board for a post-prison community release order if sentenced to a period of imprisonment of any length (for offences committed before 1 July 2001) or more than two years (for an offence committed on or after 1 July

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546 *R v Hamilton* [2000] QCA 286 (21 July 2000) 5–6 [19] (Davies and Thomas JJA). The sentence was nine months' imprisonment suspended after one month for an offender was 17 years old the time of the offence, who pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm. McPherson JA agreed but was more circumspect regarding the utility of a 'short, sharp' sentence: 'It is not easy in circumstances like those here to make a confident choice between these two views of the matter': 7 [25].

547 Ibid, 6 [19]–[21] (citations omitted).

548 Home detention is also available in Western Australia as a pre-trial condition of bail: *Bail Act 1982* (WA) s 13(2).

549 *Sentencing Act 1997* (Tas) pt 5A; *Sentencing Act 2017* (SA) div 7, subdiv 1; *Sentencing Act 1995* (NT) pt 3, div 5, subdiv 2.

550 *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) .

551 *Sentencing Act 2002* (NZ) s 10A.

552 See *Criminal Code* R.S.C. 1985, c. C-46 s 742.3(2)(f) regarding such other reasonable conditions as the court considers desirable…for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences. A Canadian guideline judgment, *R v Proulx* [2000] 1 SCR 61, 88, 115 stated that conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty and conditions such as house arrest or strict curfews should be the norm, not the exception.

2001.[553] The Board was permitted to grant the order by making a release to work order, a home detention order or a parole order.[554]

As described by a 2005 legislative review of the *Corrective Services Act 2000* (Qld) (since repealed):

> A home detention order is a highly supervised order with strict supervision. A prisoner on a home detention order is subject to a number of standard conditions as well as any condition made by a Community Corrections Board. A prisoner who is subject to a home detention order must live in the prisoner's own home or in other accommodation approved by a Community Corrections Board, such as a rehabilitation centre. The prisoner is not allowed to leave an approved residence without the permission of a corrective services officer, who may issue a pass for travel to a specific location for purposes such as employment or training or attending a rehabilitation program. A prisoner's whereabouts is randomly checked at home and other locations. A prisoner subject to a home detention order is not allowed to drink alcohol and is required to submit to drug tests.[555]

Home detention was abolished with the introduction of the new Act, with the intention of reducing the complexity of the community based release framework in Queensland by establishing parole as the single form of supervised release into the community.

While the ability to attach the same conditions as for home detention exists under the *Corrective Services Act 2006* (Qld), these are conditions of parole, not a form of order that is made prior to a prisoner being eligible for release, or to apply for release, on parole.

The Queensland Productivity Commission has recently made a draft recommendation that the Queensland Government should reform sentencing legislation to make a sentence involving home detention available to courts.[556] In making this recommendation, the Commission pointed to NSW research which found that home detention with electronic monitoring and rehabilitation for non-violent and non-serious offences reduces the probability of reoffending within two years by 16 percentage points compared to serving a prison sentence (a result which persisted for five years).[557] The cost savings were estimated at close to $30,000 for each eligible prisoner on the basis of reduced supervision and court and prison costs.[558]

The Commission has suggested:

> Although electronic monitoring should not be regarded as a panacea for the problems of prison overcrowding, opportunities exist for the greater use of technology to support a shift from prison to community management of the offender population.[559]

As discussed in Chapter 3 of this paper, there is conflicting evidence about the impact on recidivism for offenders sentenced to home detention, and some concerns about its potential negative impacts, although it appears to help offenders to reintegrate into the community and deter future offending.

The Council is aware of a number of criticisms of home detention, including that an offender's family can be significantly affected by living in a home where an offender is under surveillance. This can make family members feel responsible for assisting the offender to meet the requirements of their order.[560] There are also negative impacts for family members of being included within the same environment as those who are subject to high levels of government oversight.[561]

Concerns exist for women offenders who may be subject to domestic and family violence within the home; for these women, home detention would essentially increase their exposure to the threat of violence and potentially impact on their ability to escape a violent partner.

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553 *Corrective Services Act 2000* (Qld) (repealed) ss 134(1) and 136.

554 *Corrective Services Act 2000* (Qld) (repealed) s 141.

555 Queensland Government, Department of Corrective Services, Legislation Review *Corrective Services Act 2000*, *Community Based Release: Consultation Paper* (2005) [18].

556 Queensland Productivity Commission, above n 11, Draft Recommendation 4.

557 Ibid 152 citing Jenny Williams and Don Weatherburn, *Can Electronic Monitoring Reduce Reoffending?,* IZA Discussion Paper No 12122 (IZA Institute of Labor Economics, 2019) .

558 Ibid.

559 Ibid 153.

560 Gelb, Stobbs and Hogg, above n 356, citing Martinovic, M. 'Home Detention: Issues, Dilemmas and Impacts for Detainees' Co-residing Family Members', *Current Issues in Criminal Justice,* 19(10) (2007).

561 Ibid.

Finally, there are concerns that the ability to access home detention as a penalty will disproportionately discriminate against Aboriginal and Torres Strait Islander offenders, mentally ill offenders and offenders without a permanent home, who may not have suitable accommodation for a court to consider home detention a viable option.

The Council notes that:

- home detention may increase the sentencing options available to a court, but equally carries with it a number of risks (as outlined above) and is likely to be an option suitable only for a very small group of offenders;
- encompassing the ability to impose curfews with electronic monitoring within a broader community order may be preferable to creating a complex legislative architecture to support a home detention order or more restrictive 'home detention' condition likely to be used only for a small number of offenders, particularly given that court ordered parole, as it currently operates, already allows for the same types of electronic monitoring and curfew conditions to be ordered, effectively creating a form of home detention.

The QUT literature review conducted as part of this review has shown:

- home detention as a front-end sentencing order is rarely used in Australia, despite having high rates of successful completion;
- the costs of home detention tend to be higher than for other orders served in the community, primarily due to the cost of electronic monitoring;
- intensive case management, using a mix of surveillance and rehabilitative strategies, appears to be important for successful completion of home detention.[562]

The Council invites further feedback on this issue.

QUESTION 4: HOME DETENTION

4.1 If a new CCO is introduced in Queensland, should 'home detention' (an extended curfew with electronic monitoring) be excluded from being available as a condition of the order?

4.2 In the alternative, do you support home detention being introduced as a form of sentencing order? How might this be distinguished from court ordered parole with electronic monitoring and curfew conditions?

4.3 If home detention was to be introduced as a sentencing order, what protections would need to be introduced to ensure it is used only in appropriate circumstances? For example, should the availability of home detention be restricted to circumstances where:
(a) The person is convicted of an offence punishable by imprisonment.
(b) A conviction is recorded.
(c) The person consents to the order being made.
(d) The court would otherwise have imposed a sentence of immediate imprisonment and would not have ordered the sentence to be suspended or the person to be released at the date of sentence or shortly after this on court ordered parole.
(e) A suitability assessment has been undertaken which takes into account any impact the order is likely to have on any victim of the offence, any spouse or family member of the offender, and anyone living at the residence at which the person would live.
(f) Any co-resident has consented to the person living at the nominated address?

4.4 Should there be any restrictions on the types of offences, or circumstances, in which home detention is used (e.g. if there are safety concerns for victims or co-residents, or in the case of offences involving the use of violence, there is an unacceptable risk of the person committing a further violent offence)?

4.5 What should the maximum period of home detention be:
(a) 12 months (Northern Territory and New Zealand model)
(b) 18 months (Tasmanian model)

562 Ibid.

(c) 2 years (NSW model)?

4.6 What should be the maximum curfew period in a given day and/or week?

7.12 Conclusion

This chapter has considered the potential introduction of a new form of CBSO in Queensland — the CCO — and the operation of this form of order in other jurisdictions, with a focus on Victoria.

It has also considered potential models for the adoption of a CCO model in Queensland, what principles should guide its use and home detention as a potential condition of a CCO, or stand-alone sentencing order, highlighting current evidence and criticisms.

The following Chapter 8 explores potential reforms to suspended sentences in Queensland, including introducing an ability of courts to combine a CCO, if introduced, with a suspended sentence when sentencing an offender for a single offence. It also considers whether greater guidance is required in the setting of operational periods, and how current breach provisions might be improved.

Chapter 8 Suspended sentences

This chapter considers the current legal framework that supports the use of suspended sentences in Queensland, the current use of suspended sentences and limitations relating to the power of courts to set conditions as part of, or at the same time as suspending a term of imprisonment.

As highlighted in previous chapters, the Council has been asked to examine potential issues and options relating to the current sentencing framework, including the removal of anomalies and current restrictions on imposing a term of imprisonment with a community based order (in the interests of offender monitoring and management in the community as regards reintegration, rehabilitation and recidivism).

These considerations are of relevance to the Council's examination of suspended sentences, what purpose they currently serve, how they might be improved, options that might enable the court to attach conditions to these orders, and the potential impacts of any reform.

8.1 Historical context

Suspended sentences were reintroduced in Queensland in 1992, having been removed as a sentencing option in 1971 under changes to the then section 19(7) of the *Criminal Code* (Qld). Section 19, which dealt with the construction of provisions of the Code dealing with punishments, relevantly provided:

> Whenever the Court shall sentence any person so convicted [upon indictment of an offence] to a term of imprisonment, it may further order that the offender be imprisoned for such portion of that term as it shall think fit and that the execution of the sentence for the remaining portion thereof be suspended upon his entering into a recognizance with sureties if so directed, as aforesaid, but further conditioned that, if called upon, he shall appear and receive judgment in respect of his service of the portion of his sentence so suspended, and any judge of the Court may, upon being satisfied that the offender has committed a breach of any of the conditions of the recognizance, forfeit the recognizance and commit him to prison to undergo the portion of his sentence so suspended, or any part thereof.

This provision, introduced in 1948, was considered by the Government in 1971 to no longer be appropriate given that the Parole Board had been reconstituted and provided with broader powers in relation to parole, and the assessed desirability of only one body determining the appropriate period to be served prior to release.[563] While noting the increasing use of this provision (suggesting a number of judges considered some offenders should be released at a much earlier stage than after serving half of their sentence), the then Minister for Justice suggested this limitation could be overcome through the introduction of 'special circumstances' parole.[564]

The rationale for the reintroduction of suspended sentences in 1992 was explained by the then Attorney-General in his Second Reading Speech as expanding the range of available sentencing options in circumstances where a significant penalty is warranted, but where there is benefit in providing the offender with an opportunity to remain in the community and to demonstrate his or her rehabilitation:

> The reintroduction of the suspended sentence further enlarges the armoury of sentencing weapons available to courts, who may impose a significant penalty on an offender which stops short of depriving the offender of liberty, employment and effective rehabilitation within the community. However, should the offender not grasp the chance being offered and commit another offence during the course of the suspended sentence, the appropriate court is empowered to imprison the offender forthwith.[565]

Because of its non-conditional nature in Queensland, it is generally accepted that: 'the suspended sentence option not be used in the case of an offender requiring close supervision'.[566] In these cases, it has been submitted:

> Imprisonment of up to six months followed by probation (*Penalties and Sentences Act 1992*, s 92(1)(b), an intensive correction order (s 112) or, if the offence is so serious as to require a longer period of imprisonment, a fixed term with a recommendation for parole, should be utilised in such a case. These

563 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 July 1971, 45 (Peter Delamothe, Minister for Justice).

564 Ibid 46.

565 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 August 1992, 6303 (Dean Wells, Attorney-General).

566 John Robertson and Geraldine Mackenzie, Thomson Reuters, *Queensland Sentencing Manual* (at 15 February 2016) [15.70] ('When should a suspended term be imposed?').

> orders ensure that at some stage, in all but the exceptional case, the offender will be released back into the community during the course of imprisonment, subject to supervision.[567]

8.2 The current legal framework

Part 8 of the PSA governs the use of suspended sentences in Queensland and powers on breach.

A suspended sentence is a term of imprisonment suspended for a set period (called the 'operational period'). In Queensland, the maximum term of imprisonment that can be suspended is five years,[568] including taking into account any other sentences of imprisonment ordered to be served cumulatively.[569] A court may suspend the whole or part of the term of imprisonment imposed.[570] A conviction must be recorded.[571] The operational period starts on the day the order is made, and must not be less than the term of imprisonment imposed, nor more than five years.[572]

A court must not suspend a term of imprisonment unless satisfied it would be appropriate for the offender to be imprisoned for the period imposed, having regard to other provisions of the Act.[573]

The courts have recognised that a suspended sentence is to be regarded as a significant punishment[574] and not merely an exercise in leniency.[575] In *Director of Public Prosecutions v Buhagiar and Heathcote*, Batt and Buchanan JJA of the Victoria Court of Appeal observed:

> [T]here are cases where a judge may reach the view that suspension of a sentence is appropriate, not because it would be less unpleasant for the offender, but because it may be productive of reformation, which offers the greatest protection to society. A suspended sentence of imprisonment is not an unconditional release or a mere exercise in leniency. Rather it is an order made in the community's interest and generally designed to prevent re-offending.
>
> In deciding whether to suspend in whole or in part a term of imprisonment a judge is deciding whether, in all the circumstances, the offender should have the benefit of a special opportunity for reform, to rebuild his own life, or to make some recompense for the wrong done, or should have the benefit of the mercy … or for some other sufficient reason should have this particular avenue open to him, provided the conditions of the suspension are observed.[576]

The PSA provides specific guidance intended to limit the use of wholly suspended sentences (WSSs)[577] in some circumstances — for example, in sentencing offenders for an offence of a sexual nature committed in relation to a child under 16 years. In these circumstances, the court must order the offender to serve an actual term of imprisonment (defined under s 9(12) as 'a term of imprisonment served wholly or partly in a corrective services facility') unless there are exceptional circumstances.[578] In deciding whether exceptional circumstances exist, a court is permitted to consider the closeness in age between the offender and the child.[579]

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567 Ibid.

568 *Penalties and Sentences Act 1992* (Qld) s 144(1).

569 See *R v Hamilton* [2009] QCA 391 (18 December 2009).

570 *Penalties and Sentences Act 1992* (Qld) s 144(3)).

571 Ibid s 143.

572 Ibid s 144(6).

573 Ibid s 144(4).

574 *Elliott v Harris (No 2)* (1976) 13 SASR 516; *DPP (Cth) v Carter* [1998] 1 VR 601; *Sweeney v Corporate Security Group* (2003) 86 SASR 324.

575 *Reilly v The Queen* [2010] VSCA 278 (22 October 2010), [36]; *DPP (Cth) v Carter* [1998] 1 VR 601, 607–608; *DPP v Buhagiar and Heathcote* [1998] 4 VR 540, 547.

576 [1998] 4 VR 540, 547 (Batt and Buchanan JJA) (citations omitted).

577 These types of orders are also sometimes referred to as 'fully suspended sentences'. For this purposes of this paper, the term 'wholly suspended sentence' has been adopted, meaning a sentence of imprisonment suspended in full.

578 *Penalties and Sentences Act 1992* (Qld) s 9(4)(b).

579 Ibid s 9(5).

In addition to legislative restrictions on use, there are examples of other offence types, such as trafficking in Schedule 1 drugs[580] and burglary with the use of violence ('home invasion'),[581] for which the Queensland Court of Appeal has found that immediate suspension of a sentence of imprisonment should occur only in exceptional or rare circumstances. This is generally with reference to the seriousness of the offence and offending behaviour, and the need for denunciation and deterrence.

An offender is only liable to serve the term of imprisonment that is suspended if he or she commits another offence punishable by imprisonment during the operational period of the order.[582] In this case, a court must order the offender to serve the whole of the term of imprisonment that was suspended, unless the court is of the opinion it would be unjust to do so,[583] taking into account matters such as whether the offence was of a trivial nature, the seriousness of the original offence (including harm to a victim and any other loss or injury), or any special circumstance arising since the sentence was imposed.[584]

When either whole or part of the original sentence of imprisonment is activated, the court must apply the parole provisions set out in Part 9, Division 3 of the Act.[585] This includes, in cases where activating a period of imprisonment of three years or less, setting a parole release date where required to do so.[586]

This list of matters that courts must take into account under section 147(3) is not exhaustive,[587] and includes that a parole release date or parole eligibility date is to be set, and when it is to be set, as part of the court's exercise of its discretionary judgment.[588]

If the court finds it unjust to activate the whole of the term suspended, the court may order the operational period be extended for up to one year (or if the period has expired when the court is dealing with the offender, may order that the term of imprisonment be suspended for a further period of up to one year) or order the offender to serve part of the term suspended.[589] There is no power for a court in this circumstance to impose an ICO as a means of activating a suspended sentence in whole or part.[590]

The decision concerning whether it is unjust for the court to activate the whole of the suspended term of imprisonment upon breach: 'includes consideration of whether a parole release date or parole eligibility date is to be set, and when it is to be set'.[591]

Unlike a number of other Australian states and territories which have retained suspended sentences as a sentencing option (ACT, NT, SA, Tas and WA), there is no requirement or power in Queensland for additional supervisory, program or community service conditions to attach to a suspended sentence, or another order made in combination with a suspended sentence order when sentencing an offender for a single offence.

The court has greater flexibility in imposing a supervised form of order when sentencing an offender for two or more offences. In *R v Hood*,[592] the Queensland Court of Appeal reconsidered previous authorities, determining that in circumstances where an offender is sentenced for more than one offence, the following

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580 See *R v Ritzau* [2017] QCA 17 (24 February 2017) [30] and [36] (Morrison JA, Gotterson JA and Bond J agreeing), citing *R v Dowel; Ex parte Attorney-General (Qld)* [2013] QCA 8 (8 February 2013) [16].

581 *R v Phillips & Ors; Ex parte Attorney-General of Queensland (Qld)* [2001] QCA 544 (28 November 2001).

582 *Penalties and Sentences Act 1992* (Qld) ss 146 and 147(1)(b).

583 Ibid s 147(2).

584 Ibid s 147(3).

585 See the definition of 'impose a term of imprisonment' in s 160 of the *Penalties and Sentences Act 1992* (Qld) and the definition of 'period of imprisonment' in the *Corrective Services Act 2006* which extends to the term of imprisonment imposed by a court at the time of sentence.

586 See *Penalties and Sentences Act 1992* (Qld) s 160B and *R v Newman* [2008] QCA 147 (6 June 2008).

587 See *R v Stevens* [2006] QCA 361 (22 September 2006).

588 *R v Norden* [2009] 2 Qd R 455, 459 (Holmes JA, Keane and Fraser JJA agreeing), referring to *R v Stevens* [2006] QCA 361 (22 September 2006) in this regard.

589 *Penalties and Sentences Act 1992* (Qld) ss 147(1)(a), 147(1)(c).

590 *R v Muller* [2006] 2 Qd R 126, 130 [7] Williams JA, 139-140 [47]-[48] Jerrard JA and 143 [62] Atkinson J; applying *R v Waters* [1998] 2 Qd R 442 (see 445 Pincus JA and 446 McPherson JA) and *R v Skinner, Ex parte Attorney General (Qld)* [2001] 1 Qd R 322, 324-325 (de Jersey CJ, Davies and Pincus JJA).

591 *R v Norden* [2009] 2 Qd R 455, 459 [14] (Holmes JA, Keane and Fraser JJA agreeing).

592 *R v Hood* [2005] 2 Qd R 54.

orders can be made (with the primary consideration being whether the orders are compatible or rather not inconsistent with each other):

- WSS at the same time as probation for other offences.
- Partially suspended sentence (PSS) of up to 12 months with probation for other offences, with or without imprisonment on those other offences prior to release on probation.
- Orders for community service can be made concurrently with orders for short terms of imprisonment wholly (or partly) suspended for other offences (*R v Vincent; Ex parte Attorney-General* [2001] 2 Qd R 327; [2000] QCA 250).
- Where a suspended sentence is activated in whole or part on breach, the suspended sentence should be imposed first, and any new sentence then imposed ordered to be served concurrently or cumulatively (*R v Chard; Ex parte Attorney-General* (Qld) [2004] QCA 372; *R v Gander* [2005] 2 Qd R 317; [2005] QCA 45).

An ICO can be imposed cumulatively on an activated suspended sentence (*R v Skinner; Ex parte Attorney-General* [2001] Qd R 322; [1999] QCA 521) on the basis that activating a suspended sentence in whole or part involves 'dealing' with it (making an order pursuant to a sentence already imposed), as opposed to sentencing afresh.[593]

Drug and alcohol treatment orders, which commenced operation in January 2018, also operate as a form of conditional suspended sentence but are only available to offenders sentenced by the Drug and Alcohol Court in Brisbane who meet other suitability and eligibility criteria set out under the PSA.[594] In making a drug and alcohol treatment order, the court must sentence the person to a term of imprisonment of four years or less and order the sentence be suspended for an operational period of two to five years.[595] The court must also state the period (not more than 2 years) within which the treatment program must be completed and may include any conditions it considers necessary to achieve the purposes of the order.[596]

While subject to the treatment order, offenders must comply with core conditions (including appearing before the court at the times directed – as a form of judicial monitoring) and to comply with conditions of treatment set by the court.[597] The core conditions and treatment conditions are referred to under the Act as the 'rehabilitation part' of the order.[598]

Once the rehabilitation part of the order expires or is cancelled (for example, due to the offender's good progress on the order), the person is subject to the same standard condition as applies to all suspended sentence orders if any operational period is remaining (not to commit another offence punishable by imprisonment).[599]

8.3 Suspended sentences as an alternative to immediate imprisonment

A suspended sentence in Queensland must only be made if satisfied it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed.[600] This means that suspended sentences are intended under legislation to provide an alternative to immediate imprisonment.

There are a number of features that distinguish imprisonment with either a parole release or parole eligibility date from a suspended term of imprisonment and may influence the circumstances in which these orders are made. These features include:

593 *R v Skinner, ex parte Attorney General* [2001] 1 Qd R 322, 324-325 (de Jersey CJ, Davies and Pincus JJA).

594 *Penalties and Sentences Act 1992* (Qld) ss 151E-151F.

595 Ibid s 151N(2).

596 Ibid s 151S.

597 Ibid ss 151R and 151S.

598 Ibid s 151Q(2).

599 See ss 151N(1)(c), 151N(3), 151Q(3) and 151U.

600 Ibid s 144(4).

- **The court's ability in sentencing an offender to a term of imprisonment, to determine the appropriate period to be served in prison prior to release in the community**

While a court has the ability to determine the period to be served (if any) for sentences of up to five years where a suspended sentence is ordered, the court's powers are more limited where parole is concerned. In particular, once a sentence exceeds three years or, in the case of sexual offences or offences declared as being 'serious violent offences', any length, the court may only set a parole eligibility date rather than a release date. This may help to explain the high rate of use of PSSs for sentences of over three years but less than five years, and the continued use of PSSs in preference to a specified term of imprisonment for sexual offences in circumstances where a court has determined imprisonment is the appropriate penalty, but that the person should be released from prison before the full sentence is served.[601] The use of suspended sentences and other imprisonment orders for sexual offences is explored in Chapter 10 of this paper.

- **Conditions that apply to offenders on parole vs suspended sentence orders**

In contrast to suspended sentences which are sentences subject to the sole condition that the offender not commit an offence punishable by imprisonment, all offenders subject to parole are under supervision. Core conditions of parole are that the person:

- be under the chief executive's supervision until the end of the prisoner's period of imprisonment;
- carry out the chief executive's lawful instructions;
- give a test sample if required to do so by the chief executive;
- report, and receive visits, as directed by the chief executive;
- notify the chief executive within 48 hours of any change in the prisoner's address or employment during the parole period; and
- not commit an offence.[602]

A parole order may also contain a direction requiring the person to comply with conditions to restrict their movements and allow their location to be monitored (such as through the use of electronic monitoring devices)[603] and requiring the person to comply with any conditions: 'the board reasonably considers necessary—(a) to ensure the prisoner's good conduct; or (b) to stop the prisoner committing an offence'.[604]

While a court in sentencing can make orders in addition to a suspended sentence order to achieve a conditional form of order – such as a WSS in combination with probation — this can only be achieved in circumstances where the person is being sentenced for another (usually) less serious offence for which the court determines the making of such an order is appropriate.

The *Queensland Parole System Review: Final Report* (Queensland Parole System Review) suggested that the high use of court ordered parole by courts in sentencing was unsurprising given in many cases there would be no suitable alternative order where a head sentence of more than 12 months' imprisonment was warranted, but where the offender would also benefit from rehabilitation and supervision in the community.[605]

Stakeholder views are discussed later in this paper.

- **Breach consequences and decision making body**

In the case of a suspended sentence (ordered with or without some form of community based order for another offence, such as probation or community service) it is a court that is empowered to determine what action should be taken if the offender breaches the order by further offending, or where the person has failed to comply with the conditions of the community based order without reasonable excuse. QCS officers still have some ability, within the limits of the legislation, to increase reporting requirements and take steps to re-engage the offender and encourage compliance, but where other action is required, an application for

601 On this issue, see Queensland Parole System Review, above n 9, 6 [39]–[41], 79 [369].

602 *Corrective Services Act 2006* (Qld) s 200(1).

603 Ibid s 200(2).

604 Ibid s 200(3).

605 Queensland Parole System Review, above n 9, 97 [475].

breach and/or to amend the order must be made to a court through the complaint and summons process. This can result in delays in having these matters resolved in response to issues of elevated risk.

For offenders subject to a parole order, there are a wide range of options available to manage non-compliance and other behaviour presenting a potential risk to the community and compliance issues can be responded to more quickly than for probation and ICOs which require an application to court which can only be made if statutory criteria are met. QCS officers can give directions to prisoners on parole, consistent with the parole order conditions.[606] The chief executive can also make a written order, effective for no more than 28 days, amending a parole order[607] and requesting an immediate suspension from the Parole Board Queensland (the Board).[608]

To seek a variation of the conditions attached to a community based order, such as probation, to address issues of risk, an application must be made to a court rather than to the Board. There is no ability to amend the order without the court deciding this and the grounds on which a variation can be sought are far narrower (the court must be satisfied the offender is not able to comply because their circumstances have materially altered since the order was made, their circumstances were wrongly stated or not accurately presented, or that the offender is no longer willing to comply).

The Board has the greatest power. A parole order may contain conditions the Board reasonably considers necessary to ensure the prisoner's good conduct or to stop him or her committing an offence (for instance, a condition about residence, employment or participation in a program, or a curfew, or providing a test sample).[609] The Board can amend, remove or insert such conditions.[610] It may amend, suspend or cancel a parole order.[611]

Suspension or cancellation means a return to custody; a warrant can be issued for the prisoner's arrest.[612] A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.[613]

8.4 The approach in other jurisdictions

8.4.1 Australian jurisdictions with and without suspended sentences

A form of suspended sentence order exists in most Australian jurisdictions (ACT, NT, SA, Tas and WA) and is also available under the *Crimes Act 1914* (Cth) for the sentencing of offenders for Commonwealth offences in the form of a recognizance release order.

606 Directions to restrict prisoner movements and enable their location to be monitored. Directions can be made regarding remaining at a stated place, wearing a stated device or installing a device or equipment at the prisoner's residence (*Corrective Services Act 2006* (Qld) s 200A(2)).

607 On the basis that the prisoner has failed to comply with the order, poses a serious and immediate risk of self-harm or poses an unacceptable risk of committing an offence (*Corrective Services Act 2006* (Qld) s 201). The amendment can be cancelled by the Parole Board at any time (s 202).

608 *Corrective Services Act 2006* (Qld) ss 208A-208C; on grounds of failure to comply, serious and immediate risk of harm to another, unacceptable risk of committing an offence, or preparation to leave the State without approval.

609 *Corrective Services Act 2006* (Qld) s 200(3).

610 Ibid s 205(1).

611 Ibid s 205(2), 208 on the grounds of failing to comply with the order, posing a serious risk of harm to another or an unacceptable risk of committing an offence, or preparing to leave Queensland without permission. These three actions are also available for board-ordered (as opposed to court ordered) parole where the board receives information after granting parole which would have resulted in it making a different parole order or not making one (s 205(2)(b)). The Parole Board can amend or suspend a parole order if the prisoner is charged with an offence (*Corrective Services Act 2006* (Qld) s 205(2)(c)).

612 *Corrective Services Act 2006* (Qld) s 206.

613 Ibid s 200, and see *Penalties and Sentences Act 1992* (Qld) s 160E.

Victoria abolished suspended sentences on 1 September 2014.[614] NSW removed the ability to suspend a sentence of imprisonment on 24 September 2018, at the same time as a number of other reforms came into effect, including the introduction of CCOs and an enhanced form of ICO.[615]

The Tasmanian Government has signalled its intention to phase out suspended sentences, and legislation has now been passed to achieve this outcome.[616] However, following amendments made during consideration of the Bill by the Tasmanian Legislative Council, the Act requires that the Attorney-General request the TSAC review the operation of two new forms of orders (CCOs and home detention orders) within two years of their commencement, and that the review report be laid before both Houses of Parliament prior to proposed changes restricting the use of suspended sentences for a range of serious offences coming into effect.[617] The legislation also includes an option for either House of Parliament to disallow the commencement of the relevant provisions of the Act after a notice of intention to commence the relevant sections has been laid before the House.[618]

Availability of conditions

Of those Australian states and territories which have retained suspended sentences in some form, all (with the exception of Queensland) require or allow for the making of some form of conditional suspended sentence order:

- in the ACT[619] and SA,[620] the making of an order suspending imprisonment is conditional on the offender entering into a good behaviour bond (which is similar to the Commonwealth form of order — a recognizance release order under section 20(1)(b) of the *Crimes Act 1914* (Cth));
- in the NT,[621] Tasmania[622] and WA,[623] the court is provided with the option of making the order unconditional or subject to conditions, with guidance about the making of conditions ranging from the very broad ('order may be subject to such conditions as the court sees fit' in the NT), to the setting out of specific mandatory conditions in legislation and requiring courts to order at least one additional condition (in WA, a program requirement, supervision or curfew condition — which are imposed as part of a separate order called 'conditional suspended imprisonment').

The UK legislation sets out a list of 14 requirements that can be attached to a suspended sentence order in England and Wales.[624] These include:

- community service (not <40 hours or >300 hours completed within 12 months, unless extended);
- a rehabilitation activity requirement (to attend appointments and participate in activities, including restorative justice processes);
- a program requirement (e.g. to participate in a domestic and family violence, anger management, drug and alcohol or sex offender program);
- a prohibited activity requirement;

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614 Following an extensive review of suspended sentences and other intermediate sentencing orders, the Victorian Sentencing Advisory Council (by a majority) recommended the phasing out of suspended sentences in conjunction with broader sentencing reforms: Sentencing Advisory Council, Victoria, *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report Part 1* (2008). Recommendations are at xxv–xvi. The Council's recommendation was adopted, with suspended sentences being progressively phased out from 2011, and abolished for all offences committed from 1 September 2014: *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic).

615 *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) assented to 24 October 2017, date of commencement 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 – commencement proclamation).

616 *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas).

617 Ibid ss 2(2), (5), (6), (8).

618 Ibid s 2(9).

619 *Crimes (Sentencing) Act 2005* (ACT) ss 12, 13.

620 *Sentencing Act 2017* (SA) s 96). See also, for example, *R v Ireland* (2012) 114 SASR 438; [2012] SASCFC 120.

621 *Sentencing Act 1995* (NT) s 40(2).

622 *Sentencing Act 1997* (Tas) s 24.

623 *Sentencing Act 1995* (WA) ss 76 and 81.

624 *Criminal Justice Act 2003* (UK) s 190. The other requirement is an attendance centre requirement for offenders aged under 25 years.

- a curfew requirement (not < 2 hours or > 16 hours/day for up to 12 months);
- an exclusion requirement;
- a residence requirement – to live at a specified place (including a hostel or other institution);
- a foreign travel prohibition;
- a mental health treatment requirement;
- a drug rehabilitation requirement;
- an alcohol treatment requirement;
- an alcohol abstinence and monitoring requirement; and
- an electronic monitoring requirement (which is mandatory for a curfew or exclusion requirement, except if certain criteria are met).

The current form of conditional suspended sentence was introduced in England and Wales as part of a sentencing reform package which followed the release of the Halliday Report in 2001[625] and the UK Government's White Paper in 2002 (Justice for All).[626] The reforms made suspended sentences available in a broader range of cases (they were previously limited to be imposed only in 'exceptional circumstances'[627]).

A 2009 report following the reforms in the UK found that about 60 per cent of suspended sentence orders had two or three requirements (with a further approximately 37% having only one).[628] The most commonly used conditions at that time were: supervision (now part of a rehabilitation activity requirement), unpaid work and participation in an accredited program.[629]

Maximum and minimum terms and operational periods

The maximum and minimum terms that can be suspended vary between jurisdictions, as do the operational periods (see further information in the document *Community based Sentencing Orders, Imprisonment and Parole: Cross-jurisdictional Analysis*, which can be found on the Council's website).

Queensland, NT and WA all set a five-year limit on the maximum term of imprisonment that can be suspended.[630] However, in contrast to Queensland and the NT, the maximum operational period of the order in WA is two years, rather than five years.[631]

Tasmania does not set any limit on the maximum term of imprisonment that can be suspended or the maximum operational period. The TSAC, as part of a review of suspended sentences, reported that based on its analysis of sentencing outcomes; 'only 2% of offenders [sentenced in the Supreme Court] received FSSs [fully suspended sentences] for a period exceeding 18 months and no such sentences exceeded three years.'[632] In the case of PSSs, there were only three sentences exceeding three years (1.5%).[633] In the Magistrates Court, 'there were no PSSs imposed longer than two years, and only 0.4% of offenders received FSSs exceeding 18 months'.[634] Operational periods in the Supreme Court for WSSs range from 12 to 60 months (with a median of 24 months), while for PSSs, they ranged from 12 to 36 months (with a median of 24 months).[635]

The maximum term of imprisonment that can be suspended in England and Wales is shorter than in most Australian jurisdictions (a maximum of two years).[636] The maximum operational period for suspended sentence orders is two years.[637]

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625 Halliday, French and Goodwin, above n 402 .

626 Great Britain Home Office, *Justice for All – A White Paper on the Criminal Justice System* (The Stationary Office, 2002).

627 *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 118 (repealed).

628 Mair and Mills, above n 531, 10–11, Tables 4–5.

629 Ibid.

630 *Penalties and Sentences Act 1992* (Qld) s 144(1);

631 *Sentencing Act 1995* (WA) ss 76(1) (suspended imprisonment) and 81(1) (conditional suspended imprisonment).

632 Sentencing Advisory Council (Tasmania), above n 67, 22 [3.3.4].

633 Ibid.

634 Ibid.

635 Ibid.

636 *Criminal Justice Act 2003* (UK) s 189(1). The minimum term that may be suspended under this section is 14 days.

637 Ibid s 189(3). A minimum operational period of six months also applies.

Power to partially suspend

Unlike Queensland, in WA and England and Wales, courts have no power to partially suspend a term of imprisonment. Courts must either suspend a prison sentence imposed in full, or order the offender to serve it (with the ordinary powers relating to parole applying in this circumstance).[638] This was also the case in NSW, until suspended sentences were abolished.[639]

Powers on breach

As in Queensland, most jurisdictions (NT, SA, Tas, WA, England and Wales) have a presumption in favour of the activation of the term of imprisonment held in suspense on breach by reoffending — with the most usual form of words requiring the term suspended be activated 'unless of the opinion it would be unjust to do so', or a variation of this (Qld, NT, Tas, WA, England and Wales).[640]

Generally, the powers a court can exercise on breach are the same regardless of whether the offender has breached the order by committing a new offence or by failing to comply with other conditions of the order. However, in Tasmania, the presumption in favour of the whole of the sentence held in suspense being activated on breach does not apply where the breach is constituted by a failure to comply with the conditions of the order rather than reoffending only (in this case, the court has the power to either activate all or part of the sentence that is held in suspense, order a substituted sentence take effect, vary the conditions of the order (including extending the operational period), or to make no order).[641]

The Tasmanian legislation is also unique in allowing the Magistrates Court to deal with a breach of an order made by a superior court (in its case, the Supreme Court of Tasmania) when sentencing a person for a new offence committed during the operational period of the order.[642] In all other Australian jurisdictions, and also in England and Wales, a lower court, on becoming aware an offender has committed a further offence punishable by imprisonment during the operational period of an order made by a higher court, must commit the offender to the higher court to be dealt with by that court for the breach.

In WA, similar to Tasmania, there is no presumption that the term of imprisonment be activated where the offender has failed to comply with the order but has not committed a new offence punishable by imprisonment.[643] There are also some minor differences in the courts' powers on breach taking into account that a failure to comply with conditions constitutes a separate offence.[644] As this breach offence is punishable by a fine of up to $1,000, there is no need, as in the case of breach by reoffending, for the legislation to provide separately for the imposition of a fine. The maximum fine that can be imposed when dealing with an offender who has committed a new offence is also higher ($6,000).[645]

More information about the structure of suspended sentence orders in other Australian jurisdictions and in England and Wales is set out in the document *Community based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council's website.

8.5 How often are suspended sentences being used?

8.5.1 Queensland trends

The Council has reviewed data on offence and sentencing trends for adults in the Supreme and District Courts (combined) and the Magistrates Courts, covering a 13-year data period (1 July 2005 to 30 June 2018).

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638 *Criminal Justice Act 2003* (UK) s 189(1); *Sentencing Act 1995* (WA) ss 76(1) and 81(1).

639 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12 (1)(a), repealed by Sch 1 [14]. Date of commencement, 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 – commencement proclamation).

640 *Penalties and Sentences Act 1992* (Qld) s 147(2); *Sentencing Act 1995* (NT) s 43(7); *Sentencing Act 1997* (Tas) ss 27(4B)–(4C); *Sentencing Act 1995* (WA) ss 80(3) and 84F(3); *Criminal Justice Act 2003* (UK) sch 12, para 8 (the presumption under the UK legislation is either that the court activate the sentence with its original term unaltered, or activate it but substitute a lesser term: para 8(2)).

641 *Sentencing Act 1997* (Tas).

642 Ibid ss 27(4)–(4A).

643 *Sentencing Act 1995* (WA) s 84L.

644 Ibid ss 84J–84K.

645 Ibid s 84F(1)(d).

The Magistrates Courts dealt with the overwhelming majority of adult offenders, sentencing events, offences and penalties (well over 90% of each).

Table 8-1: Proportion of suspended sentences by offenders, events, offences and penalties, 2005–06 to 2016–17

Court Type	Adult offenders	Sentencing events	Offences	Penalties
District and Supreme Courts (N)	44,287	55,112	240,086	271,303
- Partially suspended sentence (% of N)	17.7%	14.5%	10.2%	9.0%
- Wholly suspended sentence (% of N)	18.1%	14.8%	8.3%	7.4%
Magistrates Courts (N)	714,704	1,793,180	3,366,587	4,499,371
- Partially suspended sentence (% of N)	0.6%	0.3%	0.4%	0.3%
- Wholly suspended sentence (% of N)	5.4%	2.8%	3.2%	2.4%

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Table 8-1 shows that 0.3 per cent (4,633) of sentencing events in the Magistrates Courts resulted in a PSS, while 2.8 per cent (50,702) resulted in a WSS. In the District and Supreme Courts 14.5 per cent (7,987) of sentencing events resulted in a partially suspended sentence and 14.8 per cent (8,139) resulted in a WSS.

As shown in Table 8-2, in the District and Supreme Courts, the number of sentencing events involving PSS orders decreased by 35 per cent, from 1,107 in 2005–06 to 719 in 2017–18. The number of sentencing events involving WSS orders also decreased, from 1,048 in 2005–06 to 717 in 2017–18 (a decrease of 32%). In the Magistrates Courts, the number of sentencing events involving a PSS decreased by 29 per cent, from 649 in 2005–06 to 461 in 2017–18. The number of sentencing events involving WSSs increased by 68 per cent, from 3,518 in 2005-06 to 5,922 in 2017–18.

Table 8-2: Change in suspended sentences over time, 2005–06 to 2017–18

	Number of sentencing events involving a suspended sentence			Suspended sentences as a proportion of all custodial sentences		Suspended sentences as a proportion of all sentences	
Court Type	**2005–06**	**2017–18**	**% Change**	**2005–06**	**2017–18**	**2005–06**	**2017–18**
District and Supreme Courts							
- Partially suspended sentences	1,107	719	▼ -35%	29.8%	15.9%	20.6%	13.0%
- Wholly suspended sentences	1,048	717	▼ -32%	28.2%	15.8%	19.5%	13.0%
Magistrates Courts							
- Partially suspended sentences	649	461	▼ -29%	8.0%	3.0%	0.5%	0.4%
- Wholly suspended sentences	3,518	5,922	▲ 68%	43.3%	38.6%	2.6%	4.6%

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

These trends are explored further below. The remainder of this chapter focuses on the principal offence or most serious offence (MSO).

8.5.2 National trends

National data compiled by the Australian Bureau of Statistics (ABS) on an annual basis also allows for some comparisons to be made across jurisdictions about the use of suspended sentence orders. Due to the different offence and sentencing regimes that exist in jurisdictions examined, some caution should be exercised in drawing conclusions based on this national data.

The published data on custodial sentence types distinguishes only between 'custody in a correctional institution' (including both imprisonment and PSSs), 'custody in the community' (such as under and ICO or, in some jurisdictions, home detention) and 'fully suspended sentences'.

Based on this data, summarised in Table 8-3 below, Queensland ranks fourth in its use of WSSs as a proportion of all penalties imposed in the District and Supreme Courts, and sixth in its use of WSSs in the Magistrates Courts (behind WA). When considered as a percentage of custodial penalties imposed, the picture is slightly different for sentences imposed in the Magistrates Court, with Queensland ranking slightly higher among jurisdictions most likely to impose a WSS, followed closely by NSW.

Table 8-3: Use of wholly suspended sentences by principal sentence (selected offences), Australia, 2016–17

Court Type	Total penalties	WSSs	WSS as % of all penalties	WSS as % custodial penalties
District and Supreme Courts				
Australian Capital Territory	161	29	18.0	19.1
New South Wales	4,002	527	13.2	14.4
Northern Territory	440	35	8.0	8.5
Queensland	4,408	641	14.5	17.2
South Australia	1,197	163	13.6	14.7
Tasmania	280	81	28.9	32.9
Western Australia	2,115	444	21.0	23.0
Magistrates Courts				
Australian Capital Territory	3,223	224	7.0	35.7
New South Wales	127,354	5,589	4.4	33.8
Northern Territory	8,794	709	8.1	17.3
Queensland	139,211	4,584	3.3	34.6
South Australia	26,183	2,035	7.8	46.0
Tasmania	9,908	1,123	11.3	59.1
Western Australia	79,605	2,132	2.7	42.0

Source: Australian Bureau of Statistics, Criminal Courts Australia, 2016–17 (2018)

8.6 Average sentence length for suspended sentences

As shown in Table 8-4 below, the median term of imprisonment suspended in the Magistrates Courts was 3.0 months, compared to 1.0 year in the District and Supreme Courts. Comparatively, the median term for sentences of imprisonment that were not suspended in the Magistrates Courts was 6.0 months, and 2.0 years in the District and Supreme Courts.

Table 8-4: Length and count of wholly suspended sentences (MSO), 2005–06 to 2017–18

Court Type	No.	Average term	Median term	Minimum term	Maximum term
District and Supreme Courts	8224	1.2 years	1.0 year	2 days	5 years
Magistrates Courts	52,633	3.7 months	3.0 months	1 day	3 years

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Excludes offences where a Commonwealth offence was the MSO.

Table 8-5 shows sentence lengths and the term of imprisonment required to be served prior to suspension for PSSs. This shows that the term of imprisonment imposed as part of a PSS is, on average, significantly longer than where that term is suspended in whole (a median of 2.5 years for PSSs imposed in the District and Supreme Courts, and 6 months for those ordered in the Magistrates Courts).

Table 8-5: Length and count of partially suspended sentences (MSO), 2005–06 to 2017–18

Court Type	No.	Average term	Median term	Minimum term	Maximum term
Head sentence					
District and Supreme Courts	8,012	2.6 years	2.5 years	1 month	5 years
Magistrates Courts	4,619	8.2 months	6 months	2 days	3 years
Time to serve prior to suspension					
District and Supreme Courts	8,012	8.7 months	7.3 months	1 day	3.5 years
Magistrates Courts	4,616	2.5 months	2 months	1 day	2.5 years

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Excludes offences where a Commonwealth offence was the MSO.

8.7 How has the use of suspended sentences changed over time?

8.7.1 Magistrates Courts

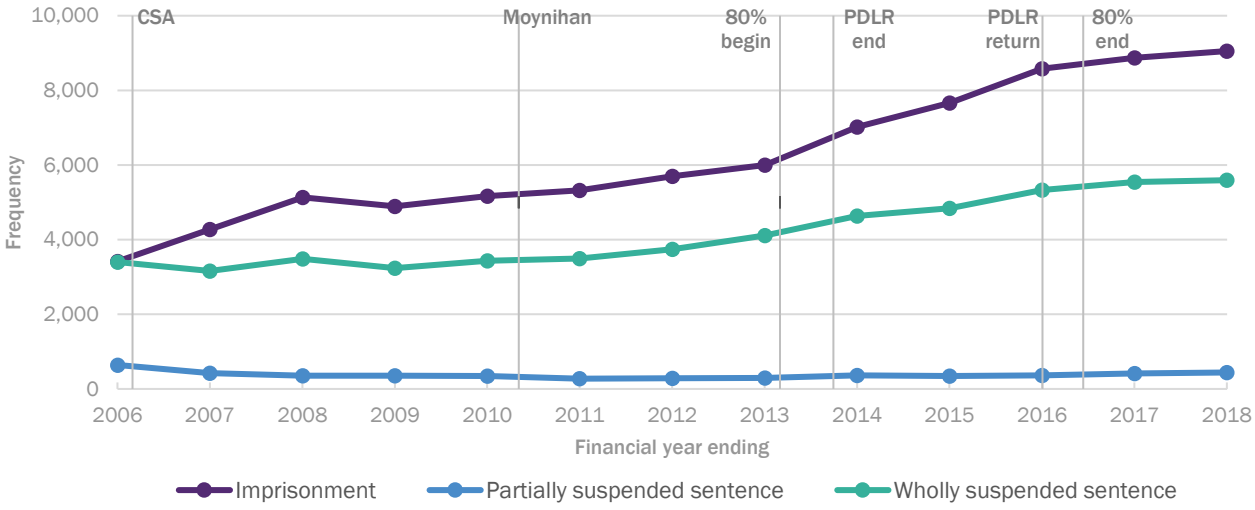
The use of suspended sentences in the Magistrates Courts in Queensland has steadily increased since 2009–10 when 2010 legislative amendments,[646] referred to as the 'Moynihan reforms'[647] came into effect — representing an increase from 2.3 per cent of all penalties in 2009–10 (the financial year immediately prior to these reforms coming into effect), to 4.8 per cent of all penalties in 2017–18.[648]

The Moynihan reforms resulted in significant expansion of the Magistrates Courts' jurisdiction to determine indictable offences in the *Criminal Code* (Qld) and *Drugs Misuse Act 1986* (Qld), resulting in many matters previously dealt with in the District Court being dealt with instead in a Magistrates Court. This means that the overall profile of offences dealt with in the Magistrates Courts is likely to have changed to include more serious forms of offending.

As shown in Figure 8-1, the use of WSSs has been the primary driver of the increasing use of suspended sentences by Magistrates Courts. There was a 64.5 per cent increase in the use of WSSs over the period 2005–06 to 2017–18, from 3,400 orders in 2005–06 to 5,593 orders in 2017–18. Over this same 13 year period, the number of prison sentences imposed in the Magistrates Courts has increased at an even faster rate (from 3,418 prison sentences imposed in 2005–06 to 9,053 in 2017–18 – representing a 164.9% increase).

The trends for PSSs are markedly different. Apart from a small dip in their use following the introduction of court ordered parole in 2006–07, the overall numbers of PSSs imposed has remained relatively stable. The drop in the use of PSSs following the introduction of court ordered parole can be understood in light of the same sentencing outcome (a period in custody, followed by release into the community on a date which is fixed by the court) being able to be achieved through the use of court ordered parole. However, unlike a person subject to a PSS, a person sentenced to imprisonment with a court ordered parole release date does not have the remaining period of the sentence suspended, and must comply with the conditions of their parole order if they are to avoid being returned to custody.

Figure 8-1: Custodial penalty type by most serious offence (MSO), Magistrates Courts, 2005–06 to 2017–18[649]



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

646 *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld). Relevant provisions commenced on 1 November 2010.

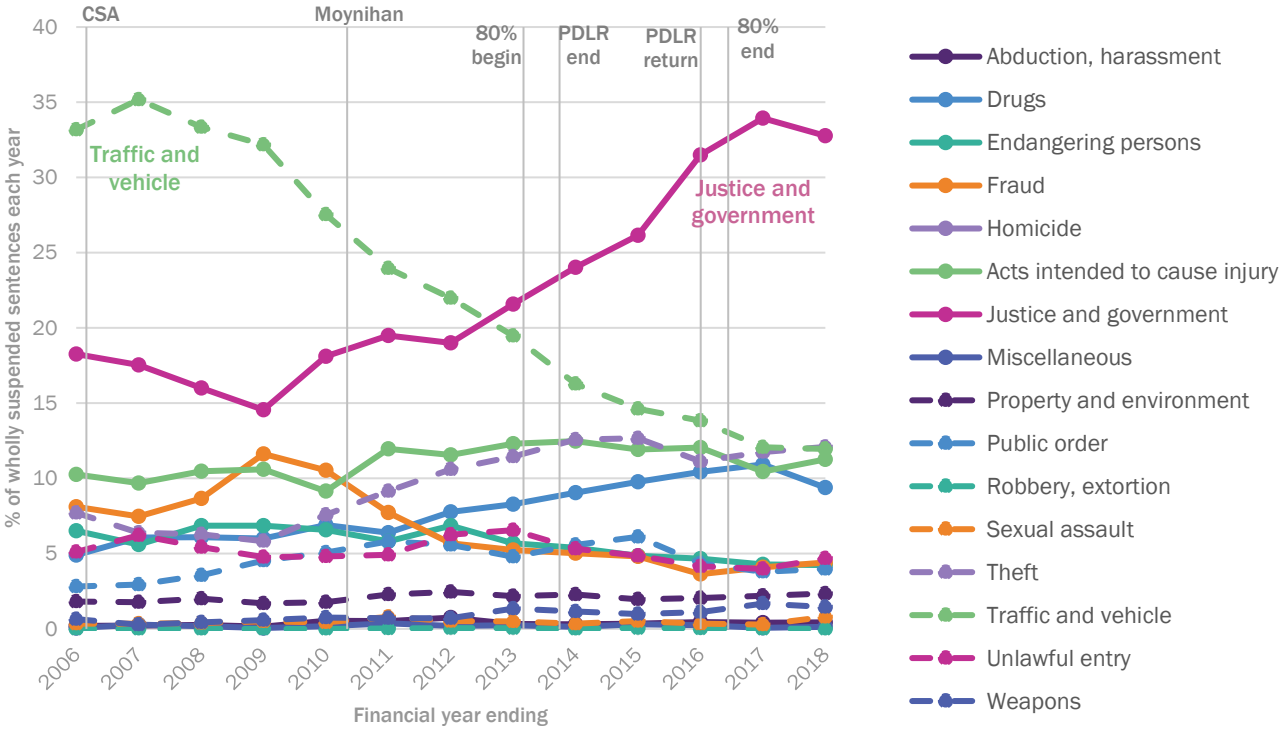
647 The report which formed the basis of these reforms was undertaken by the Hon Martin Moynihan AO – see above n 4 .

648 See Chapter 7, Figure 7-4.

649 For an explanation of lines representing key legislative reforms, see n 649 above.

Figure 8-2 (below) shows that as a proportion of all WSSs imposed, the offence category driving the increase in the use of WSSs is 'justice and government' offences. This offence category includes breaches of custodial and community based orders, breach of domestic violence orders and other justice procedure-related offences. The apparent decreasing use of WSSs for the category of offences falling under 'traffic and vehicle' mirrors the increasing proportion of WSS orders made for 'justice and government' offences. The number of justice and government offences that received a WSS increased 299 per cent, from a low of 472 in 2008–09 to a peak of 1,882 in 2016–17. The number of traffic and vehicle offences that received a WSS peaked at 1,161 in 2007–08 and decreased 42 per cent, to 669 in 2017–18.

Figure 8-2: Offence type (MSO) for offences attracting a wholly suspended sentence, Magistrates Courts, 2005–06 to 2017–18[650]

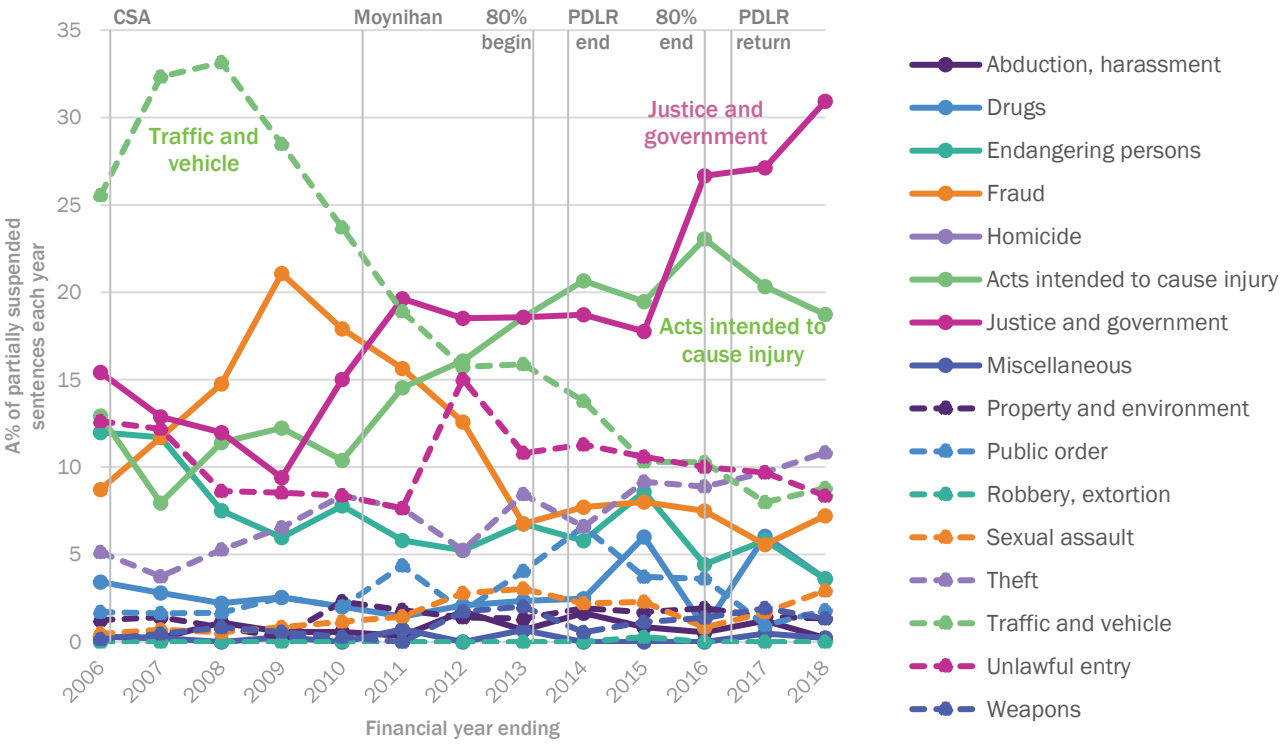


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Offences where less than 100 cases received a wholly suspended sentence in the lower courts across the 13 year period have been excluded from this graph (homicide offences, miscellaneous offence, and robbery and extortion offences).

Similar trends can be observed when the use of PSSs in the Magistrates Courts is examined, although there are some differences. In particular, an increasing proportion of PSSs were imposed for the offence category of 'acts intended to cause injury' (encompassing offences such as common assault, assault occasioning bodily harm, grievous bodily harm, wounding and stalking) from 2009–10, before the proportion of PSS for this offence started to decline in 2016–17 (See Figure 8-3 below). In terms of numbers of MSOs receiving a PSS, acts intending to cause injury was lowest in 2006–07 at 34 and peaking in 2016–17 at 84, an increase of 147 per cent, and remaining steady at 83 cases in 2017–18.

650 For an explanation of lines representing key legislative reforms, see n 440 above.

Figure 8-3: Offence type (MSO) for offences attracting a partially suspended sentence, Magistrates Courts, 2005–06 to 2017–18[651]



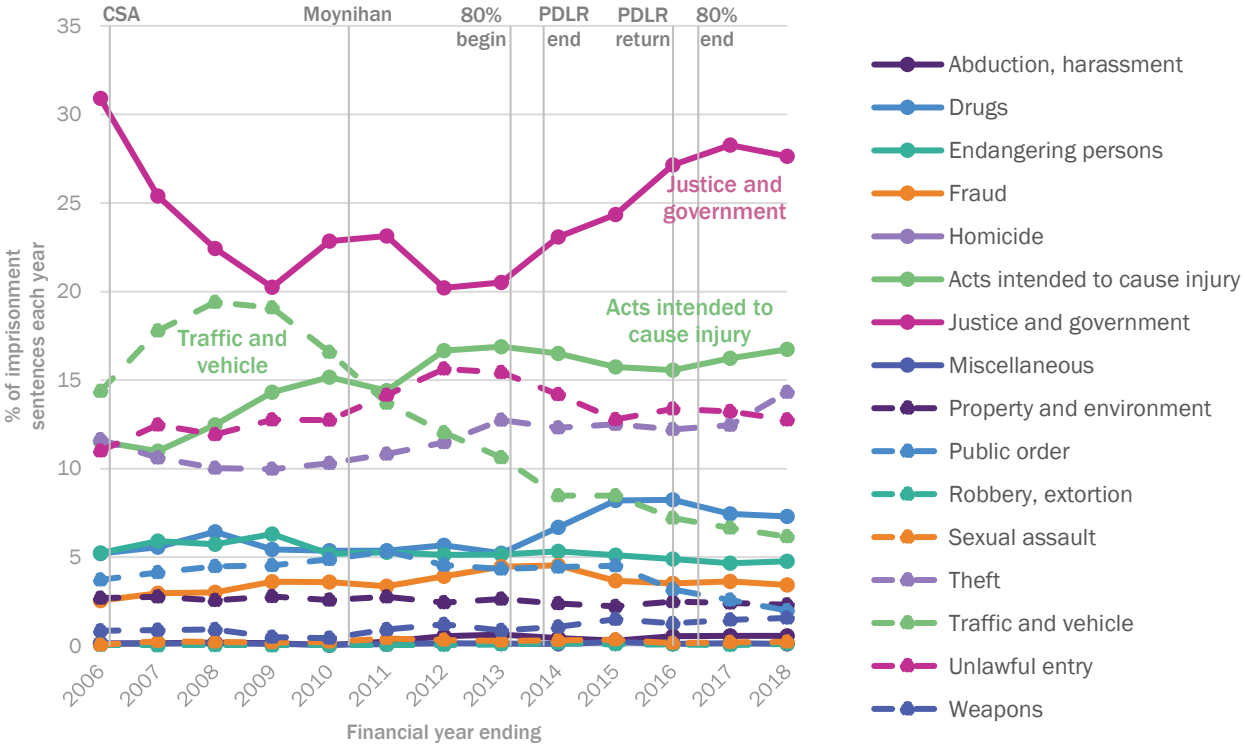
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Offences where less than 100 cases received a partially suspended sentence in the lower courts across the 13 year period have been excluded from this graph (abduction and harassment offences, homicide offences, miscellaneous offences, property and environment offences, robbery and extortion offences, sexual assault offences, weapon offences).

As shown in Figure 8-4, the highest proportion of prison sentences imposed by the Magistrates Courts was for 'justice and government' offences,[652] fluctuating from a high of 30.9 per cent in 2005–06 to a low of 20.2 per cent in 2011–12, rising again to 28.3 per cent in 2016–17. The other offences making up the highest proportion of prison sentences since the Moynihan reforms were for 'acts intended to cause injury', 'theft' and 'unlawful entry' – together with 'justice and government', they account for over 70 per cent (71.4) of prison sentences (by MSO) in the 2017–18 financial year. Prior to November 2010 when the Moynihan reforms came into effect, the second most common offence category (as a proportion of all prison sentences imposed) was 'traffic and vehicle', reaching a high of 19.4 percent in 2007–08. By 2017–18, this offence category represented only 6.2 per cent of all prison sentences imposed.

651 For an explanation of lines representing key legislative reforms, see n 440 above.

652 This offence category includes breaches of custodial and community-based orders, breach of domestic violence orders and other justice procedure-related offences.

Figure 8-4: Offence type (MSO) for offences attracting imprisonment, Magistrates Courts, 2005–06 to 2017–18[653]



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Offences where less than 100 cases received a partially suspended sentence in the lower courts across the 13 year period have been excluded from this graph (homicide offences, miscellaneous offences, and robbery and extortion offences).

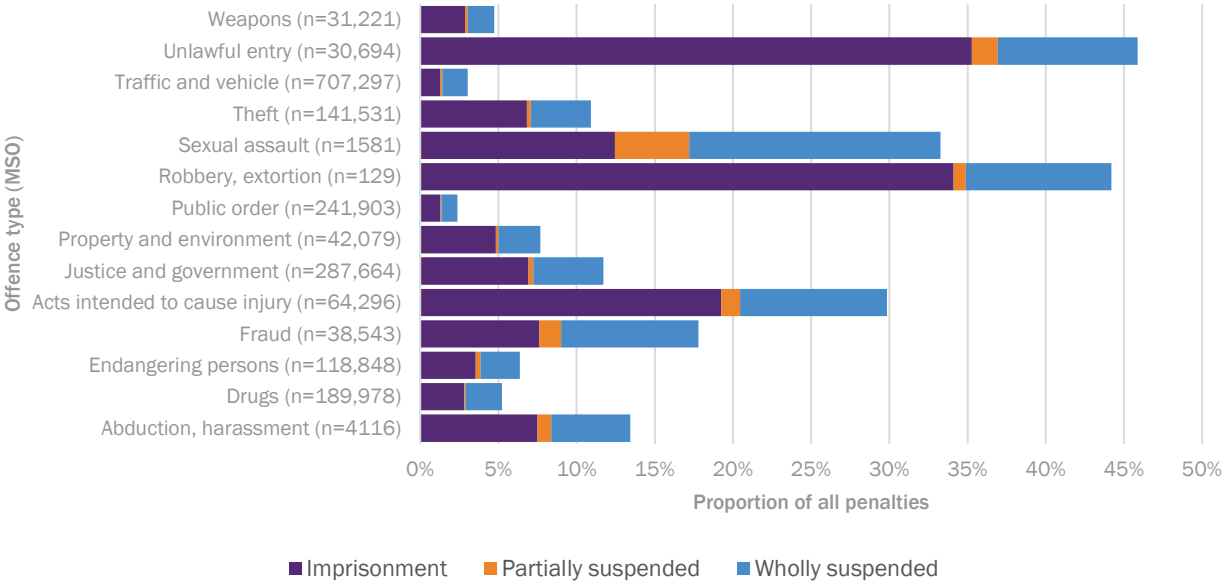
As shown in Figure 8-5, the offences most likely to result in either a wholly or partially sentence of imprisonment being imposed in the Magistrates Courts (by offence type, rather than volume) were:

- Sexual assault offences (20.8%);
- Unlawful entry (10.6%);
- Acts intended to cause injury (10.6%); and
- Fraud (10.2%).

Unlawful entry offences were most likely to receive an immediate imprisonment sentence in the Magistrates Court (35.3%), closely followed by robbery and extortion offences (34.1%).

653 For an explanation of lines representing key legislative reforms, see n 440 above.

Figure 8-5: Proportion of penalties given in Magistrates Courts by offence type (MSO), Queensland, 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

8.7.2 Supreme and District Courts

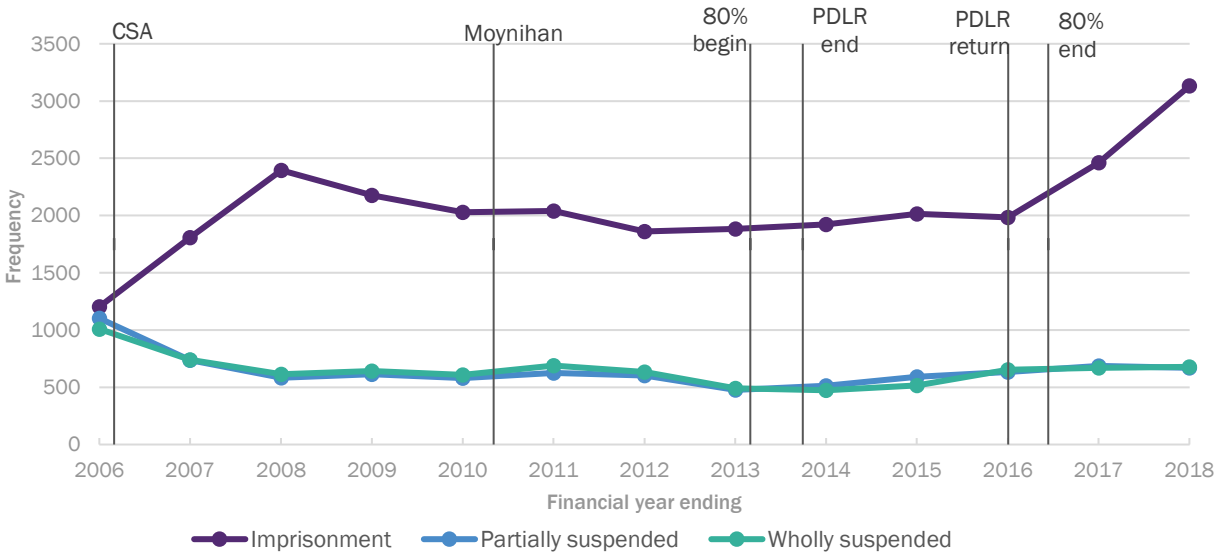
As shown in Figure 8-6, the use of suspended sentences (by MSO) in the higher courts has remained relatively constant since 2007–08 (the year after court ordered parole was introduced). The drop following the introduction of court ordered parole in the use of suspended sentences (both WSSs and PSSs) suggests that some offenders who previously would have been sentenced to a term of imprisonment that was suspended, instead were sentenced to imprisonment with a court ordered parole release date.

In 2017–18, 678 WSSs were imposed for the MSO sentenced at that court event, with a similar number of PSSs (669).

From 2015–16 to the most recent financial year, there has been a notable jump in the higher courts in the number of imprisonment sentences imposed – rising from 1,984 in 2015–16 to 3,132 in 2017–18. Based on the offence categories representing the largest proportion of prison sentences imposed (Figure 8-7 below), it seems likely that sentencing practices for drug offences has been the largest contributor to this increase. The number of drug offences (MSO) sentenced in higher courts has increased steadily from a low in 2005-06 (n=680) to a high in 2017–18 (n=1,971). Of these drug offences (MSO) the proportion that resulted in an immediate imprisonment sentence also increased, from 17.7 per cent in 2005–06 to 64.9 per cent in 2017–18. The higher proportion of drug offences in the higher courts attracting a term of imprisonment may be explained in part by the significant changes made to the jurisdiction of Queensland courts with the commencement of the Moynihan reforms in November 2010. As a result of these reforms, the Magistrates Courts can now deal with a broader range of drug possession charges (those carrying a maximum penalty above 15 years' imprisonment) so long as the prosecution does not allege a commercial purpose.[654]

654 *Drugs Misuse Act 1986* (Qld) s 14. For more information on the Moynihan reforms, see n 440 above.

Figure 8-6: Custodial penalty type for most serious offence (MSO), higher courts, 2005–06 to 2017–18[655]

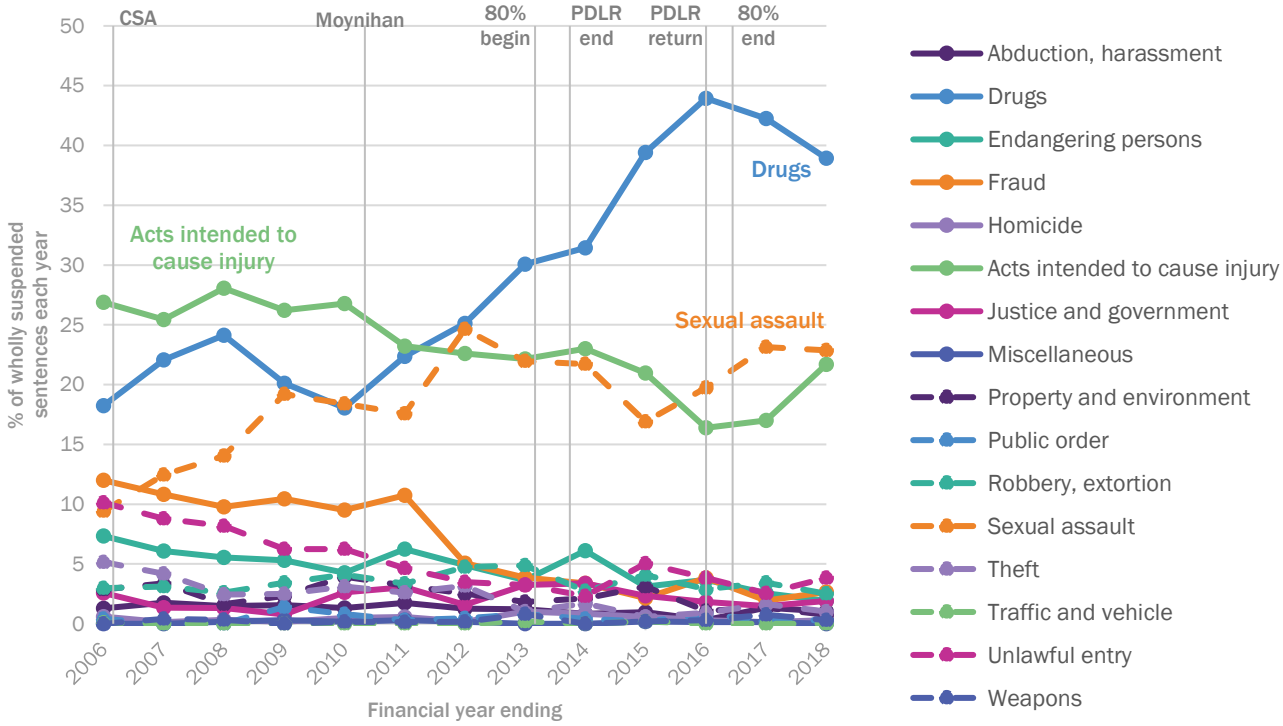


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Figure 8-7 (below) shows that as a proportion of all WSSs imposed in 2017–18, the offence category with the highest overall numbers of WSSs imposed was drug offences (38.9%), followed by sexual assault (22.9%) and acts intended to cause injury (21.7%). Together, these three offence categories account for 83.5 per cent of all WSSs imposed in the higher courts in 2017–18. These categories of offence are also the most commonly dealt with in the higher courts, together accounting for 71.6 per cent of all offences (MSO) sentenced in Queensland higher courts in 2017–18 (35.9% drugs, 21.9% acts intended to cause injury, 12.8% sexual assault offences).

655 For an explanation of lines representing key legislative reforms, see n 440 above.

Figure 8-7: Offence type (MSO) for offences receiving a wholly suspended sentence, higher courts, 2005–06 to 2017–18[656]



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Offences where less than 100 cases received a wholly suspended sentence in the higher courts across the 13 year period have been excluded from this graph (homicide offences, miscellaneous offences, public order offences, traffic and vehicle offences, and weapon offences).

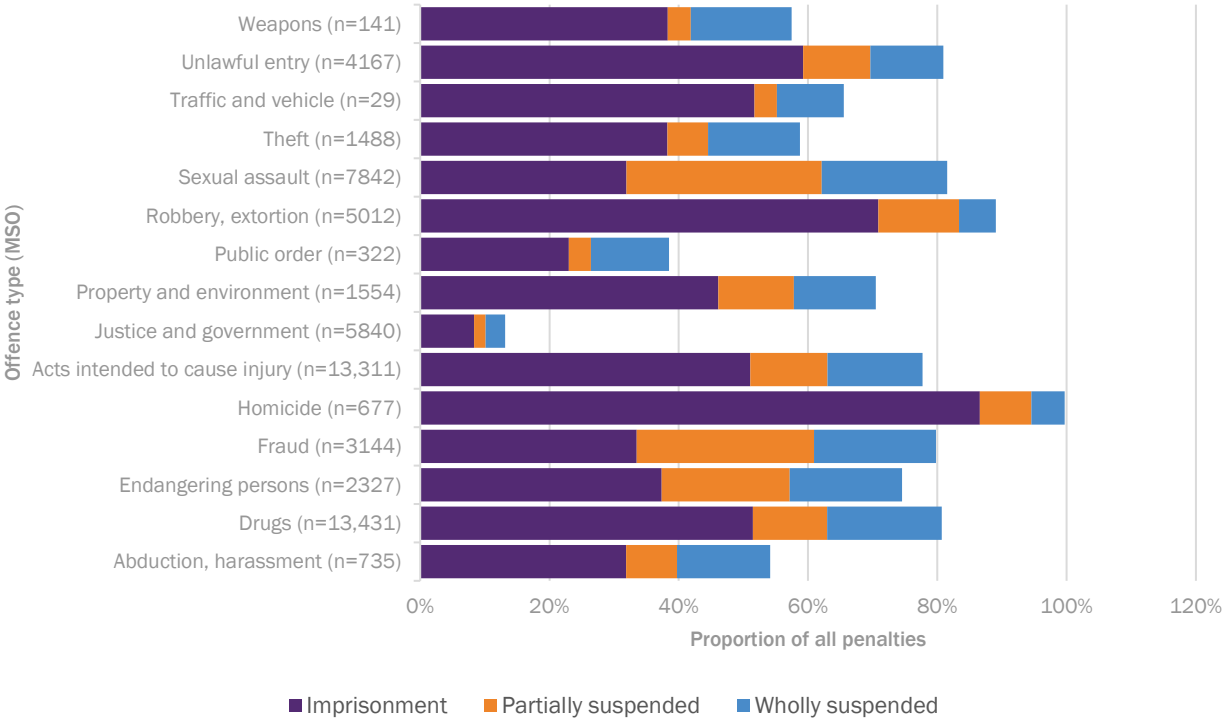
Figure 8-8 shows that the offences most likely to result in either a wholly or partially suspended sentence of imprisonment being imposed in the higher courts (by offence type, rather than volume) were:

- Sexual assault offences (49.6%);
- Fraud offences (46.3%);
- Acts endangering persons (37.2%).

In contrast, the offences most likely to result in an immediate term of imprisonment being imposed were homicide offences (86.6%) and robbery and extortion offences (70.9%).

656 For an explanation of lines representing key legislative reforms, see n 440 above.

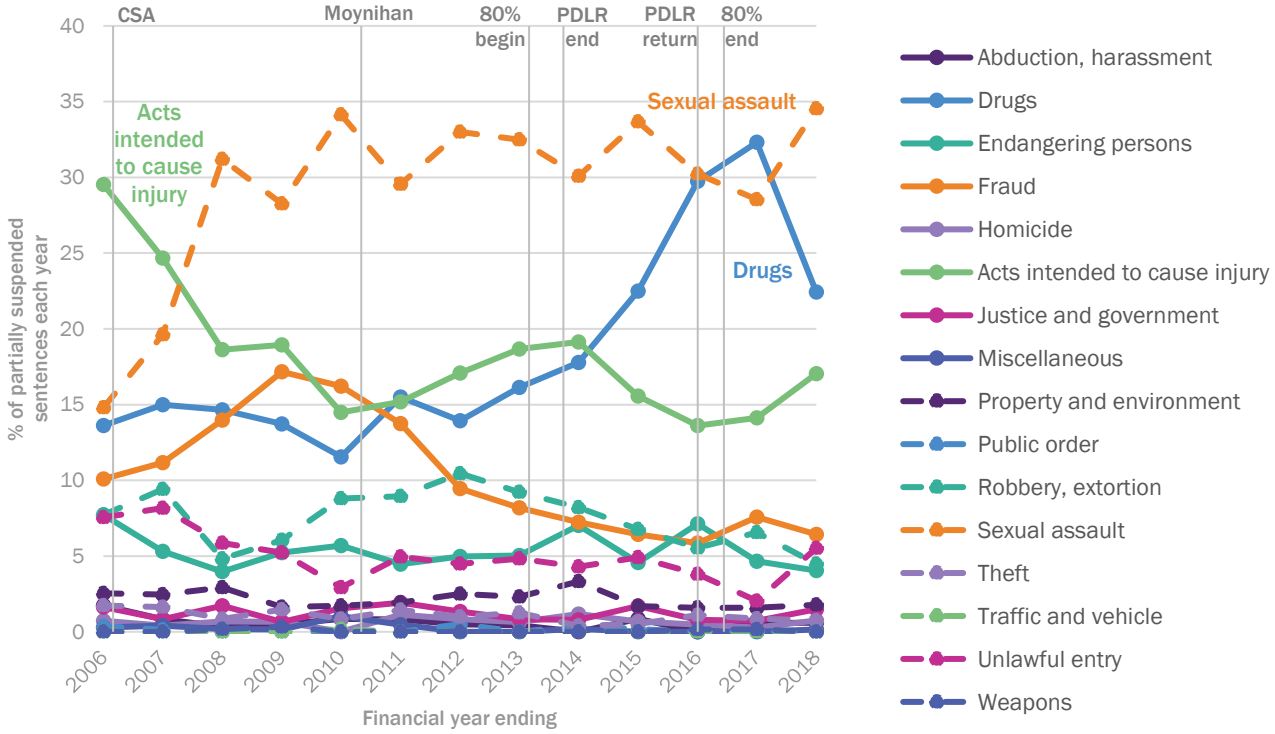
Figure 8-8: Proportion of penalties given in higher courts by offence type (MSO), , 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

As shown in Figure 8-9, the introduction of court ordered parole in 2006–07 was followed by a jump in the overall share of PSSs imposed for a sexual assault offence. Court ordered parole is not available to courts when sentencing an offender for a sexual offence, which may explain this trend. The proportion of PSSs imposed for drug offences has increased substantially since 2009–10 when they represented 11.6 per cent of all PSSs imposed by the higher courts, to a high of 32.3 per cent in 2016–17 before dropping in 2017–18 to 22.4 per cent of PSSs imposed. Overall, the number of drug offences (MSO) sentenced in Queensland higher courts has increased by 65 per cent, from 680 offences sentenced in 2005–06 to 1971 offences sentenced in 2017–18. As a proportion of offences (MSO) sentenced in Queensland higher courts, the proportion of drug offences has increased almost every year (2005–06: 12.7%; 2017-18: 35.9%).

Figure 8-9: Offence type (MSO) for offences receiving a partially suspended sentence, higher courts, 2005–06 to 2017–18[657]

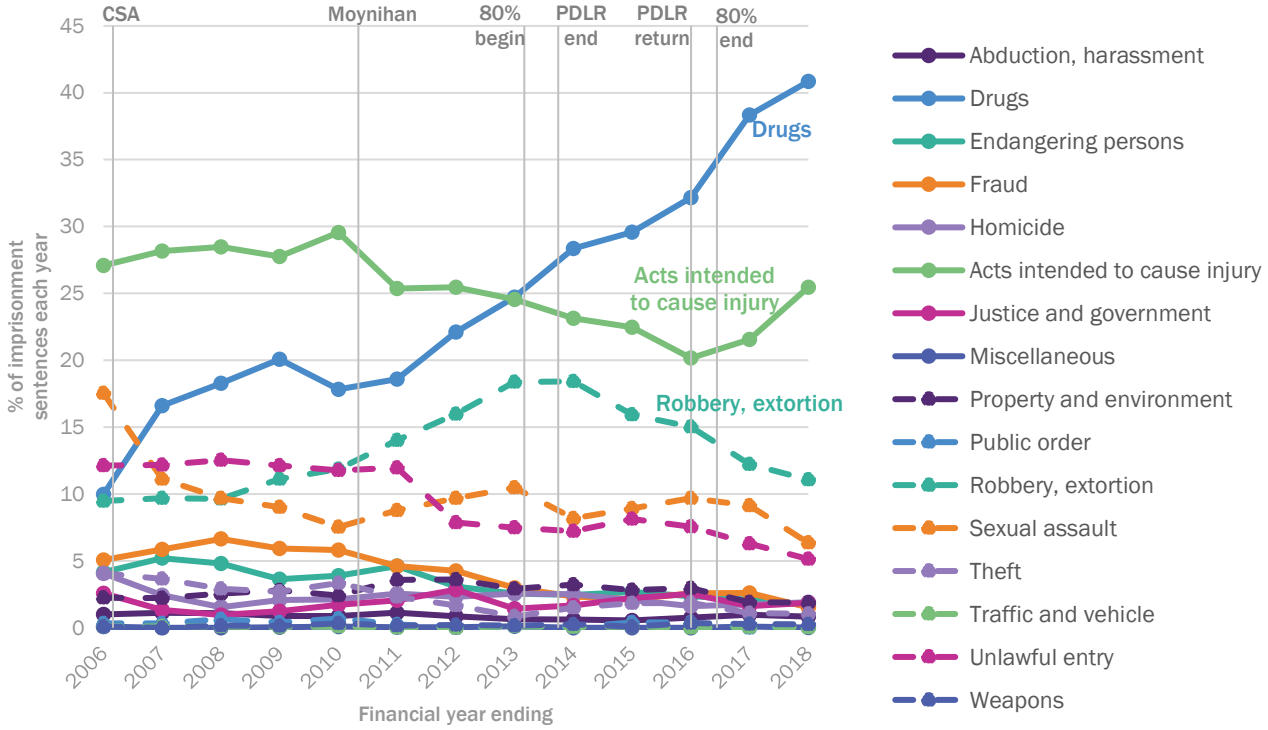


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Offences where less than 100 cases received a partially suspended sentence in the higher courts across the 13 year period have been excluded from this graph (abduction and harassment offences, homicide offences, miscellaneous offences, public order offences, theft offences, traffic and vehicle offences, and weapon offences)

As shown in Figure 8-10, the greatest share of prison sentences imposed in the higher courts were for drug offences, acts intended to cause injury and robbery and extortion. In 2017–18, these offences represented 40.8 per cent (drug offences), 25.5 per cent (acts intended to cause injury) and 11.1 per cent (robbery, extortion) of all prison sentences imposed by the higher courts, and together accounted for over three in every four prison sentences imposed (77.4%). Over this same year, these three offences were also the most common offences sentenced in Queensland higher courts (excluding sexual assault offences).

657 For an explanation of lines representing key legislative reforms, see n 440 above.

Figure 8-10: Offence type (MSO) for offences receiving imprisonment, higher courts, 2005–06 to 2017–18[658]



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Note: Offences where less than 100 cases received an imprisonment sentence in the higher courts across the 13-year period have been excluded from this graph (miscellaneous offences, public order offences, traffic and vehicle offences and weapons offences).

8.8 How often are suspended sentences being combined with other penalty types?

As discussed below, courts commonly sentence offenders for multiple offences at the same court event which results in a number of sentencing orders being made. The most common outcome is for a court to impose the same penalty type for different offences dealt with at the same time as the MSO (for example, a WSS with a WSS, or a PSS with a PSS).

8.8.1 Wholly suspended sentences

Of the 60,857 court events involving Queensland offences that resulted in a WSS as the most serious penalty, 14,329 (23.5%) had no other penalties imposed (22.1% of cases sentenced in the Magistrates Courts and 32.5% of cases sentenced in the higher courts).

Additional penalties were given in 76.5 per cent of court events where a WSS was the most serious penalty (77.9% of cases for Queensland offences sentenced in the Magistrates Courts, and 67.5% of cases for Queensland offences sentenced in a higher court).

Considering all cases involving Queensland offences where multiple penalties were given in the same court event as a WSS (MSO) (n=46,528), nearly half (49.4%) received further WSSs for separate offences (see Table 8-6). The next most frequently applied penalties in combination with a WSS were fines (33.3%) and convictions with no further punishment (18.0%).

This pattern of additional penalties was the same for Magistrates Courts, with 47.2 per cent of cases receiving a further WSS, 37.5 per cent receiving a fine and 17.4 per cent receiving a conviction with no further punishment.

658 For an explanation of lines representing key legislative reforms, see n 440 above.

In the higher courts, a further WSS remains the most frequent additional penalty with close to two thirds of cases (66.1%) recording at least one additional WSS. Probation and conviction with no further punishment were the next most frequently applied in combination with a WSS with 22.5 per cent of cases recording each of these combinations of penalties (see Table 8-6).

Community service is rarely ordered at the same time as a WSS for the MSO, with only 2.6 per cent of Queensland cases where a WSS is applied with a community service order. The use of community service orders in combination with a WSS occurs more frequently in the higher courts (4.3%) than in the Magistrates Courts (2.4%).

Table 8-6: Penalties sentenced in the same court event as a wholly suspended sentence (MSO), Queensland, 2005–06 to 2017–18

Penalty type	All Queensland offences		Magistrates Courts (Queensland offences)		Higher Courts (Queensland offences)	
	N	%	N	%	N	%
Wholly suspended sentence	23,003	49.4	19,332	47.2	3,671	66.1
Intensive correction order	0	0.0	0	0.0	0	0.0
Community service	1,222	2.6	981	2.4	241	4.3
Probation	5,908	12.7	4,657	11.4	1,251	22.5
Fine	15,500	33.3	15,369	37.5	131	2.4
Good behaviour, recognisance	514	1.1	343	0.8	171	3.1
Convicted, not punished	8,362	18.0	7,111	17.4	1,251	22.5
TOTAL	**46,528**	**100**	**40,976**	**100**	**5,552**	**100**

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Notes:

(1) Multiple non-MSO penalties can be applied per court event, therefore percentages add to more than 100%.

(2) If more than one penalty has been applied for one offence, each penalty has been counted separately.

(3) Rising of the court has been excluded.

(4) Any juvenile penalties have been excluded.

(5) Commonwealth offences have been excluded

8.8.2 Partially suspended sentences

Of the 12,631 court events sentenced for a Queensland offence that resulted in a PSS as the most serious penalty, 2,671 (21.1%) received no other penalties (MSO only). For Queensland offences, the proportion of cases with no additional penalty imposed was lower in the Magistrates Courts (14.7%) than in the higher courts (24.9%).

Additional penalties were given in 78.9 per cent of court events where a PSS was the most serious penalty (85.3% of cases for Queensland offences sentenced in the Magistrates Courts, and 75.1% of cases for Queensland offences sentenced in a higher court).

As Table 8-7 shows, the most common additional penalty when considering all Queensland offences is a further PSS (61.2%). The second most frequently applied penalty in combination with a PSS is conviction with no further punishment (29.3%), followed closely by imprisonment (29.1%).

Although the most common additional penalty in combination with a PSS across the Magistrates Courts and the Higher Courts was a further PSS (56.9% of cases in the Magistrates Courts and 64.0% of cases in the Higher courts), the next most frequent combinations differed. In the Magistrates Courts, the next most frequently applied penalties in combination with a PSS were conviction with no further punishment (31.7%) and a fine (26.8%). In the higher courts, the second most commonly applied penalty in addition to a PSS was imprisonment (34.2%), followed by conviction with no further punishment (27.8%).

As for WSSs, community service is rarely given as an additional penalty where a PSS is imposed for the MSO (0.8% of all PSSs imposed for a MSO with an additional penalty given). Probation is more commonly combined with a PSS (MSO), with 16.1 per cent of cases where a PSS was ordered for a MSO with additional penalties involving probation. This is much more common for cases sentenced in higher courts (20.3%) than the Magistrates Courts (9.8%).

Table 8-7: Penalties sentenced in the same court event as a partially suspended sentence (MSO), Queensland, 2005–06 to 2017–18

Penalty type	All Queensland offences		Magistrates Courts (Queensland offences)		Higher Courts (Queensland offences)	
	N	%	N	%	N	%
Imprisonment	2,897	29.1	836	21.2	2,061	34.2
Partially suspended sentence	6,096	61.2	2,242	56.9	3,854	64.0
Wholly suspended sentence	347	3.5	249	6.3	98	1.6
Intensive correction order	4	0.0	2	0.1	2	0.0
Community service	78	0.8	49	1.2	29	0.5
Probation	1,606	16.1	386	9.8	1,220	20.3
Fine	1,076	10.8	1,055	26.8	21	0.3
Good behaviour, recognisance	228	2.3	27	0.7	201	3.3
Convicted, not punished	2,922	29.3	1,247	31.7	1,675	27.8
TOTAL	**9,960**	**100**	**3,939**	**100**	**6,021**	**100**

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Notes:

1. Multiple non-MSO penalties can be applied per court event, therefore percentages add to more than 100%.
2. If more than one penalty has been applied for one offence, each penalty has been counted separately.
3. Rising of the court has been excluded.
4. Any juvenile penalties have been excluded.
5. Commonwealth offences have been excluded.

8.9 Achieving the effect of a conditional suspended sentence by combining existing orders

In cases where suspended sentences are used in combination with probation and community service orders, it achieves what is effectively a conditional form of suspended sentence, although this option is only available to a court when sentencing a person for more than one offence. Where community based orders and suspended sentences are imposed together, it means that the person must both comply with their obligations under the suspended sentence (not to commit an offence punishable by imprisonment during the operational period of the order) and with the conditions of the community based order.

The main practical difference between the use of this combination of orders and conditional forms of suspended sentence orders that exist in some other jurisdictions is that the consequences of breaching a community based order (other than by further offending) does not place the offender at risk of having the suspended term activated. This is because a breach of conditions of a community based order is a breach of that order only, not of the suspended sentence. Although breach of community based orders is an offence,[659] it is not punishable by imprisonment (the maximum penalty for this offence is a fine of 10 penalty units, currently translating to a maximum fine of $1,305.50).

8.10 Who receives a suspended sentence?

When the gender and Aboriginal and Torres Strait Islander status of people sentenced to imprisonment (5 years or less), PSSs and WSSs is examined, it appears that:

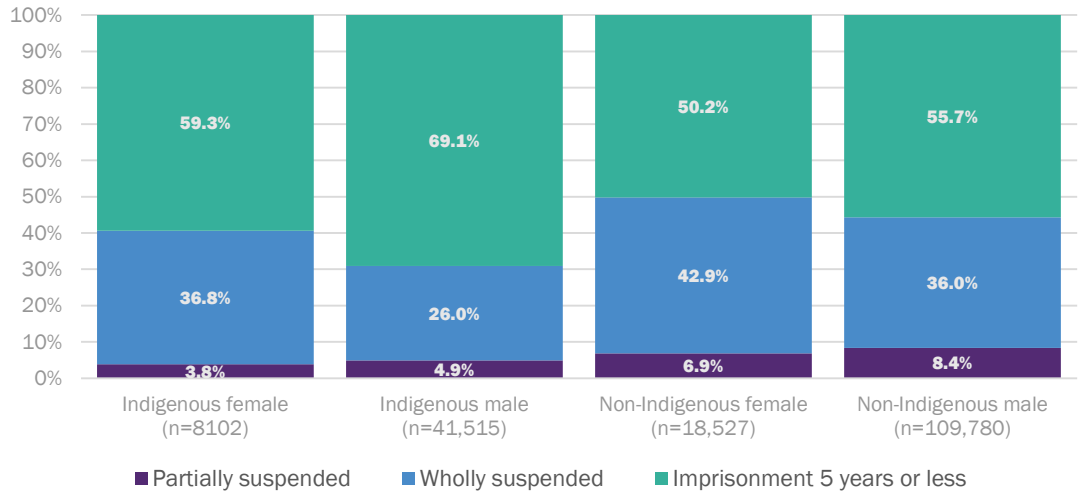
- there are no differences based on gender in the proportion of imprisonment sentences and PSSs imposed, although women appear more likely than men to receive a WSS than either imprisonment or a PSS;
- of people receiving a prison sentence, Aboriginal and Torres Strait Islander offenders are more likely to receive a sentence of immediate imprisonment compared to non-Indigenous offenders.

These findings do not take into account different offence or offending profiles, or other factors that may influence the sentence (such as prior criminal history).

659 *Penalties and Sentences Act 1992* (Qld) s 123.

Figure 8-11 below shows that Aboriginal and Torres Strait Islander people are less likely to receive a suspended sentence and more likely to receive an imprisonment sentence compared to their non-Indigenous counterparts. Male Aboriginal and Torres Strait Islander offenders are the most likely to receive an imprisonment sentence, while non-Indigenous females are the most likely to receive a WSS and non-Indigenous males are the most likely to receive a PSS.

Figure 8-11: Proportion of sentences resulting in suspended sentences compared with terms of imprisonment five years or less, 2005-06 to 2017-18

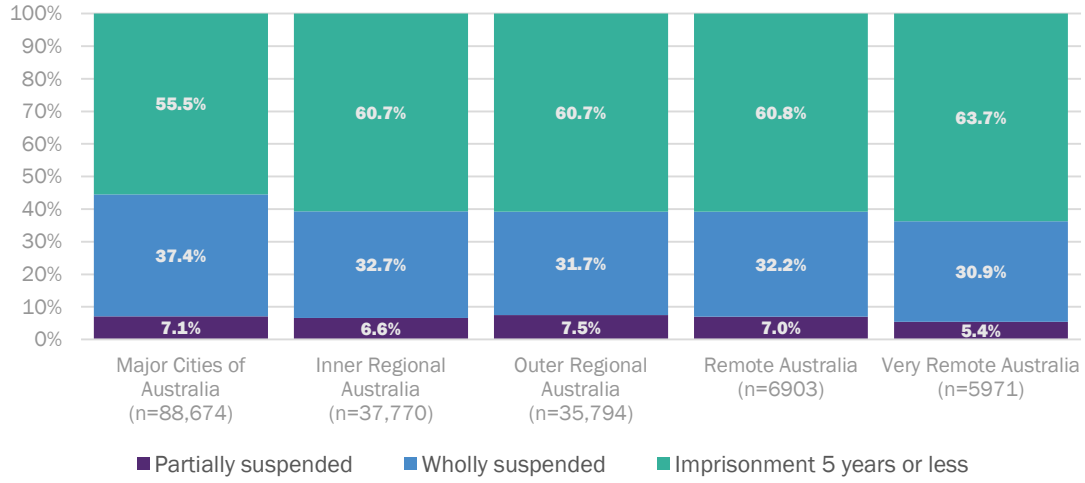


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

8.11 Impact of remoteness on use of suspended sentences

Across all remoteness areas, as a proportion of custodial sentences of five years or less, offenders are more likely to receive a sentence of imprisonment than a suspended sentence. Figure 8-12 shows those offenders living in very remote areas are slightly less likely to receive a PSS or WSS. Offenders living in major cities sentenced to a term of imprisonment are the least likely to receive an immediate sentence of imprisonment and most likely to have their term of imprisonment wholly suspended.

Figure 8-12: Type of imprisonment sentence by remoteness area, 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

As with the findings in relation to the gender and Aboriginal and Torres Strait Islander status of people receiving suspended sentences, these findings do not take into account a number of offence and offender-related variables that may account for these differences.

8.12 Operational periods of suspended sentences

The majority of suspended sentences had an operational period of less than two years (83%, 58,215 cases) – see Figure 8-13.

Figure 8-13: Operational periods and head sentences of suspended sentences (MSO), 2005-06 to 2017-18

Operational period length	Number of cases (MSO)
1 year or less	27,926 (40%)
1 to 2 years	30,289 (43%)
2 to 3 years	7,410 (11%)
3 to 4 years	2,222 (3%)
4 to 5 years	2,013 (3%)

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods from Queensland-Wide Interlinked Courts, extracted February 2019.

Table 8-8 shows the relationship between head sentences and operational periods. There were 27,926 cases with a head sentence and operational period of one year or less (40% of cases). An additional 27,125 cases had a head sentence one year or less, but had a longer operational period of between one and two years (39% of cases). Over two thirds of offenders (69%, 48,235 cases) had a short head sentence (less than six months) with a short to moderate operational period (two years or less).

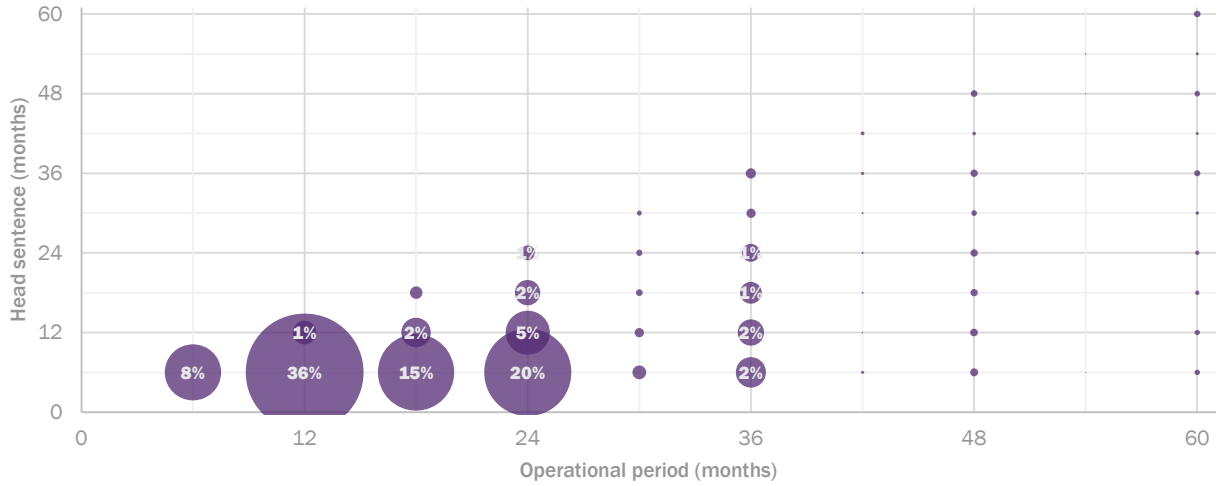
Table 8-8: Relationship between head sentences and operational periods (months) (MSO), 2005-06 to 2017-18

		Head Sentence (months)																			
		0-6		7-12		13-18		19-24		25-30		31-36		37-42		43-48		49-54		55-60		Total	
		n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Operational Period (months)	0-6	4,927	7%																			4,927	7%
	7-12	21,825	31%	1,174	2%																	22,999	33%
	13-18	9,260	13%	1,747	3%	487	1%															11,494	17%
	19-24	12,223	18%	3,895	6%	1,817	3%	860	1%													18,795	27%
	25-30	300	0%	159	0%	125	0%	144	0%	212	0%											940	1%
	31-36	1,512	2%	1,329	2%	1,165	2%	1,027	2%	567	1%	870	1%									6,470	9%
	37-42	18	0%	4	0%	10	0%	13	0%	14	0%	63	0%	149	0%							271	0%
	43-48	108	0%	114	0%	124	0%	162	0%	123	0%	374	1%	285	0%	661	1%					1,951	3%
	49-54	2	0%		0%	1	0%		0%		0%	2	0%		0%	30	0%	97	0%			132	0%
	55-60	46	0%	59	0%	57	0%	54	0%	43	0%	153	0%	81	0%	388	1%	189	0%	811	1%	1,881	3%
	Total	50,221	72%	8,481	12%	3,786	5%	2,260	3%	959	1%	1,462	2%	515	1%	1,079	2%	286	0%	811	1%	69,860	100%

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.

The operational periods for wholly suspended sentences and partially suspended sentences follow decidedly different trends. Figure 8-14 below illustrates the relationship between operational periods and head sentences for wholly suspended sentences. The three largest bubbles show that the majority of wholly suspended sentences have a head sentence of 6 months or less, with an operational period between 12 and 24 months.

Figure 8-14: Wholly suspended sentences (MSO), operational periods and head sentences, 2005-06 to 2017-18

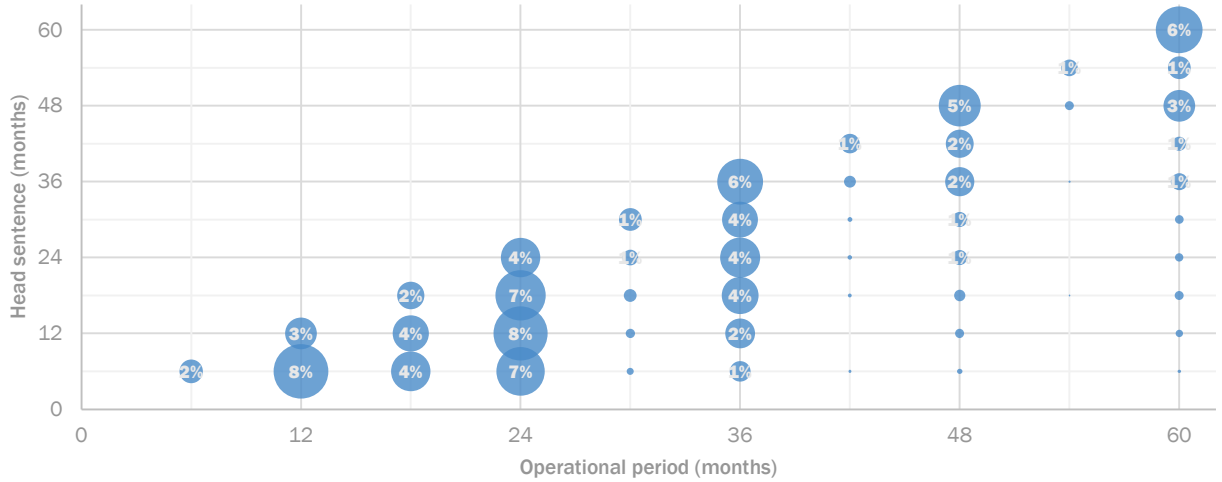


Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: bubbles with no labels represent less than 1% of cases.

Figure 8-15 below contains partially suspended sentences. Partially suspended sentences are more likely to have longer operational periods - almost a third (31%) of all partially suspended sentences have the operational period set at the same length as the head sentence. In general, cases with a long head sentence were accompanied by a proportionately long operational period.

Unlike wholly suspended sentences, only a small proportion of offenders had a short head sentence (less than six months) with a moderate length operational period (12 to 24 months) (11%, 1,329 cases).

Figure 8-15: Partially suspended sentences (MSO), operational periods and head sentences, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: bubbles with no labels represent less than 1% of cases.

Suspended sentences with a short head sentence are much more likely to have an operational period that is disproportionately long compared to the head sentence – see Table 8-9. For example, offenders sentenced to a wholly suspended sentence of less than 6 months, on average, have an operational period 7.4 times longer than their head sentence. This ratio is slightly lower for partially suspended sentences, where on average, sentences with a head sentence of less than six months have an operational period 5.0 times longer than the head sentence.

Table 8-9: Operational periods as a ratio to head sentence (MSO), 2005-06 to 2017-18

	Head Sentence (months)									
Operational period ratio	**0-6**	**6-12**	**12-18**	**18-24**	**24-30**	**30-36**	**36-42**	**42-48**	**48-54**	**54-60**
Suspended partially	5.0x	2.2x	1.6x	1.3x	1.2x	1.1x	1.1x	1.1x	1.1x	1.0x
Suspended wholly	7.4x	2.3x	1.7x	1.4x	1.3x	1.2x	1.2x	1.1x	1.1x	1.0x

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.

The uncertain relationship between head sentences and operational periods was an issue raised with the Council during consultation. A suggestion was made that this should be the subject of further guidance.

From the Council's analysis, it appears that this is most needed in the case of short sentences of less than six months, with comparatively long operational periods being ordered for relatively short sentences.

8.13 Recidivism and breach rates

8.13.1 Recidivism of offenders in Queensland

As discussed in Chapter 3 of this paper (see section 3.3), evidence suggests:

- A small but statistically significant positive effect on recidivism by offenders serving WSSs compared to offenders who serve a period of imprisonment. This is thought to be linked to the fact that offenders on WSSs are able to maintain family connections, employment and accommodation.
- Higher recidivism rates for those having served PSSs than those who served a WSS, particularly in the case of young offenders and those with a criminal history.

Chapter 3 (see section 3.4) also presented the findings of the Council's analysis of court data on the reoffending of a two-year cohort (2010–2011 to 2011–12). It showed, contrary to other research findings, that offenders sentenced to a WSS were more likely to reoffend (44.6%) than those sentenced to a PSS (31.7%). Offenders sentenced to a suspended sentenced combined with a community based order were slightly less likely to reoffend (45.6%) than offenders who did not have a CBSO imposed (47.6%).

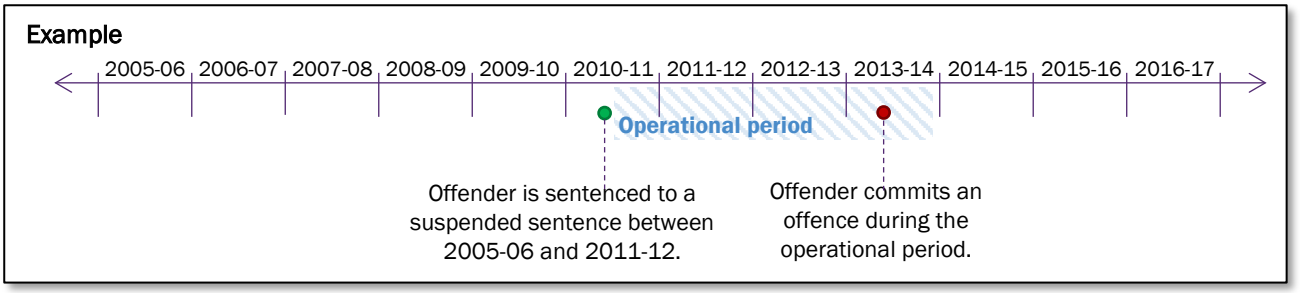
Because the current form of suspended sentences has been available in Queensland for over 25 years when introduced in the current *Penalties and Sentences Act* in 1992, it has not been possible for the Council to consider the extent to which suspended sentences are being used in place of sentences of immediate imprisonment, or used in place of non-custodial orders. This 'net-widening' effect has been one of the major criticisms of suspended sentences, with the suggestion that far from reducing prisoner numbers, suspended sentences have actually contributed to increasing rates of imprisonment.[660] This is discussed further below.

8.13.2 Breach rates in Queensland

This section follows a cohort of offenders that were sentenced to a suspended sentence in 2005-06 and 2011-12 (32,178 cases), and investigates whether offenders reoffend during the operational period of the suspended sentence.

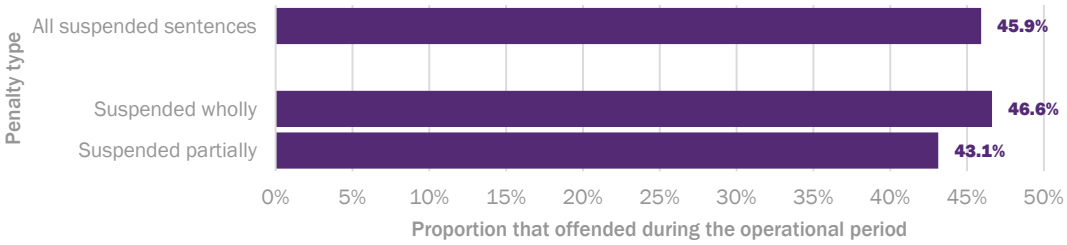
Any breaches involving offences against justice procedures are excluded from this analysis to remove court proceedings involving breaches of other court orders. Reoffending that had not proceeded to sentence by June 2017 are not included in this analysis, although the practical impact from this is expected to be minimal. Note that while this analysis can be used as a proxy for breach of suspended sentence, this analysis does not distinguish reoffending that is punishable by imprisonment, as is required to trigger a breach.

660 See, for example, Patricia Menéndez and Don Weatherburn, *The Effect of Suspended Sentences on Imprisonment, Issue Paper No. 97* (New South Wales Bureau of Crime Statistics and Research, 2014); and L. McInnis and C Jones, 'Trends in the Use of Suspended Sentences in NSW', *Crime and Justice Statistics Bureau Brief: Issue Paper No. 47* (NSW Bureau of Crime Statistics and Research, 2010).



Overall, 45.9 per cent of offenders who were sentenced to a suspended sentence between 2005-06 and 2011-12 were later sentenced for an offence committed during the operational period of the order. Wholly suspended sentences had a slightly higher proportion of those reoffending, with 46.6 per cent of offenders reoffending during the operational period, compared to 43.1 per cent for partially suspended sentences.

Figure 8-16: Proportion of offenders that were sentenced for an offence committed during the operational period of the suspended sentence (MSO) between 2005-06 and 2011-12.



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: Includes suspended sentences issued between 2005-06 and 2011-12. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.

Suspended sentences issued by the Magistrates Courts had a higher number of offenders commit an offence during the operational period of the order (50.8%) compared to those issued by the higher courts (33.4%) – see Table 8-10.

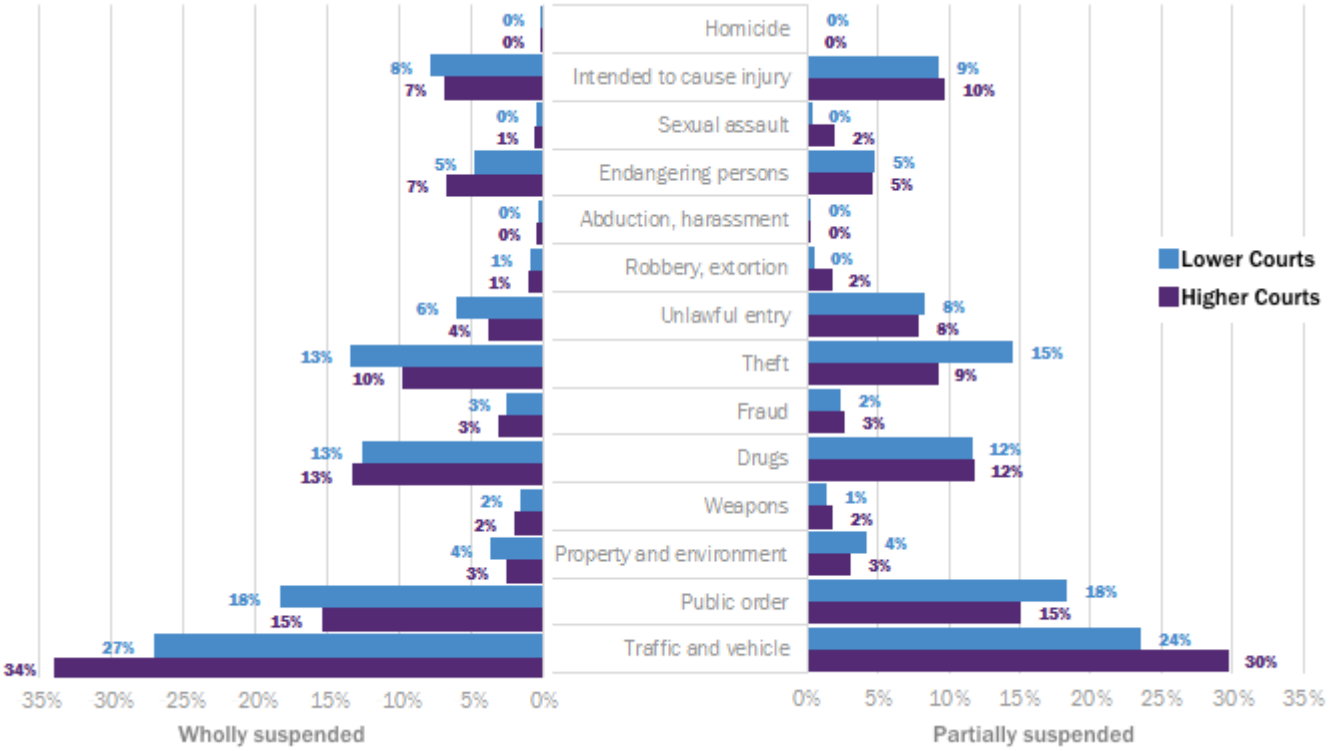
Table 8-10: Offences committed during the operational period of suspended sentences (MSO) by court type, 2005-06 to 2017-18

	Higher Courts			Magistrates Courts		
Penalty type	Breaches n	Cases n	Breaches %	Breaches n	Cases n	Breaches %
Partially suspended sentence	1,613	4,361	37.0%	1,214	2,193	55.4%
Wholly suspended sentence	1,403	4,670	30.0%	10,547	20,954	50.3%
All suspended sentences	3,016	9,031	33.4%	11,761	23,147	50.8%

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: Includes suspended sentences issued between 2005-06 and 2011-12. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.

Figure 8-17 shows which offences were committed during the operational period of a suspended sentence. In the higher courts, approximately a third of the offences committed during the operational period of a suspended sentence were traffic offences; in the lower courts approximately a quarter were traffic offences. Following traffic offences, the most common offences committed while on a suspended sentence were public order offences, drug offences and theft offences.

Figure 8-17: Type of offences committed during the operational period of suspended sentences, 2005-06 to 2017-18.



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: Includes suspended sentences issued between 2005-06 and 2011-12. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
Note: Court type indicates the court that issued the original suspended sentence.

For offences committed during the operational period of a suspended sentence imposed by the higher courts, in 82 per cent of cases the new offence was less serious than the prior offence.

Table 8-11: Suspended sentences that have offences committed during the operational period by seriousness of offending, 2005-06 to 2017-18.

Penalty type	Less serious	Equally serious	More serious
Higher courts			
Partially suspended sentence	82%	8%	9%
Wholly suspended sentence	83%	6%	12%
All suspended sentences	82%	7%	10%
Magistrates Courts			
Partially suspended sentence	48%	19%	33%
Wholly suspended sentence	42%	18%	40%
All suspended sentences	42%	18%	39%

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: Includes suspended sentences issued between 2005-06 and 2011-12. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.

A theme to bear in mind while reading the following tables is that the longer an operational period, the more time and opportunity an offender has to reoffend. However, as discussed in section 3.4.5 of this paper, the majority of reoffending occurs within the first six months of an offender's release from custody.

For all suspended sentences, offenders with longer head sentences are less likely to reoffend compared to offenders with shorter head sentences for cases with operational periods of similar length – see Figure 8-18.

Figure 8-18: Percentage of offenders that commit an offence during the operational period of a partially suspended sentence (MSO), by head sentence length and operational period length, 2005-06 to 2011-12

Partially suspended sentences		Head Sentence (years)				
		0-1	1-2	2-3	3-4	4-5
Operational Period (years)	0-1	44%				
	1-2	50%	35%			
	2-3	52%	40%	36%		
	3-4	*	48%	45%	40%	
	4-5	*	*	50%	43%	43%

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: Includes suspended sentences issued between 2005-06 and 2011-12. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
* Small cell sizes (fewer than 30 cases).

For wholly suspended sentences, there are many more offenders that are sentenced to a short period of imprisonment with an operational period many times longer than the head sentence. Figure 8-19 (below) shows that offenders with longer operational periods are more likely to reoffend than those with shorter operational periods.

Figure 8-19: Percentage of offenders that commit an offence during the operational period of a wholly suspended sentence (MSO), by head sentence length and operational period length, 2005-06 to 2011-12

Wholly suspended sentences		Head Sentence (years)				
		0-1	1-2	2-3	3-4	4-5
Operational Period (years)	0-1	44%				
	1-2	50%	26%			
	2-3	54%	32%	37%		
	3-4	59%	40%	30%	*	
	4-5	43%	32%	*	*	*

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland-Wide Interlinked Courts February 2019.
Note: Includes suspended sentences issued between 2005-06 and 2011-12. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
* Small cell sizes (fewer than 30 cases).

8.13.3 Breach rates and outcomes in other jurisdictions

Prior to the removal of suspended sentences as a sentencing option in NSW in 2018, there were three reviews that examined breach rates undertaken by the Judicial Commission of NSW (2005)[661], the NSW Sentencing Council (2011),[662] and the NSWLRC (2013).[663]

The Judicial Commission study examined the successful completion rates for supervised suspended orders in 2003 and 2004 for both the Local Court (equivalent to Queensland Magistrates Courts) and higher courts, and found overall, 84 per cent of orders were successfully completed and 16 per cent of suspended sentences were breached.

The later 2011 study conducted by the NSW Sentencing Council which examined the breach rates of suspended sentences imposed in the Local Courts in 2008 found that overall, 75.5 per cent of offenders did not commit an offence during the operational period. The success rates were slightly higher for offenders serving a suspended sentence without supervision (77.9%), with the NSWLRC attributing this finding to the 'higher risk characteristics of offenders subject to a supervision condition and the higher likelihood of breaches being detected when the sentence is supervised'.[664] Of those dealt with for breach of the order (where the principal proven offence at that court event) during the period 2000–10, between 69 per cent and 79 per cent of offenders dealt with in the Local Court for breach of a suspended sentence were imprisoned.

661 Judicial Commission of NSW, 'Trends in the Use of s 12 Suspended Sentences', *Sentencing Trends & Issues No 34*(2005).

662 Sentencing Council (NSW), *Suspended Sentences: A Background Report by the NSW Sentencing Council* (2011).

663 NSW Law Reform Commission, above n 62.

664 Ibid [10.17].

The NSWLRC examined data for breach in 2012 which showed that of the 824 offenders dealt with for breach of a suspended sentence, 59 per cent were imprisoned, 21 per cent were required to serve the order by way of home detention or ICO and 16 per cent of offenders remained subject to the suspended sentence as the court declined to revoke the bond.

In 2014, the NSW Bureau of Crime Statistics and Research published a study[665] that provided evidence forming the basis of the decision to abolish suspended sentences in that state. Using a regression analysis, it found that for every 10 offenders given a suspended sentence, it was associated with an additional 3 to 4 offenders sent to prison.[666] An earlier study had found that the introduction of suspended sentences led to a decrease in the use of non-custodial orders — in particular, community service orders.[667] The 2014 study concluded:

> Our findings suggest that, far from reducing the rate of imprisonment, suspended sentences have increased it. This suggests that one way of reducing the rate of imprisonment is to abolish or curtail the use of suspended sentences in favour of sanctions (e.g. community service orders) that, if breached, do not automatically result in imprisonment.[668]

As part of its extensive review of suspended sentences, VSAC conducted a preliminary breach study in 2005 and a more thorough analysis in 2007 using better quality data that examined the rates of breach for suspended sentences in the higher courts and the Magistrates Court.[669] This found that:

- just over one in four (27.5%) of all suspended sentences imposed during 2000-01 and 2001-02 were breached by the offender committing further offences during the operational period of the order;
- the breach rate for suspended sentences imposed in the Magistrates Court (29.1%) was substantially higher than for sentences imposed by the higher courts (8.6%);
- the breach rate for PSSs was higher than the breach rate for WSSs for both the Magistrates Court (31.8% vs 28.7%) and higher courts (10% vs 8.2%);
- offenders under 25 had a higher breach rate than those aged over 25 in both the Magistrates Court (34.3% vs 26.9%) and higher courts (13.5% vs 6.7%);
- nearly two-thirds (62.8%) of breached suspended sentences imposed in 2000-01 and 2001-02 were restored on breach with the offender ordered to serve the sentence in prison – this represented 17.3 per cent of all suspended sentences imposed; and
- there was a higher percentage of PSSs restored on breach than WSSs.

An analysis undertaken by the ACT Office of the Director of Public Prosecutions found that of 23 breaches of fully suspended sentences that came before the ACT Supreme Court in 2009, the original suspended sentence was activated (in whole or part) in just over a quarter (26%) of cases.[670] Unlike Queensland, there is no legislative presumption in the ACT of activating the original sentence on breach.

A study of breaches of suspended sentences imposed by the Supreme Court of Tasmania from 1 July 2002 to 30 June 2004,[671] found that suspended sentences were activated in relation to very few offenders who had breached the order – largely as a result of very few breaches resulting in breach proceedings being instituted. While 41 per cent of the 229 offenders who received a WSS in the Supreme Court over the two-year period (n=94) breached their sentence by committing a further imprisonable offence, only 5 per cent (n=5) were subject to breach proceedings of whom two had their sentence activated in whole or in part. There was a similar finding in relation to 81 offenders on PSSs, of whom 32 (40%) breached their sentence by further offending, but only two offenders (6%) had breach proceedings initiated. Both these sentences were activated.

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665 Menéndez and Weatherburn, above n 660.

666 Ibid 1.

667 McInnis and Jones as cited in Menendez and Weatherburn, above n 660, 1–2.

668 Menéndez and Weatherburn, above n 660, 5.

669 Sentencing Advisory Council (Victoria), above n 1; and Nick Turner, 'Suspended Sentences in Victoria: A Statistical Profile' (Sentencing Advisory Council, Victoria, 2007).

670 ACT Law Reform Advisory Council (LRAC), *A Report on Suspended Sentences in the ACT* (Report 1, October 2010) 39.

671 Lorana Bartels, 'Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania' (2009) 21 *Current Issues in Criminal Justice* 119, 228.

A later Tasmanian study[672] found a breach rate for WSSs of 34 per cent, with 75 per cent of those breaching likely to breach it multiple times (25% committing 11 or more offences) and 41 per cent breaching by committing serious offences. Just over half of those who breached the order (52%) breached within 150 days. Of the 44 offenders who breached, 24 had breach proceedings initiated (of which 10 (42%) were activated in full and three (13%) were partly activated or had lesser terms of imprisonment substituted).

Quarterly statistics produced by the UK Ministry for Justice show that 74 per cent of the supervision periods of suspended sentences (the period during which offenders are subject to additional conditions) were successfully completed.[673] Other data published by the UK Ministry of Justice for the last quarter of 2016 (the last period for which these recidivism statistics have been published) suggest that people on community orders or suspended sentence orders are less likely to reoffend than those who receive sentences of imprisonment of 12 months or less that are unsuspended (38.2% compared with 64.5%).[674]

Earlier UK research[675] which matched offenders on offender and offence-based characteristics (such as age, gender, ethnicity, number of prior criminal convictions and offence type) found that offenders sentenced to less than 12 months in custody had a higher one year reoffending rate than similar, matched offenders receiving a suspended sentence order (62.5% for those receiving immediate custody, versus 53.9% for those sentenced to a suspended sentence, for 2010). Offenders sentenced to a suspended sentence order who reoffended had a lower number of proven offences (a mean of 2.2 per offender for suspended sentence orders, versus 3.4 for offenders sentenced to immediate custody of 12 months or less). Those on suspended sentences also performed better than matched offenders receiving a community order, reoffending at a slightly lower rate (33.6% for suspended sentences, versus 36.8% for community orders), and committing fewer new offences (mean of 1.1 offences per offender for suspended sentences, versus 1.2 offences per offender for those on a community sentence). In both cases, those who reoffended on a suspended sentence were more likely to be given a custodial sentence than those reoffending subject to other orders (44.4% custody rate for those previously sentenced to immediate custody of 12 months or less, versus 55.5% for those subject to a suspended sentence; and 25.6% for those on a community order, versus 48.1% for those matched offenders on a suspended sentence). The higher reoffending custody rate for suspended sentences can be understood in light of the operation of the relevant breach provisions which require a court to activate a suspended sentence on breach 'unless of the opinion that it would be unjust to do so'.[676]

As noted in section 7.8, important differences between England and Wales and Queensland at that time include that offenders in the UK sentenced to custodial sentences of less than 12 months when the study was undertaken were not subject to post-release supervision by the probation service on their release, and suspended sentence orders in the UK provide for a range of conditions (including supervision) to be attached to the order.

8.14 Key issues

8.14.1 Retention of suspended sentences as a sentencing option

Two jurisdictions (Victoria and NSW) have abolished suspended sentences as a sentencing option, with a third (Tasmania) proposing to phase these orders out, subject to the outcomes of a monitoring report considering the use of recent reforms introducing new forms of sentencing orders.

In recommending the abolition of suspended sentences, the NSWLRC pointed to:

- Its recommendation that the community detention order (CDO) combining home detention and ICOs be introduced as a new form of flexible custodial community based order, which would be available to a wider cohort of offenders than home detention and ICOs, and would 'occupy the same space as suspended sentences';
- The flexible design of breach and revocation procedures for the CDO, which would allow, in cases of non-compliance, for the person to serve only the period of the order remaining in full-time custody, rather than the full term of the sentence under a suspended sentence, and which would also allow the person to apply to have the community based order reinstated;

672 Sentencing Advisory Council (Tasmania), *Phasing Out of Suspended Sentences, Background Paper* (2015).

673 United Kingdom, Ministry of Justice, *Offender Management Statistics Bulletin, England and Wales, Quarterly data July to September 2018* (2019) 7.

674 United Kingdom, Ministry of Justice, *Proven Reoffending Statistics Quarterly Bulletin, October 2016 to December 2016* (2018).

675 United, Kingdom, Ministry of Justice, *2013 Compendium of Re-Offending Statistics and Analysis* (2013) 4, 16 (Table 1.2).

676 *Criminal Justice Act 2003* (UK) sch 12, paras 8(3)–(4).

- The ability of the new order to provide a framework for intensive rehabilitative support, which the NSWLRC considered would be better able to cater to offenders likely to breach the conditions of their suspended sentence;
- Evidence that suspended sentences in NSW had caused net widening from other forms of orders, which has failed to serve the interests of offenders with complex needs who have difficulty complying with sentencing orders.[677]

The reforms recommended by the NSWLRC have now come into effect, with some modifications. For a summary of the NSW reforms and changes introduced in Victoria and Tasmania, see Chapter 7 on CCOs.

In the Second Reading Speech for the Bill removing suspended sentences as a sentencing option, the NSW Attorney-General referred to the concerns that:

> They do not hold offenders accountable, 44 per cent of them are not supervised and [based on research by the NSW Bureau of Crime Statistics and Research] they have been found to increase the New South Wales prison population.[678]

VSAC, following its review of suspended sentences, raised a number of concerns about suspended sentences including:

- problems of net-widening (offenders being sentenced to imprisonment who would have otherwise received a non-custodial sentence) and sentence inflation (longer prison sentences being imposed than if the sentence had been ordered to be served immediately);
- the substitutional nature of the sanction and its impact on community understanding and confidence in sentencing: 'In the public mind, a prison sentence (or a custodial sentence) is a sentence that offenders serve in prison—not something which is imposed, but not activated'. [679]

The ALRC, which most recently reported on the use of suspended sentence orders in the context of its inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples, also commented on the 'problematic' nature of suspended sentences:

> In particular, research has demonstrated that they have resulted in net widening while being perceived as too lenient by the public. While offering some offenders a last chance, suspended sentences can and do 'set people up to fail', particularly people with complex needs.[680]

While noting the problems with this order, it recommended the retention of suspended sentences in the absence of the availability of appropriate community based sentencing options.[681] In doing so, the ALRC referred to the following risks and benefits of retaining suspended sentences:

- Aboriginal and Torres Strait Islander offenders may be disproportionate recipients of suspended sentences compared to non-Indigenous offenders (referencing both NSW and Qld national data showing that a higher proportion of Aboriginal and Torres Strait Islander defendants in those jurisdictions found guilty of an offence received a WSS compared to their non-Indigenous counterparts).[682]
- The removal of suspended sentences without improving access to community based sentences is likely to lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to prison.[683]
- Stakeholder views about the need to ensure that intermediate sentencing options are uniformly available before suspended sentences are phased out—particularly with reference to the potential negative impacts for Aboriginal and Torres Strait Islander people living in remote communities — and that they are a useful 'last chance' option for offenders to avoid full-time custody.[684]

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677 NSW Law Reform Commission, above n 62, 229–230 [10.34]– [10.39].

678 NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 'Second Reading Speech – Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017', 2 (Mark Speakman, Attorney-General).

679 Sentencing Advisory Council (Victoria),above n 67. See also Bartels, above n 671, 127–131.

680 Australian Law Reform Commission, above n 26, 267 [7.149].

681 Ibid 264, Recommendation 7–4.

682 Ibid 264 [7.136]. Cf. the Council's analysis which found, of those offenders receiving imprisonment for five years or less, Aboriginal and Torres Strait Islander offenders are more likely to receive an imprisonment sentence than their non-Indigenous counterparts. This does not, however, take into account the use of non-custodial penalties as an alternative to imprisonment.

683 Ibid 267–8 [7.150].

684 Ibid 265 [7.139].

- Highlighted benefits for Aboriginal and Torres Strait Islander women of suspended sentence orders because they are able to be structured in a way which requires few reporting obligations, making them more suitable for offenders with kinship and cultural obligations than other forms of community based orders.[685]

In its initial Issues Paper setting out fundamental principles proposed to guide the review, outlined in Chapter 4 of this paper, the Council proposed that suspended sentences should be retained. It noted there has been no indication from stakeholders thus far of any need to remove suspended sentences as a sentencing option. To the contrary, most stakeholders consulted supported there being a greater number of sentencing options available to courts in sentencing and/or more flexibility in the use of existing orders to meet the purposes of sentencing, to respond to offenders' individual circumstances and to take into account the individual circumstances of the case.

Legal stakeholders consulted by the Council have pointed to suspended sentences serving an important purpose and being cost effective. The utility of suspended sentences is seen as particularly high when sentencing people who are considered to have a low risk of reoffending, in sentencing elderly offenders (in their 70s or 80s) and for offences that have low rates of recidivism. The potential for imprisonment numbers to increase if the option of a suspended sentence is removed as a sentencing option was another concern raised.

These views of stakeholders generally reflect those commonly advanced in support of retaining suspended sentences, as summarised by TSAC, including that they:[686]

- provide a useful sentencing option and have an important place in the sentencing hierarchy;
- 'allow for the seriousness of the offence and/or the offender's conduct to be appropriately acknowledged by imposing a sentence of imprisonment, while at the same time allowing for mercy';
- enable offenders to avoid short prison sentences, which is 'expected to have a protective effect against reoffending';
- are an effective specific deterrent;
- may reduce the prison population; and
- may provide an incentive for offenders to plead guilty.

The Terms of Reference do not ask for the Council's views on the use of suspended sentences except to the extent that their use may result in 'anomalies in sentencing or parole laws that create inconsistency'. While not a question specifically asked under the Terms of Reference, the Council's preliminary view is that suspended sentences serve a useful purpose and should be retained as a sentencing option in Queensland. The Council, however, invites views on this issue, including the particular benefits, or perceived problems, with the current use of these orders in Queensland.

QUESTION 5: SUSPENDED SENTENCES

5.1 Are wholly suspended sentences operating as an effective alternative to actual imprisonment in Queensland?

5.2 Are there cases where suspended sentences could be used, but are not? If so what are the barriers to their use?

5.3 Are there unique factors for offenders in remote and very remote areas of the State, including Aboriginal and Torres Strait Islander offenders, that:
(a) affect a court's decision to make a suspended sentence order; and
(b) if imposed, are likely to predispose such offenders breaching the order through commission of a new offence?

8.14.2 The introduction of conditional suspended sentences

As discussed earlier in this paper, courts are restricted in their ability to sentence a person to supervision at the same time as making a suspended sentence order, unless sentencing that person for two or more offences.

Based on the Council's data, in about 20 per cent of cases where a suspended sentence is imposed as MSO for a Queensland offence (23.5% for WSSs, and 21.1% for PSSs), the court is only sentencing the person for a single

685 Ibid 266 [7.145].

686 Sentencing Advisory Council (Tasmania), above n 67, 13 [3.2.1] (references omitted).

offence. In these cases, a court has no option to make another form of CBSO – for example, requiring the offender to be under supervision or to perform community work.

Where courts have the ability to impose multiple orders — for example, when sentencing a person for two or more offences of differing levels of seriousness at the same court event — courts frequently make use of combination orders, combining a wholly or partially suspended sentence with other order types. The Council's research shows that of the cases where more than one penalty was applied with a Queensland offence as the MSO, over one in five WSSs imposed in the higher courts (22.5%) for the most serious offence (MSO) sentenced at that court event, and one in 10 WSSs in the Magistrates Courts (11.4%) was made alongside a probation order imposed for a separate offence (see above, Table 8-6). Probation is also commonly combined with a PSS – 20.3 per cent of PSSs imposed for the MSO sentenced in the higher courts was combined with probation, and 9.8 per cent in the Magistrates Court (see above, Table 8-7). The use of community services orders in combination with suspended sentence orders is, however, far less common.

The situation in other Australian jurisdictions

As discussed earlier in this paper, all Australian jurisdictions which have retained suspended sentences as a sentencing option allow (or, in some cases, require) offenders to be subject to conditions during the operational period of the order. In contrast to Queensland, none of these jurisdictions have an equivalent order to court ordered parole. A parole eligibility date is either set by the court (with a parole board determining the date and conditions of release), or the person is subject to a statutory release date. This is discussed further in Chapter 9 of this paper.

Conditional suspended sentences are generally structured in one of two ways:

- The court suspends a term of imprisonment, conditional upon the person entering into a good behaviour bond (e.g. ACT and SA).
- The court attaches conditions directly to the suspended sentence order (e.g. NT, Tasmania and WA (where this constitutes a separate 'conditional suspended imprisonment' order)).

Stakeholder views

A number of stakeholders consulted during the early stages of the review suggested that enabling courts to set conditions for supervision at the same time as a suspended sentence order could potentially increase their use (and by extension, reduce the number of offenders required to serve a prison sentence). An amendment to section 92 of the PSA was put forward as a potential mechanism to achieve this (this section currently provides that a combined imprisonment and probation order can only be made if the person is sentenced to a term of imprisonment of not more than one year that is not suspended).

The use of suspended sentences for sexual offences, leaving these offenders without supervision or support in the community, was raised by some as a particular issue of concern, reflecting views expressed by the Queensland Parole System Review.[687] The use of suspended sentences, community based sentences and court ordered parole for sexual offences is addressed further in Chapter 10 of this paper.

Stakeholder support exists for conditional suspended sentence orders to be introduced in Queensland, however, has not been universal. Some consulted have submitted that suspended sentences address particular circumstances of offending and of defendants who do not require supervision and a conditional form of order is not needed. Questions have also been raised about how this conditional form of order might differ from court ordered parole and, if extended, whether this option might be preferred by courts.

Key issues

To inform the Council's views about whether a conditional form of suspended order should be introduced in Queensland, or courts should have the ability to combine a suspended sentence with community based orders in a broader range of circumstances, a number of issues need to be considered. These include:

- How any potential risks of net widening from non-custodial orders can best be avoided should a conditional form of order be introduced. The additional threat of imprisonment a conditional form of suspended sentence order would likely carry could make suspended sentences a more attractive option to judicial officers. The introduction of this power may therefore result in the reduced use of non-custodial orders, such as probation or community service. Should this risk eventuate, it may result in a number of offenders who would have received a non-custodial order instead receiving a prison sentence, with the consequences on breach that they may be liable to serve the whole or part of the suspended period in prison. Unless properly managed, this may mean such an order may contribute

687 Queensland Parole System Review, above n 9, 6 [39]–[40].

to, rather than reduce, prisoner numbers. Evidence of the net widening effects of suspended sentences has been one of the reasons used to justify the removal of these orders in jurisdictions such as Victoria, NSW and Tasmania.

- How potential for sentence escalation can be minimised. For example, courts may set longer operational periods than they otherwise might have for non-conditional forms of suspended sentence orders in the interests of offenders being supervised for an extended period to reduce their reoffending risks. This may result in an offender being at risk of having their prison sentence activated for a longer period than they otherwise might.
- What conditions should, or should not, be permitted to be attached to the order (or, alternatively, orders made in conjunction with a suspended sentence order). For example, while some jurisdictions (ACT, SA, Tasmania and England and Wales) allow community service to be ordered as a condition, this is not an option in WA, and was not supported by the NSWLRC for adoption in NSW.[688] An earlier review by VSAC also noted opposition by some stakeholders to the use of punitive conditions, such as community service, on the basis that 'the punitive element would be constituted by the term of imprisonment hanging over the offender's head, while the conditions would focus on bringing about an offender's rehabilitation'.[689] Other conditions not supported by the NSWLRC were those conditions requiring an offender to make any payment (in the nature of a fine, compensation or otherwise), with the NSWLRC citing concerns that this: 'could present an undesirable impression that the person was able to "buy" his or her way out of a sentence that would have otherwise involved full-time custody.'[690]
- What powers a court should have on breach of conditions, other than by reoffending. Adopting a model that would allow courts to make a probation order in conjunction with a suspended sentence for a single offence may allow the consequences of failing to comply with the conditions of the order to be uncoupled from the suspended sentence order, mitigating the risks of net widening outlined above. However, if the potential value of a conditional suspended sentence is to promote compliance with the order through the threat of the prison sentence being activated on breach, this potential benefit could be eroded if the prospect of having the sentence activated does not apply to breach of the conditions of the probation order. As noted above, most jurisdictions apply the same consequences of breach of a conditional suspended sentence order as for a non-conditional form of order, although the presumption in favour of activating the full period of the sentence suspended on breach of conditions other than by reoffending does not apply in Tasmania or WA.

In the NSW context, the NSWLRC, which recommended the abolition of suspended sentences, observed that the absence of suitability assessments required before a suspended sentence was imposed in that State when these orders were available 'may mean, in some cases, they are imposed when the offender has little chance of not reoffending or complying with any other obligations under the sentence' and can mean that offenders are 'set up to fail'.[691] Whether pre-sentence reports should be mandatory before conditions are attached to a suspended sentence order to avoid these potential risks is an issue to be considered, although this could be challenging given the limited capacity of QCS to support this under current resourcing.

The introduction of a conditional suspended sentence may lead to an increase in the number of offenders who otherwise would not be monitored, requiring monitoring, which would have significant resource implications that would need to be considered.

The WA experience

The experience of WA is instructive as the Australian jurisdiction that has most recently introduced a conditional suspended sentence (in 2006) in the form of a Conditional Suspended Imprisonment (CSI) order.[692] Until September 2017, this order could only be imposed by the Supreme Court, District Court, Children's Court and Perth Drug Court. It has now been extended for use in the Magistrates Court.

In the sentencing options set out under the *Sentencing Act 1995* (WA), the CSI order has been positioned above a suspended sentence of imprisonment, and below a term of imprisonment[693] suggesting it is to be treated by courts

688 See NSWLRC, above above n 62, 235, Recommendation 10.3.

689 Ibid.

690 Ibid 234 [10.61]–[10.62].

691 Ibid 228 [10.28].

692 *Sentencing Act 1995* (WA) pt 12 inserted by *Sentencing Legislation Amendment Act 2004* (WA) s 5, which came into effect on 31 May 2006.

693 *Sentencing Act 1995* (WA) s 39(2).

in sentencing as a more severe form of penalty than an unconditional form of suspended sentence.[694] In contrast to Queensland and many other Australian jurisdictions, there is no power under WA legislation to partially suspend a prison sentence.

The court can suspend a sentence of up to five years' imprisonment similar to Queensland, but the suspension period must be not more than 24 months.[695]

Offenders in WA must comply with standard obligations set out in the legislation, and one or more primary requirements as decided by the court.[696] Standard obligations include reporting to a community corrections centre following sentence, notifying of any change of address or employment, not leaving the state without permission and complying with other requirements set out under the *Sentence Administration Act 2003* (WA), such as complying with lawful orders or directions about undertaking community corrections activities and other obligations.[697]

Three primary requirements are permitted to be attached to the order: a program requirement; a supervision requirement; and a curfew requirement.[698] More information about these conditions is contained in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council's website.

In a statutory review undertaken by the Western Australia Attorney-General's Department in 2013, concerns were noted about the inflexibility of the CSI order, specifically in relation to the ability to amend or cancel the order.[699] The Chief Justice submitted improvements could be made by allowing for more 'generalised and flexible conditions' and also suggested that community work be considered as a possible condition and, in the case of offenders in remote communities, scope for conditions which 'regulate or restrain their conduct generally'.[700] The conclusion reached by the review was the *Sentencing Act 1995* (WA) 'should provide as much flexibility as possible in both range of conditions and flexibility of their use, so that judicial officers are able to exercise as much discretion as they can in response to individual offender situations'.[701]

The current conditions that can be attached to a CSI order are unchanged from those which existed at the time the statutory review was undertaken. The rationale for not acting on the statutory review's conclusion supporting flexibility in the range of conditions and their use is unclear.

8.14.3 Relationship between court ordered parole and suspended sentences

Queensland is unique in that it is the only Australian jurisdiction where a form of court ordered parole and suspended sentences operate alongside each other.

The only other Australian jurisdiction with a similar recent experience in having these two orders operate together is NSW which, until recently, had both court-based parole and suspended sentences. Suspended sentences have now been abolished, and the former court-based parole replaced with statutory parole orders for sentences of three years or less.[702] Even when these orders existed alongside each other, courts in NSW only had the power to suspend a term of imprisonment imposed in full, not part.

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694 Ian Weldon, *Criminal Law Western Australia* (Chatswood, NSW: LexisNexis Butterworths as at June 2017) [SA s 81.5].

695 *Sentencing Act 1995* (WA) s 81(1).

696 Ibid s 81(2).

697 Ibid s 83.

698 Ibid s 84.

699 Western Australia, Department of the Attorney-General, *Statutory Review of the Sentencing Act 1995 (WA)* (2013) 52.

700 Ibid.

701 Ibid, Conclusion 41.

702 See *Crimes (Administration of Sentences) Act 1999* (NSW) s 158 inserted by *Parole Legislation Amendment Act 2017* (NSW) sch 1, [13]. Under this scheme, an offender subject to a sentence of three years or less, being a sentence for which a non-parole period has been set, must be released on parole at the end of the non-parole period unless ineligible for release under section 126 of the Act. A person is only eligible for release if subject to at least one sentence for which a non-parole period has been set, and has served the non-parole period of each such sentence and is not subject to any other sentence. Other exceptions listed in section 126 are offenders required to be kept in custody in relation to an offence against a Commonwealth law, or for State offences, if the offender is a Commonwealth post-sentence terrorism inmate or a NSW post sentence inmate. In setting a non-parole period, the court must also comply with requirements under ss 44(1)–(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) – for example, to ensure in setting the non-parole period, the balance of the sentence does not exceed one-third of the non-parole period for the sentence, unless the court decides there are special circumstances.

From the Council's preliminary analysis of sentencing data, there would appear to be a strong correlation between the availability of court ordered parole and the use of suspended sentences. Where court ordered parole is not available as a sentencing option (such as for sexual offences), suspended sentences are used more frequently.

Stakeholder views

During early consultations, some stakeholders referred to their experience of suspended sentences being imposed in the range of three to five years imprisonment in the higher courts to ensure a particular release date, even when submissions suggest continued supervision would be of benefit to both the offender and community generally. The availability of a conditional form of suspended sentence order may avoid this outcome. However, as noted above, there are a number of issues to be considered prior to any such reforms being recommended.

The potential for courts to reduce a head sentence to five years or less (for example, by not declaring pre-sentence custody under s 159A PSA, but making allowance for it by deducting double the period of pre-sentence custody from the head sentence) to allow for its suspension was also referred to as concerning given the unconditional nature of the order. This may result in a sentence that would otherwise have been in excess of five years' imprisonment, meaning that what would otherwise have been release regulated by the Board, becomes a case of the person being released unsupervised. The same problem of being subject to an order that does not allow for supervision arises for those who are otherwise not eligible for court ordered parole due to the length of sentence (over three years) or other exclusionary criteria (such as if the person has had a parole ordered cancelled during their period of imprisonment, or is sentenced for a sexual offence). *R v Wano; ex parte Attorney-General (Qld)*[703] was referred to in this context.

An observation was made that while judges are well placed, given the material tendered at sentence, to determine whether a person is a risk to the community if released at time of sentence, the same cannot be said for future release, months or years later. In this case, it was submitted, it is preferable for the person to be assessed by parole authorities as their eligibility date is approaching, rather than a prognosis of future risk being determined at the time of sentence. The advantage of these assessments taking place at this stage include that the prisoner is in a less artificial and more dynamic environment than the courtroom and there is an appreciation of residential arrangements to be in place for the prisoner on their release. Residential arrangements, it was noted, are one of the highest risk factors of recidivism on release and an important factor in terms of community reintegration.

Partially suspended sentences and court ordered parole

Quite apart from potential for the introduction of conditional forms of suspended sentence orders, there is some question about the value PSSs play given the existence of court ordered parole — particularly should the current restrictions in terms of the period of the order and offences for which it is available be removed. The issue is relevant to the current review to the extent the availability of both may result in anomalies or inconsistencies in the operation of the law.

When faced with a similar question, the NSWLRC recommended against the reintroduction of a power to partially suspend a sentence of imprisonment, questioning whether partial suspension 'could achieve anything that could not be achieved by a sentence containing a non-parole period and a period of potential release on parole'.[704] It further submitted: 'Where the sentencing court is taking into account a period of pre-sentence custody, it may note this in its reasons for imposing a suspended sentence and in fixing its duration'.[705]

The key differences between the Queensland form of court ordered parole and suspended sentences are discussed earlier in this chapter. These differences include the maximum term of imprisonment that is permitted to be imposed, whether conditions can be imposed, what body deals with breaches, and powers on breach.

While the Council is concerned to ensure current sentencing options operate, as far as possible, in a logical and coherent way, it is equally concerned to ensure that the objective set under the Terms of Reference – to provide courts with flexible sentencing options that are consistent with the principles and purposes of sentencing under the PSA – is not undermined through any recommended reforms.

8.14.4 Relationship between the operational period and sentence length

A further issue raised during early consultations was concern about the operational period to head sentence ratios being imposed for short sentences of imprisonment.

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703 [2018] QCA 117 (12 June 2018).

704 NSW Law Reform Commission, above n 62, 233 [10.55].

705 Ibid.

As discussed in section 4.11 and 5.1.2 of this paper, proportionality is a fundamental principle of sentencing. As also highlighted in section 5.3, sentencing is not a mathematical exercise; each individual case must be decided on its own facts in the exercise of judicial discretion.

While the exercise of judicial discretion in determining a sentence that is proportionate also applies to the setting of the operational period, the Council has not been able to identify any case law or other guidance that addresses the appropriate relationship between the head sentence imposed and its accompanying operational period. Section 144 of the PSA (Sentence of imprisonment may be suspended) does not provide guidance beyond requiring, in sub section (2), that the court is satisfied that it is appropriate to suspend the sentence in the circumstances and in sub section (6), stating that the operational period starts on the day the order is made and must be—

(a) not less than the term of imprisonment imposed; and

(b) not more than 5 years.

The development of guidelines about the setting of the operational period to ensure it is proportionate to the offending and term of imprisonment imposed was suggested as a means of addressing this problem, as otherwise there is a risk that in sentencing, courts may be setting people up to fail. This is a concern given even relatively minor offences will breach a suspended sentence, being offences that are punishable by imprisonment.

The data presented in section 8.12 (above) highlights that this is particularly a concern in the case of short prison sentences of less than six months, which are also the most likely orders to be breached.

A step beyond guidelines would be legislating a method or model for imposing operational periods of suspended sentences; for instance, a mandatory ratio or calculation (such as no more than twice the length of the sentence imposed) with a presumption that it be applied unless exceptional circumstances warrant a departure. This might enhance certainty and consistency for such sentences and avoid the imposition of unduly long operational periods. For instance, it might reflect the general proposition that, where a sentence of imprisonment does not involve immediate release, a suspension or parole release or eligibility date will often be set at the one-third mark of the head sentence for an offender who enters an early guilty plea accompanied by genuine remorse.[706] However, this could inhibit judicial discretion and risk increasing complexity.

Another issue to be considered is the appropriate relationship between the length of operational period set for a suspended sentence and the duration of a community based order which is made at the same time as the suspended sentence. This situation is likely to occur more frequently if the power to combine a suspended sentence with a community based order when sentencing for a single offence is introduced. A court in structuring a sentence which provides for the operational period to expire before an accompanying community based order does, could arguably create a better tailored, combined form of order as it would commence with more intensive requirements and serious consequences on breach (including the potential activation of the suspended sentence on breach), but then taper to less demanding conditions that do not risk activation of the suspended sentence. However, depending on the head sentence imposed, it might be that allowing a suspended sentence to be combined with a community based order in a broader range of circumstances may risk a form of 'sentence escalation' in the setting of the operational period, if one of the perceived purposes of the operational period is to encourage or enforce compliance with the community based order.

QUESTION 6: GUIDANCE ON SETTING OPERATIONAL PERIOD

6.1 Is the current guidance under section 144(6) of the *Penalties and Sentences Act 1992* (Qld) about the setting of the operational period for a suspended sentence sufficient?

6.2 If there is a need for additional guidance, what form should this take (e.g. legislative guidance, bench book, professional development sessions for lawyers and/or judicial officers, other)?

6.3 If legislative guidance is provided, should this specify a specific proportion between the term of imprisonment imposed and the operational period? For example, that the operational period set can be no more than two times the period of imprisonment imposed?

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706 Where the sentence is not mandatory, it is common for an offender who enters an early guilty plea — accompanied by genuine remorse — to have a parole eligibility date or release date set, or suspension of their sentence after serving one-third of their head sentence in custody: See *R v Crouch*; *R v Carlisle* [2016] QCA 81 (5 April 2016) 8–9 [29] (McMurdo P, Gotterson JA and Burns J agreeing), *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22 (6 March 2018) 6–7 [42]–[44] (Boddice J, Philippides and McMurdo JA agreeing), *R v Rooney*; *R v Gehringer* [2016] QCA 48 (4 March 2016) 6 [16]–[17] (Fraser JA, Gotterson JA and McMeekin J agreeing) and *R v McDougall and Collas* [2007] 2 Qd R 87, 97 [20] (Jerrard, Keane and Holmes JJA) .

8.14.5 Factors relevant to whether a sentence must be activated on breach

Some stakeholders have also expressed concerns about the restrictive nature of the terminology of section 147(3)(a) which sets out seven factors that a court must consider in deciding whether it would be unjust to order that the offender serve the whole of the suspended imprisonment. In particular, there is concern that the use of the word 'trivial' in (3)(a) is an anachronism and unintentionally undermines the extent of the court's discretion when dealing with a breach.

Section 147 as originally drafted in the PSA as made did not contain current subsection (3) and did not use the word 'trivial' (it was added in 1997, see below). Instead, original subsection (2) required the court to order the offender to serve the suspended part of a partly suspended sentence, or the whole of a wholly suspended sentence, 'unless it is of the opinion that it would be unjust to do so in view of all the circumstances that have arisen since the suspended imprisonment was imposed'.[707]

The word 'trivial' had been used in Queensland criminal legislation prior to 1997, but this was not mentioned in the context of the bill introducing section 147(3).

Section 657A of the *Criminal Code* (Qld) ('Power to permit release of certain persons charged') allowed a court to absolutely discharge an offender or discharge conditionally upon a recognizance (a good behaviour bond). One of the relevant factors was 'the trivial nature of the offence'.[708] That section was inserted into the Code in 1975[709] and omitted from it by the original PSA in 1992.[710] In its place, PSA sections 18 and 19 (release absolutely and recognizance) were enacted (at the same time as the original PSA s 147). Sections 18 and 19 were expressly stated to have derived from part of section 657A of the Code.[711] However, they did not (and do not) refer to the offence as 'trivial'.

The Court of Appeal has noted this and stated that, because section 18 'now simply refers to the nature of the offence rather than to the "trivial nature of the offence" as previously applied, [it] indicates that the court is now given a broader discretion to act pursuant to s. 19'.[712] Another judgment also recognised the widening of the discretion which the PSA brought, regarding the recording of convictions generally:

> The *Penalties and Sentences Act 1992* has brought some significant changes in sentencing practice and as part of those changes has expressly conferred discretions in areas where they did not previously exist. In my opinion the deliberate legislative policy discernible behind this should not be impeded by over-rigid rules or by restrictive approaches drawn from the experience of an era when the discretions did not exist.
>
> The broad situation used to be that a finding of guilt and the decision to convict involved the recording of the conviction as a consequence. Then, limited exceptions were created, e.g. under the Code by s. 657A in the case of ''trivial offences'' and by the *Offenders Probation and Parole Act 1980*, 20 ss 85A and 33 where orders for community service and probation resulting from conviction were deemed not to be convictions except for restricted, specified purposes. This narrower sentencing regime is now considerably broadened by the specification of a wide range of circumstances in which a conviction may not be recorded [the various parts of the PSA which allowed this were discussed].[713]

Section 147(3)(a) uses 'trivial' as the value against which its seven factors are contextualised, and against which they are evaluated. The first of the seven (s 147(3)(a)(i)) is 'the nature of the offence and the circumstances in which it was committed'.

Subsection 147(3) was inserted by section 7 of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld). It has not been amended since.[714] The Explanatory Notes spoke of creating 'provisions setting out

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707 The words from 'in view of all the circumstances…' were criticised as 'the source of the confusion, owing to their ambiguity' - Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Second Reading – Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997', (Denver Beanland, Attorney-General and Minister for Justice) 601.

708 Section 657A(b) *Criminal Code* (Qld).

709 *Justices Act Amendment Act 1975* (Qld) s 29.

710 *Penalties and Sentences Act 1992* (Qld) s 207, Schedule s 13.

711 Explanatory Notes, Penalties and Sentences Bill 1992 (Qld) 3.

712 *R v Fullalove* (1993) 68 A Crim R 486, 493 (Lee J).

713 *R v Brown, Ex parte Attorney-General (Qld)* [1994] 2 Qd R 182, 184 (Macrossan CJ).

714 Section 147(3), including the word' trivial', has been imported (although not verbatim) into PSA Part 8A Drug and alcohol treatment orders, in s 151P.

guidelines for courts faced with deciding whether to order that a person serve the whole of a suspended term of imprisonment', but are not otherwise instructive.[715]

In the Second Reading Speech leading to the amending Act in 1997, the Attorney-General stated that the government agreed with a South Australian judgment,[716] relating to the *Offenders Probation Act 1913* (SA) s 9(5) (now repealed).[717] The portion of the judgment quoted in the speech included this: 'the [SA] legislation contemplates that a breach may be excusable, if it is trivial or if there are otherwise proper reasons to excuse the breach; but whether trivial or not, those reasons must lie primarily in the nature of the breach itself'.[718] Section 9(5) of the SA statute read:

> (5) Where a probationer is subject to a suspended sentence and the probative court is satisfied that the failure of the probationer to observe the conditions of his recognizance is trivial or that there are proper grounds upon which the failure should be excused, the court [may refrain from ordering the sentence be carried into effect, and extend the term of recognizance by up to one year].[719]

The Explanatory Notes and Second Reading Speech did not mention section 657A of the *Criminal Code* (Qld), PSA sections 18 and 19 or the Court of Appeal's consequent recognition of the widening of the discretion as regards recognizances because of the omission of the word 'trivial'. The Attorney-General stated that:

> This amendment will still ensure that the primary focus is to require the whole of a suspended sentence to be served if the person comes back before the court for an offence for which the person may be imprisoned, but that a lesser term may be ordered to be served if the subsequent offence is genuinely trivial or if other special or limited circumstances have arisen.[720]

The Court of Appeal has since stated that the word 'trivial' in s 147(3) should not 'be given a meaning other than its ordinary meaning by reference to the matters referred to in subpara (i) to subpara (vii) of subs 3(a)'.[721] Another judge wrote that 'triviality in that section is a relative concept'.[722] In a third case, another judge wrote that while breaching offences were not trivial 'under the ordinary meaning of that word:

> However, in s 147(3)(a) of the Penalties and Sentences Act, "trivial" is used in a completely artificial sense. In my view, having particular regard to such factors as proportionality under s 3(a)(ii), the respondent's genuine attempts at rehabilitation under s 3(a)(v) and to further factors that arise under subs 3(b) and subs 3(c), it would have been unjust to require this respondent to serve the full three years of the initial sentence.[723]

The Council invites views about the powers that courts should have when dealing with a breach of a suspended sentence order. For example:

- Whether a court's powers on breach are appropriate. For example, whether the wording in section 147(2) of the PSA should be amended to remove the requirement that the court activate the whole of the sentence held in suspense unless it considers it 'unjust to do so' in order to promote greater judicial discretion in the sentencing process.
- Whether any other changes that should be made to the current powers of a court on breach of a suspended sentence – for example, to introduce an additional power to: (a) impose a fine and make no other order (Western Australia and England and Wales); and/or (b) make no order (Northern Territory and Tasmania).

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715 Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld) 1.

716 *R v Buckman* (1988) 47 SASR 303, 308 (Jacobs J).

717 See s 114 of the *Sentencing Act 2017* (SA), however, which retains the use of the term 'trivial'.

718 Queensland, *Parliamentary Debates*, Second Reading – Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997, 19 March 1997 (Denver Beanland, Attorney-General and Minister for Justice) 601.

719 As reproduced in *R v Buckman* (1988) 47 SASR 303, 306 (Jacobs J).

720 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Second Reading – Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997', (Denver Beanland, Attorney-General and Minister for Justice) 601.

721 *R v Edward* [1997] QCA 425 (30 October 1997) 4 (Davies JA, de Jersey and Muir JJ agreeing).

722 *Gordon & Camp v Whybrow* [1998] QCA 052 (24 March 1998) 13-14 (Fryberg J, dissenting as to the result).

723 *Villiers v Attorney-General of Queensland* [1999] QCA 244 (5 July 1999) 10-11 (Thomas JA, McPherson JA agreeing).

QUESTION 7: POWER OF COURT DEALING WITH OFFENDER ON BREACH OF A SUSPENDED SENTENCE

7.1 Are the courts' powers on breach of a suspended sentence, as set out under section 147 of the *Penalties and Sentences Act 1992* (Qld), appropriate? For example:
   (a) should the requirement under section 147(2) that the court activate the whole of the sentence held in suspense unless of the opinion it is 'unjust to do so' be removed in order to promote greater judicial discretion in the sentencing process; and/or
   (b) should the wording of section 147(3)(a) be amended to widen judicial discretion when dealing with a breach of a suspended sentence — for example, to remove the reference to whether the subsequent offence committed during the operational period of the order is 'trivial'?

7.2 Are there any other changes that should be made to the current powers of a court on breach of a suspended sentence – for example, to introduce an additional power to:
   (a) impose a fine and make no other order (Western Australia and England and Wales); and/or
   (b) make no order (Northern Territory and Tasmania).

8.14.6 Power of courts to deal with breaches of suspended sentence orders

A final issue identified for consideration is whether the current restrictions on the legislative powers of courts to deal with breach of suspended sentence orders should remain. In particular, a concern has been raised that the current provisions under section 146 of the PSA that prevent a lower court from dealing with a breach of an order imposed by a court of higher jurisdiction are inefficient and likely to result in delays for the offender in having all their court matters finalised.

The position of all jurisdictions reviewed, with the exception of Tasmania, is consistent with Queensland — with courts of inferior jurisdiction unable to deal with breaches of orders imposed by courts of higher jurisdiction.

In Tasmania, if any court (including a Magistrates Court) finds an offender guilty of an offence punishable by imprisonment committed during the operational period of a suspended sentence order imposed by another court, an application can be made orally while the offender is before the court and the court may either deal with the application, or adjourn the application to the court that imposed the suspended sentence.[724]

Various models were proposed by stakeholders:

- Option 1: defence election.
- Option 2: by referral to the DPP seeking consent to have the matter dealt with in this way.
- Option 3: by the court (on its own motion), with an adaption of section 651 *Criminal Code* (Qld) type considerations (this section which allows a court to decide summary offences if a person is charged on indictment after the DPP consent to transmit). Under this model, a court would be provided with the ability to determine action to be taken when dealing with a person for an offence breaching a suspended sentence order imposed by a higher court, provided: (a) the court considers it appropriate to do so; and (b) the accused person is represented by a legal practitioner; and (c) the Crown and the accused consent to the court so doing; and (d) sufficient information about the original offence and circumstances in which it was imposed is before the court.

The Council's preferred option is Option 3 should this reform be supported.

Some protections could be built in to ensure this power is only exercised where appropriate. For example, a lower court dealing with a breach of an order imposed by a higher court might be provided with more limited powers on breach, such as only to extend the operational period or to take no further action. Alternatively, additional guidance could be provided to assist in determining when it may be inappropriate to deal with such a breach.

The Council invites views on the potential benefits and disadvantages of this approach, and recommended safeguards should this be permitted.

QUESTION 8: BREACH POWERS

8.1 Should a court have a discretionary power to deal with a breach of a suspended sentence imposed by a higher court, if that court is dealing with an offence that breaches the higher court's order?

8.2 If so, should there be guidance as to the use of the discretion and what form should this take?

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724 *Sentencing Act 1997* (Tas) ss 27(4)–(4A).

8.15 Options and preliminary Council views

Suspended sentences clearly play an important role in the broader sentencing framework in Queensland. Suspended sentences have the ability to respond to a particular range of circumstances where supervision of an offender is not required.

The Council has considered three options for suspended sentences in Queensland:

- Option 1: Retain suspended sentences in their current form, or with minor reforms only.
- Option 2: Reform suspended sentences to allow a court to order a combined suspended sentence with a community based order for a single offence.
- Option 3: Introduce a conditional form of suspended sentence order.

8.15.1 Option 1 – Retain suspended sentences in their current form, or with minor reforms only

Option 1: No change to suspended sentences, or only minor reforms

- As currently exists – a maximum of 5 years' imprisonment that can be suspended for an operational period of up to 5 years.
- No conditions, other than not to commit an offence punishable by imprisonment during the operational period.

Option 1 would provide the most low cost model but would not address issues with the ability of courts to impose conditions on suspended sentence orders.

It would therefore potentially leave a gap in the range of available orders if court ordered parole is not extended beyond three years, and if sexual offences are not included in the court ordered parole scheme. This is because courts will have to continue to rely on suspended sentences to achieve a certain release date, but without the ability to ensure, by imposing appropriate conditions, the offender is subject to some form of supervision on their release.

8.15.2 Option 2 – Reform suspended sentences to allow a court to order a combined suspended sentence with a community based order for a single offence

Option 2: Reform suspended sentences to allow a court to order a combined suspended sentence with a community based order for a single offence (Council preferred option)

- Under this option, courts would have a discretionary power to combine a suspended sentence with a community based order (including a new CCO, if introduced) when sentencing an offender for a single offence.
- The term of imprisonment to be served prior to suspension could be limited to 12 months, consistent with the combined imprisonment and probation order that can be made under section 92(1)(b) *Penalties and Sentences Act 1992* (Qld).
- The community based order could commence at date of sentence, with the requirements commencing at the date of the person's released from custody.
- Contravention of conditions of the community based order (other than committing a new offence) could be dealt with under section 123 of the *Penalties and Sentences Act 1992* (Qld), or equivalent new provision.

Option 2 — the Council's preferred option — is to introduce a discretionary power of courts to combine a suspended sentence with a community based order when sentencing an offender for a single offence. This form of order (a suspended sentence made alongside another form of order) is the most common form of conditional suspended sentence that exists in Australia.

Arguments in support of this approach include:

- The ability to impose probation or community service at the same time as imposing a suspended sentence has potential to increase community confidence in suspended sentences. For example, where an order is made requiring an offender to undertake community service, the offender will be required to do more than just refrain from committing another offence.

- This would align the courts' powers with those which already exist when a court is sentencing an offender for more than one offence. The introduction of this new power would therefore address an existing anomaly that exists under current legislation.
- This option would enable an offender to be supervised, where this is warranted, potentially assisting in reducing the likelihood of breach by reoffending.
- While court ordered parole is a potential alternative to a conditional form of suspended sentence order, the maximum duration of this order (three years) is more limited than a suspended sentence (five years), and court ordered parole is not currently available to courts in sentencing for sexual offences or if the person has had their parole order cancelled.
- Community service is not a standard condition of parole, so court ordered parole may not provide a real substitute for a suspended sentence with the power to combine with community service.
- By uncoupling the consequences of breaching the conditions of a community based order from that of breaching the suspended sentence (through the imposition of two separate orders) it may protect against the risks of the suspended sentence being activated on breach on the basis of the person's failure to comply with the conditions of the order other than by reoffending.

At the same time, there are potential risks with this approach, including that:

- Allowing courts to make combination orders for a single offence will increase the attractiveness of suspended sentences, thereby potentially contributing to net widening effects of suspended sentences (i.e. courts being more like to impose a community based order with a suspended sentence, than a community based order on its own). Given that a number of jurisdictions have either abolished, or indicated their intention to abolish, suspended sentences on the basis of net widening concerns and its impact on prison populations, the impact of the introduction of this new power would need to be carefully monitored.
- Increased resourcing would be required to supervise offenders who would otherwise not have been subject to QCS involvement. Given the numbers of suspended sentences currently made without any other form of supervised orders, the impacts of this change could be significant.
- Additional conditions may increase the risk of an offender breaching the order, and therefore potentially erode the diversionary potential of suspended sentences.

An argument could also be made that court ordered parole (if extended to sexual offences and beyond its three year cap) could be more effective in encouraging compliance with order conditions, given the Board is in control of suspending or cancelling parole, and this can be achieved relatively immediate, as opposed to the need to return the matter to court.

QUESTION 9: COMBINED SUSPENDED SENTENCE/COMMUNITY BASED ORDER

9.1 Should greater flexibility be introduced to allow a court:
- (d) to make a probation order in addition to a suspended sentence for a single offence, and/or
- (e) to make a community service order in addition to a suspended sentence for a single offence; or
- (f) as an alternative to (a) and (b), to make a CCO in addition to a suspended sentence for a single offence?

9.2 Under this form of order, should a failure to comply with the conditions of the community based order be dealt with under Part 7, Division 2 of the *Penalties and Sentences Act 1992* (Qld) (Contravention of community based orders) or an equivalent provision?

9.3 Should the maximum period the person is subject to conditions be limited in some way? For example, should the term of the probation order or CCO be required to be no longer than the operational period of the order, provided the operational period does not exceed 3 years?

8.15.3 Option 3 – Introduce a new form of order – the conditional suspended sentence

Option 3: Introduce a new form of order – the conditional suspended sentence

WA model – Conditional suspended imprisonment
Maximum term: 5 years (which cannot be partially suspended)
Maximum operational period: 2 years
Core requirements:

- Report to a community corrections centre within 72 hours;
- Notify change of address or place of employment;
- Not leave the state without permission; and
- Comply with lawful orders/directions.

Primary requirements (court must attach at least one):

- Program requirement (assessment and treatment, attendance at educational, vocational or professional development programs);
- Supervision requirement (similar to probation); and
- Curfew requirement (not less than 2 hours or more than 12 hours/day for up to 6 months.

Breach by reoffending: Presumption to activate whole term (must activate unless unjust in the circumstances).
Breach by failure to comply with conditions: Broader range of powers, including making no order. Breach of conditions is an offence (max penalty: $1,000 fine).

The final option considered is to introduce a new form of conditional suspended sentence order as exists in WA and in England and Wales. The WA model is presented above as an example of how this new order might operate.

The arguments against the adoption of this form of order are similar to Option 2, but in this case, there would be a greater risk of the diversionary power of suspended sentences being eroded. This is because a breach of this order would constitute a breach of the suspended sentence order, and unless the provisions provide for separate consequences on breach of conditions other than by reoffending, the person subject to the order would risk having part or the whole sentence activated if they fail to comply with the conditions.

There is also, arguably, greater risk of sentence escalation if courts set longer operational periods for supervisory purposes to enable offenders to address issues associated with their risk of reoffending. Some guidance may need to be provided to ensure operational periods are limited by the principle of proportionality and not extended beyond that which is appropriate in light of the seriousness of the offence for which the order is being imposed.

The introduction of this form of order may also lead to confusion about how the different forms of conditional orders should be used, considering two different variations would potentially be available:

- A conditional suspended sentence when sentencing an offender for a single offence.
- A partially or wholly suspended sentence combined with a community based order when sentencing for two or more offences.

At the same time, there are a number of potential benefits of this option over Option 2 including:

- This form of conditional suspended sentence would more closely align with an existing form of conditional suspended sentence in Queensland, being the Drug and Alcohol Treatment order, and would be designed, from the outset, to operate in an integrated way.
- A conditional suspended sentence, as a separate form of order, could be clearly positioned as a more serious sentencing option than an ICO (if retained) and a non-conditional suspended sentence. This would clearly signal to the courts and the community the intention for a conditional suspended sentence to be viewed as more onerous and therefore punitive.
- The possibility of the activation of the suspended term of imprisonment (or part of the term suspended) on breach may encourage compliance with conditions.
- Because a court, rather than the Board, would need to determine what powers to exercise on breach, this would ensure, as far as possible that the diversionary capabilities of suspended sentences are preserved.

8.16 Conclusion

This chapter has considered the current legislative framework that supports the use of suspended sentences in Queensland, how these orders are currently being used, and the approach in other jurisdictions.

It has also explored options for reform, including powers of courts to deal with breaches of suspended sentence orders, and to either combine a suspended sentence with a community based order when sentencing for a single offence, or a new form of conditional suspended sentence order.

In the following Chapters 9 and 10, we consider potential reforms to court ordered parole, including its potential extension to sexual offences. Depending on what reforms are supported to expand the availability of court ordered parole, the options discussed in this chapter could play a greater, or lesser role in ensuring offenders not currently eligible for court ordered parole are subject to appropriate conditions and supervision where required.

Chapter 9 Court ordered parole

This chapter considers how court ordered parole fits into the sentencing 'picture'. The Terms of Reference have asked the Council to consider several factors directly relevant to parole:

- Recommendation 2 of the 2016 Queensland Parole System Review Final Report, that court ordered parole should be retained.[725]
- The importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the PSA.
- It is important that sentencing orders of the court are properly administered so that they satisfy the intended purposes of the sentencing order and facilitate a fair and just sentencing regime that protects the community's safety.
- The purpose of parole is to allow an offender to serve part of their period of imprisonment in the community in order to successfully reintegrate a prisoner into the community and minimise the likelihood of an offender reoffending.

The Terms of Reference require the Council to:

- Review sentencing and parole legislation, including but not limited to the PSA and the *Corrective Services Act 2006* (CSA) to identify any anomalies in sentencing or parole laws that create inconsistency or constrain sentencing options available to a court and advise how these anomalies could be removed or minimised.
- Consider Recommendation 3 of the Parole System Review Final Report and advise whether a court should have discretion to set a parole release date or parole eligibility date for sentences of greater than three years where the offender has served a period of time on remand and the court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence.
- Assess restrictions on the ability of a court to impose a term of imprisonment with a community based order and advise on whether those restrictions should be removed or modified to better enable offenders to be appropriately managed on release in to the community to support the reintegration and rehabilitation of an offender and prevent recidivism.
- Assess whether there are any inherent complexities in the legislative framework including recognition of pre-sentence custody, that contribute to, or cause complexity in calculating an offender's overall period of incarceration, and advise on how those inherent complexities can be addressed with a view to simplifying the calculation process and preventing discharge and detention error.

Initial feedback from stakeholders, where relevant, has been incorporated in this chapter on a de-identified basis.

This chapter considers the legal framework that supports the use of court ordered parole in Queensland, including post-sentence executive power and statutory consequences of reoffending on a parole order. This includes a discussion of anomalies and complexities. Recommendation 3 of the Parole System Review Final Report is discussed. As a wider alternative, the potential to lift the head sentence ceiling for court ordered parole to five years is discussed, including the possibility of including sexual offences in this change. A further potential to create a judicial discretion to order a parole eligibility date for any head sentence duration (e.g. including under three years) is also discussed in this context. Short sentences are canvassed, and feedback is sought regarding whether there is utility in considering removing the ability to order any form of parole release or eligibility for head sentences of six months or less. Judicial power to order parole conditions for court ordered parole orders is discussed.

9.1 Historical context

Court ordered parole involves a sentencing court setting a definite date for an offender's release on a parole order, without any application to a parole board. It was introduced in Queensland in the CSA in 2006. Before this, a parole board made all orders for release on parole.[726] Furthermore:

> Prior to 2006, a short-sentence prisoner (serving two years or less of imprisonment) who was granted early release could not be supervised by corrective services in the community for the remainder of their sentence. Early

[725] The Queensland Government supported this recommendation: Queensland Government, above n 7, 4. There has been general stakeholder support for the retention of court ordered parole.

[726] Queensland Parole System Review, above n 9, 78 [362].

> remission allowed the chief executive to administratively reduce the length of a prisoner's sentence by authorising the release of the prisoner from custody for good behaviour while in custody. These decisions however, could not be based on considerations of community safety. The prisoner could not be monitored nor could their risks upon release be addressed and supported through case management.[727]

The CSA established parole as the only form of early release from custody. It abolished remission, phased out conditional release along with two forms of community based release (release to work and home detention) and introduced court ordered parole.

Court ordered parole only applies to sentences of three years or less, and cannnot be imposed for declared serious violent offences or sexual offences.[728]

In her Second Reading Speech, the then Minister for Police and Corrective Services explained the rationale for introducing court ordered parole as being part of 'truth in sentencing' because 'a prisoner's release date is a decision that should only ever be made by a court or by a parole board':

> Short-sentenced prisoners, who are not sex offenders or serious violent offenders, will have their parole date set by the sentencing court. A court might decide that a prisoner should serve every day of their sentence in prison. If that is the case, it will happen. Alternatively, a court might decide that a prisoner needs to spend time in custody and time under supervision before the end of their sentence. Prisoners released to parole on the date set by a court will have to comply with their parole order or they can be returned to custody. There will be no second chances for prisoners whose behaviour leads to the cancellation of their court ordered parole order.[729] They will be off to jail. If that happens, they will have to ask a parole board for further release to parole, or else serve their full sentence behind bars.[730]

By introducing court ordered parole, the Government established a mixed parole system whereby prisoners on short sentences could receive automatic parole and prisoners on longer sentences were subject to discretionary parole.[731] Court ordered parole was aimed at addressing the overrepresentation of low-risk prisoners subject to short sentences. These prisoners were responsible for a high degree of turnover in the prison population, and this scheme enabled them to be diverted away from custody, while providing post-release support and supervision.[732]

9.2 Purpose and benefits of parole

The sole purpose of parole 'is to reintegrate a prisoner into the community before the end of a prison sentence *to decrease the chance that the prisoner will ever reoffend*. Its only rationale is to keep the community safe from crime'.[733] The *Ministerial Guidelines* that set out the criteria for the Parole Board Queensland (the Board) to use when considering applications provide that the overriding consideration for the Board's decision-making process is community safety.[734]

The Parole System Review Final Report, which recognised parole as being primarily a 'method that has been developed in an attempt to prevent reoffending',[735] found evidence suggesting that parole does 'have a beneficial impact on recidivism', at least in the short term and perhaps modestly.[736] Paroled prisoners are less likely to reoffend than prisoners released without parole.[737] It also found 'it is more risky to have a short period of parole' than a longer one.[738]

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727 Queensland Corrective Services, *Court Ordered Parole in Queensland*, Research Paper No.4. June 2013 2.

728 *Penalties and Sentences Act 1992* (Qld) s 160B.

729 Queensland, *Parliamentary Debates*, Second Reading – Corrective Services Bill 2006, Legislative Assembly, 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).

730 Ibid.

731 Queensland Parole System Review, above n 9, 56 [256].

732 Ibid 3.

733 Ibid 1 [3] [emphasis in original].

734 Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, Ministerial Guidelines to Parole Board Queensland, 3 July 2017, 2 [1.2], [1.3].

735 Queensland Parole System Review, above n 9, 2 [8].

736 Ibid 38 [140] and see 2 [11] and 38 [139].

737 Ibid 1 [7].

738 Ibid 7 [46].

The Court of Appeal has noted that parole places support, supervision and control over sentenced offenders.[739] The community benefits from having an offender rehabilitated rather than remaining for extended periods in prison.[740]

A key issue for the current review is the effectiveness of court ordered parole versus board ordered parole . A review of the evidence undertaken by QUT for this review found:

> There is sufficient robust evidence to conclude that parole is more effective at reducing recidivism than unsupervised release. This is particularly so for rehabilitation-focused supervision, rather than compliance-focused supervision. However, evidence on the effectiveness of parole for vulnerable cohorts is sparse. Parole may be less effective for Aboriginal and Torres Strait Islander offenders, male offenders and offenders with a mental illness, but a lack of robust research precludes any definitive conclusion.
>
> While there is consistent evidence that parole failure is more likely among parolees who are young, male, Indigenous and have a criminal history, there is no consensus on the relative effectiveness of court-ordered versus board-ordered parole.[741]

The absence of robust evidence on the impacts of court ordered versus board ordered parole has limited the extent to which the Council has been able to present options based on what is likely to be most effective in reducing reoffending risks. However, consistent with the fundamental principles of the review, the Council's position is that a sentence that enables an offender to be supervised in the community where it can meet the purposes of sentencing and it is safe to do so, is preferable to one that involves imprisonment. To the extent that court ordered parole is one of a number of available orders that encourage this to occur, its use is supported.

At the same time, the Council is conscious of the potential net-widening effects of the Queensland form of order which allows a court to set a parole release date as the date of sentence. This may make imprisonment a more attractive sentencing option to sentencing courts when considering whether to impose a custodial or non-custodial order, as imposing imprisonment has the advantage of enabling time served in custody to be recognised, while still enabling the person to be released into the community under supervision. The difficulty is that the use of court ordered parole in place of non-custodial orders can have serious impacts for those who fail to comply with the conditions of parole — including exposing these offenders to the risk the parole order will be suspended or cancelled and they will be ordered to serve the entirety of the sentence in custody, which is a decision made by the Board rather than by a court. It also means the person will have a term of imprisonment recorded on their criminal history — which may suggest to those reviewing the person's criminal history in future that the offence was more serious than if a non-custodial sentence had been imposed, and may also increase the likelihood of the person being sentenced to imprisonment for future offences.

In this chapter, the Council considers whether parole should be available for short sentences of imprisonment, taking into account these potential net widening impacts of court ordered parole.

The impact of court ordered parole on sentencing practices and its relative effectiveness when compared with other forms of orders, including community based alternatives, is an important area for future research.

9.3 The current legal framework

9.3.1 Making a court ordered parole order

Court ordered parole involves a parole release date fixed by the court (meaning the offender is automatically released on that date, subject to certain powers of intervention held by the Board. Judicial power to order parole release (and eligibility)[742] dates is governed by Part 9, Division 3 of the PSA. A court required to fix a parole release date may fix any day of the offender's sentence as that parole release date (PSA, s 160G(1)).

Court ordered parole orders flow from a court sentencing an offender to a sentence of three years or less, provided the offence for which the sentence is imposed is not a declared serious violent offence or a sexual offence. The court must fix a date the offender is to be released on parole, unless the offender has had a court ordered parole order cancelled under sections 205 or 209 of the CSA during the offender's period of imprisonment (in which case the court must fix a parole eligibility date: s 160B of the PSA).

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739 *R v Clark* [2016] QCA 173 (24 June 2016) 3–4 [5]–[6] (McMurdo P).

740 Ibid 13 [52] (Morrison JA). See also *R v Riseley; Ex parte Attorney-General (Qld)* [2009] QCA 285 (22 September 2009) 12 [48] (Keane JA, McMurdo P and Holmes JA agreeing).

741 Gelb, Stobbs and Hogg, above n 356, [3.3.5].

742 Parole eligibility dates are discussed here only for the purpose of completeness. The different circumstances and provisions which engage their operation are not discussed here.

All other forms of sentencing under Part 9, Division 3 result in the court setting a parole eligibility date (by legislative requirement or at the court's discretion) or in the court setting no parole eligibility date, in which case the deeming provision in section 184(2) of the CSA applies. It sets parole eligibility where a parole eligibility date has not been set after half of a sentence is served.[743] Then, the offender must apply for parole to the Board for board ordered parole.

As Table 9-1 shows, court ordered parole orders form the overwhelming majority of parole orders in Queensland.

Table 9-1: Number of offenders supervised on parole any time during 2017/18

Penalty type	Distinct offender count	Distinct order count
Court ordered parole	12,937	13,592
Board order parole*	3,359	3,515
All parole orders	15,817	17,107

Source: QCS unpublished data supplied 29 March 2019
*Board ordered parole includes: Qld Parole, Interstate Parole, Commonwealth License, Parole pursuant to *Youth Justice Act 1992* (Qld)
Some offenders had more than one parole order during 2017-18

The Council is mindful that there is not clear evidence on the relative effectiveness of court ordered versus board ordered parole. It is also aware that the reported court ordered parole and board ordered parole completion rates represent a point in time and may not (and in a number of recent examples brought to the Council's attention by the Board, **do not**) capture further offending that occurred within the order period but was yet to be finalised by the Court prior to the order expiring. QCS has advised that the counting rules used in Queensland to calculate completion rates are derived from National Counting Rules.

The operation of sections 209 and 215 of the CSA, discussed below, means that reoffending on parole may lead to cancellation of the parole order, but not until after the parole period has expired.

9.3.2 The approach in other jurisdictions

Queensland's parole system is not directly analogous to other Australian models (nor the UK, Canada or New Zealand). General details regarding other parole regimes are outlined in the document *Community- based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council's website.

The Parole System Review Final Report noted that Queensland appeared to be the only Australian state that allowed offenders to serve a period of imprisonment completely on parole [and, it follows, to have immediate release on parole].[744] It further noted:

> Queensland is the only state in Australia to have a system where parole must apply to all sentences of a term of imprisonment. In Victoria, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory, parole is not available for sentences of imprisonment for periods of less than 12 months. In New South Wales, parole is not available for sentences of imprisonment for periods of less than six months. In all Australian states, except for Queensland, the sentencing Court may choose not to fix a non-parole period, meaning the offender will not be eligible for parole and will be required to serve the full term.[745]

743 This is the general position which does not apply to various mandatory sentencing schemes, such as the serious violent offence scheme, and head sentences of life imprisonment.

744 Queensland Parole System Review, above n 9, 93 [452].

745 Ibid 72 [325]. In Queensland, a court may generally choose not to order a parole eligibility date if it is not required to order a parole release date – but s 184 of the CSA will then automatically apply.

WA,[746] Victoria,[747] Tasmania,[748] the ACT[749] and the Northern Territory[750] do not have court ordered parole or something similar. These jurisdictions have systems entirely of discretionary parole.[751]

NSW,[752] SA, the UK, Canada and New Zealand have systems that involve an offender's early release from custody without consideration by the Parole Board.

In NSW, a court cannot set a non-parole period for imprisonment of six months or less.[753] Otherwise it must do so when sentencing to imprisonment. The balance of the term must not exceed one-third of the non-parole period, unless the court decides there are special circumstances for it being more.[754] A court can decline to set a non-parole period if it is appropriate to do so.[755] NSW has standard non-parole periods for set offences listed in a table, which must be taken into account by sentencing courts.[756] An offender subject to a sentence of three years or less, being a sentence for which a non-parole period has been set, is taken to be subject to a parole order (a statutory parole order) directing release on parole at the end of the non-parole period.[757]

In SA, a court must fix a non-parole period when sentencing to imprisonment, but may decline to do so if it would be inappropriate and may not do so if the sentence of imprisonment is for less than 12 months.[758] Legislation then dictates that the Parole Board must order that a prisoner liable to serve a total period of imprisonment of less than five years, and for whom a non-parole period has been fixed, be released from prison on parole not later than 30 days after the non-parole period expires.[759] The prisoner must agree in writing to the parole conditions prior to release.[760]

9.4 Executive power after sentence in Queensland

The chief executive of QCS must issue a court ordered parole order for a prisoner in accordance with the date fixed by the court, and provide a copy to the prisoner.[761] However, the chief executive is not required to issue the parole order if the parole release date is the date the offender is to be unconditionally released from lawful custody[762] (that is, the prisoner has served their full sentence upon their release from custody).

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746 Part 3, *Sentence Administration Act 2003* (WA) and Part 13 *Sentencing Act 1995* (WA). Terms of imprisonment of six months or less generally cannot be imposed: s 86 *Sentencing Act 1995* (WA). A court may make a parole eligibility order (s 89) but this simply means the board can consider an application once the proportion of the sentence determined by statute is reached (s 93) – half of a term of four years or less; two years before expiry of the full term of over four years' duration.

747 *Sentencing Act 1991* (Vic) – For a term of two years or more, court must fix period during which the offender is not eligible for release on parole, unless inappropriate. May do so when head sentence less than two years but not less than one year. Non-parole period must be at least six months less than the head sentence (s 11). Set percentages for non-parole periods regarding 'standard sentence' offences (where Act specifies standard sentence) – ss 3, 11A.

748 *Sentencing Act 1997* (Tas) ss 17(2), (3), (3A), (4), (5). In Tasmania, courts have the discretion to order that an offender is not eligible for parole in respect of a sentence for a term of imprisonment, or that the offender is not eligible for parole before a date specified, which cannot be less than one-half of the sentence period. If no such order is made, the offender is not eligible for parole.

749 *Crimes (Sentencing) Act 2005* (ACT) – Court must set a non-parole period for terms of imprisonment of 1 year or longer, but may decline to do so if inappropriate (s 65).

750 *Sentencing Act 1995* (NT) – Generally, a court imposing imprisonment of 12 months or more must set a non-parole period unless this is inappropriate; and may not fix one for imprisonment of less than 12 months (s 53). The non-parole period for sentences of 12 months or more (unless 'inappropriate') must be not less than 50 per cent and the period cannot be less than eight months (s 54). There are minimum non-parole periods set for sexual and drug offences (s 55) and offences against children under 16 (s 55A).

751 NSW Law Reform Commission, *Parole Question Paper 1: The Design and Objectives of the Parole System* (2013) 15.

752 NSW previously had court based parole, however the Government accepted and implemented a NSW Law Reform Commission recommendation to abolish that approach (see now repealed sections 50, 51, 51A and 51B of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) and replace with statutory based parole (NSW Law Reform Commission, *Report 142 – Parole* (2015) Recommendation 3.1(4)). Under this approach for sentences of three years or less the court is required to set a non-parole period and offenders must be released at the end of the non-parole period, unless the State Parole Authority revokes parole in advance. The court is no longer required to make parole orders or have a role in setting parole conditions. It is required to set a non-parole period (s 44) but may decline to do so (s 45).

753 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

754 Ibid s 44.

755 Ibid s 45.

756 Ibid ss 54A-D.

757 *Crimes (Administration of Sentences) Act 1999* (NSW) s 158.

758 *Sentencing Act 2017* (SA) s 47. This is the general proposition, from which there are numerous deviations.

759 *Correctional Services Act 1982* (SA) s 66(1).

760 Ibid s 68(4).

761 *Corrective Services Act 2006* (Qld) s 199.

762 *Penalties and Sentences Act 1992* (Qld) s 160G(2).

The definition of 'court ordered parole order' in schedule 4 of the CSA recognises the interplay between the PSA and CSA: it means an order issued by the chief executive in accordance with a court order[763] fixing the date for the prisoner to be released on parole.

A sentencing court's involvement in the process ceases after it sets a release or eligibility date. It has no power over conditions and no participation in breach responses. The Court of Appeal has noted:

> In Queensland there are two mechanisms by which a sentenced prisoner may be released on parole. The first is by order of the Parole Board Queensland … In such a case, while the court imposing the sentence has the jurisdiction to set a date upon which a prisoner is eligible for parole, the decision to release the prisoner on parole is an exercise of executive, not judicial power. Upon sentence being imposed by the court "[the] controversy represented by the indictment [has] been quelled and, allowing for any applicable statutory regime, the responsibility for the future of the [prisoner] pass[es] to the executive branch of the government of the State."[764]
>
> Court ordered parole, being the second mechanism for release on parole in Queensland is a relatively recent invention. By this regime, the sentencing court, not the executive, orders the release of the prisoner on parole. The only function of the executive in the release of the prisoner on parole is that it is the Chief Executive who formally issues a parole order in obedience of the court's order. It is clear that once the parole order is made by the court, supervision of the prisoner on parole is the province of the executive.[765]
>
> The major practical distinction between an offender being released on court ordered parole or being released on a suspended sentence is the power of supervision vested in the executive where the prisoner is on parole. In addition, while a suspended sentence may only be breached by commission of a further offence during the operational period, a breach of parole may be committed upon a breach of any of the conditions prescribed by s 200 of the Corrective Services Act or by a failure to comply with directions given pursuant to those conditions. Imprisonment for an offence committed during a parole period automatically results in the prisoner being taken into custody. Commission of an offence during the operational period of a suspended sentence does not. The prisoner may argue that it is unjust to activate the sentence, although in practical terms it would be unlikely that the suspended sentence would not, at least in part, be activated.[766]

Unlike a court, the Board is not subject to the sentencing principles or factors in the PSA. It must operate within its functions and powers under the CSA and is guided by the Ministerial Guidelines to Parole Board Queensland, which includes guiding principles for the Board (community safety is paramount) and a section regarding suitability when deciding the level of risk that a prisoner may pose to the community.[767]

A court must fix a parole release date when sentencing an offender to a term of imprisonment of three years or less for an offence that is not declared to be a serious violent offence or is not a sexual offence (provided no pre-existing court ordered parole order has been cancelled).[768]

Parole release or eligibility dates do not apply to terms of imprisonment made with any of the following orders:

- an ICO;
- a probation order mentioned in section 92(1)(b) of the PSA;
- an order that the whole or part of the term of imprisonment be suspended.[769]

However, they do apply to orders imposing terms of imprisonment, following the contravention of a suspended sentence or ICO, that require an offender to serve the whole or part of suspended imprisonment and the unexpired portion of an ICO.[770]

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763 Court order made under *Penalties and Sentences Act 1992* (Qld) s 160B(3)

764 *R v SCZ* [2018] QCA 81 (4 May 2018) 9-10 [36] Davis J (Morrison and Philippides JJA agreeing), citing *Crump v New South Wales* (2012) 247 CLR 1, [28] and *Elliott v The Queen* (2007) 234 CLR 38, [5] (being the direct quote).

765 *R v SCZ* [2018] QCA 81 (4 May 2018) 10 [37] Davis J (Morrison and Philippides JJA agreeing).

766 Ibid 15 [43] (Davis J, Morrison and Philippides JJA agreeing).

767 Mark Ryan MP, above n 734, 2.

768 *Penalties and Sentences Act 1992* (Qld) s 160B

769 Ibid s 160A(6).

770 Ibid s 160, definition of 'impose' and s 160A(1).

9.4.1 Statutory conditions of court ordered parole orders

A prisoner released on court ordered parole is subject, at a bare minimum, to the standard, mandatory conditions set out in section 200(1) of the CSA, which require the offender to:

- be under the chief executive's supervision;
- carry out the chief executive's lawful instructions;
- give a test sample if required to do so by the chief executive;
- report, and receive visits, as directed by the chief executive;
- notify the chief executive within 48 hours of any change in the prisoner's address or employment during the parole period; and
- not commit an offence.

Further, all court ordered parole orders include a condition reflecting section 200A of the CSA. Section 200A enables corrective services officers to direct a prisoner to remain at a stated place, wear a stated device, or permit installation of a device or equipment at the prisoner's residence.[771] They have further power to give other reasonable directions necessary for the proper administration of one of these directions.[772] The purpose of the power is to enable movements of a prisoner subject to a parole order to be restricted and to enable the location of the prisoner to be monitored.[773] A parole order can also contain a condition requiring a prisoner to comply with such a direction.[774]

A prisoner must comply with the conditions included in the parole order.[775]

When an offender's release date is the day of their sentence hearing (often referred to as 'an immediate release' to parole supervision) - assuming this is not the prisoner's full time release date from custody (that there is in fact a period for supervision following the imposition of the sentence by the court) - the offender is taken immediately to be subject to a court ordered parole order:

- containing the conditions mentioned in section 200(1) of the CSA;[776] and
- requiring the offender to report to a probation and parole office and obtain a copy of the parole order (failure to do so means the offender is unlawfully at large).[777]

The sentencing court must, when fixing the offender's parole release date in such circumstances, tell the offender about the conditions, the reporting requirement and consequences of failing to comply with it.[778]

Restrictions and permissions regarding interstate travel are dealt with in CSA sections 212 and 213.

9.4.2 Board can add further conditions – and otherwise amend, suspend or cancel - a court ordered parole order, including prior to release from custody

A sentencing court cannot impose conditions on court ordered parole (this is discussed as a possible change later in this paper). The CSA sets mandatory statutory conditions which can never be altered (s 200(1)). The Board can add, amend and remove other conditions it considers necessary, by the combination of sections 205(1)(b) and 200(3) of the CSA.

By section 200(3) of the CSA, a parole order granted by the Board (as opposed to court ordered parole) may also contain conditions the Board reasonably considers necessary:

- to ensure the prisoner's good conduct; or
- to stop the prisoner committing an offence.

Examples given are conditions about the prisoner's residence, employment or participation in a particular program, a curfew and provision of a test sample.

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771 *Corrective Services Act 2006* (Qld) s 200A(2).

772 Ibid s 200A(3).

773 Ibid s 200A(1).

774 Ibid s 200(2).

775 Ibid s 200(4).

776 *Penalties and Sentences Act 1992* (Qld) s 160G(3)(a).

777 Ibid s 160G(3)(b).

778 Ibid s 160G(5).

These grounds, especially those concerning good conduct, are very wide and supplement the separate departmental power in the standard condition (s 200(1)) regarding 'lawful instructions'.

This power is extended to court ordered parole orders by virtue of section 205(1)(b) of the CSA (Amendment, suspension or cancellation) which gives the Board power to add conditions to a court ordered parole order by amending the order through inserting a condition mentioned in section 200(3) if the Board reasonably believes the condition is necessary for a purpose mentioned in the subsection (as listed above).[779]

Section 205(1) expressly recognises the ability to amend or remove an existing section 200(3) condition; but only speaks of 'inserting' a section 200(3)-type condition into a court ordered parole order; perhaps because section 205(1)(b) marks the first opportunity for the Board to exercise power in respect of a section 200(3) type condition for a court ordered parole order.

The Board can also amend a parole order if it reasonably believes the prisoner poses a serious risk of self-harm.[780]

Furthermore, section 205(2) gives the Board power in respect of court ordered parole (and Board-ordered parole) orders to amend, suspend or cancel if it reasonably believes the prisoner:

- has failed to comply with the parole order;
- poses a serious risk of harm to someone else;
- poses an unacceptable risk of committing an offence; or
- is preparing to leave Queensland without permission.[781]

It can also amend or suspend if the prisoner is charged with committing an offence.[782]

These powers are all exercised by written order, which have effect when made by the Board.[783]

The 'imported section 200(3) power' as regards court ordered parole orders in section 200(1)(b) is particularly significant because of the wider grounds justifying Board action in section 200(3) ('good conduct', 'stop the prisoner committing an offence') as distinct from what might be viewed as more constrained grounds in section 205(2).

The *Ministerial Guidelines* require the Board to consider making additional conditions to reduce the risk of reoffending if it decides to amend a parole order (in the context of failure to comply).[784]

The Board has wide powers to amend a court ordered parole order to ensure community safety through setting additional conditions designed to ensure the prisoner's good conduct and/or that are aimed at stopping the prisoner from committing an offence. It allows the Board to tailor a court ordered parole order (when needed) to the actual risk posed by an individual prisoner.

In terms of a board ordered parole order, in addition to the above, the Board has the ability to amend, suspend or cancel a board ordered parole order in circumstances where it receives information that had it known at the time of the grant of parole, the Board would have included additional conditions to mitigate that prisoner's risk or perhaps not even have granted parole release at that time.[785]

The Board's powers in section 205 can be exercised prior to a prisoner's release from custody to court ordered parole (often referred to as a pre-emptive suspension of the court ordered parole order or a 'pre-release suspension'). This was confirmed by the Court of Appeal in *Foster v Shaddock* (which dealt with a suspension of a court ordered parole order prior to physical release as opposed to amending by adding conditions):

> [40] The entitlement and therefore expectation of a prisoner to be released on the parole release date fixed by the sentencing court, which will be set out in the court ordered parole order, and the expectation reflected in Part 9 Division 3 of the PSA that an offender whose parole release date is fixed by the court will be released on that date, are modified by the power given to the parole board in s 205 of the CSA to amend, suspend or cancel that parole order. It is modified to the extent only that the parole board's powers may not be exercised except in the

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779 An example of a Board-imposed condition is found in *Vaughan v Parole Board Queensland* [2019] QSC 10 (30 January 2019) 4-5 [12] (Brown J): 'the prisoner must actively participate in treatment with a psychologist to address his appending profile as directed by an authorised Corrective Services officer or the Board' and 'the prisoner is to permit any medical, psychiatrist, psychologist, social worker, counsellor or other mental health professional to disclose details of attendance and compliance with treatment and provide opinions relating to level of risk of reoffending to a Corrective Services Officer if such a request is made'.

780 *Corrective Services Act 2006* (Qld) s 205(1)(c).

781 Ibid s 205(2)(a).

782 Ibid s 205(2)(c).

783 Ibid s 205(5).

784 Mark Ryan MP, above n 734, 8 [6.3].

785 *Corrective Services Act 2006* (Qld) s 205(2)(b).

> specific circumstances set out in subsection 205(2)(a) of the CSA… The parole board's power is thus circumscribed. It cannot act unless one these conditions is satisfied.
>
> [41] The circumstances in which the parole board is empowered to act apply only once a person is subject to a parole order. A parole order will necessarily have to be made before a person may be released on parole ….
>
> [42] A failure to comply with the parole order can only occur after a person is released on parole; however, the other circumstances, posing a serious risk of harm to someone else or a serious risk of committing an offence or preparing to leave Queensland, may, as a matter of fact, occur before or after the person subject to the parole order has been released from prison on that parole order. It follows that, if the parole board reasonably believes that one of those circumstances has arisen before the person is released on any parole order, the board has the power to suspend, amend or cancel the parole order before the person is released on that parole order. There is nothing in the wording of the legislation that suggests that this power (that is the power in the specified circumstances to amend, suspend or cancel the person's parole order prior to release) does not apply to a person subject to a court-ordered parole order. On the contrary, it is clear from the wording of the legislation that it does and there is no temporal limitation on when that power may be exercised once a parole order has been made.
>
> [44] … There is a clear expression of a statutory curtailment on the unfettered or absolute right to be released on the parole date set by the sentencing court as the parole release date. The parole board may amend, suspend or cancel a parole order under s 205 of the CSA whether before or after a prisoner is released on parole.[786]

The Parole System Review Final Report identified three benefits of this power to pre-emptively suspend or cancel the issuing of a parole order:

- Safeguards community safety - QCS can consider offender behaviour close to release and make recommendations where appropriate regarding parole amendment, suspension or cancellation before release, on limited grounds.
- Aids in maintaining prison discipline to some degree, by providing an offender with an incentive to behave while in custody.
- Retains certainty for the Court and the community as to the length of time in custody that will actually be served by a prisoner - unless the offender's conduct in prison demonstrates an unacceptable risk to the community close to his or her release.[787]

The Board must – 'if practicable' – give a prisoner (1) an information notice and (2) reasonable opportunity to be heard on a proposed amendment, before amending a parole order.[788]

It is not required to give either in the case of a suspension or cancellation,[789] but it must:

- give the prisoner an information notice on the prisoner's consequent return to prison;
- consider all properly made submissions; and
- inform the prisoner, by written notice, whether the Board has changed its decision, and if so, how.[790]

The distinction between amending on one hand and suspending or cancelling on the other is underlined by the difference in the definition of 'information notice'. For an amendment, the definition speaks of proposed action with 21 days for written submissions prior to the decision.[791] For cancellation or suspension, the definition describes the Board's decision in the past tense, with 21 days for written submissions showing cause why the Board should change its decision.[792]

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786 *Foster v Shaddock* [2017] 1 Qd R 201, 208-209 [40]-[42], [44] (Atkinson J, Margaret McMurdo P and Fraser JA agreeing). See also the affirmed judgment of Daubney J: *Foster v Shaddock* [2015] QSC 36 (25 February 2015) 2 [3], 6 [13], [16], 6-7 [18]. There, the suspension followed adverse behaviour by the prisoner in the days leading up to his release, including attempting to contact the aggrieved victim by telephone.

787 Queensland Parole System Review, above n 9, 89 [421]-[424].

788 *Corrective Services Act 2006* (Qld) s 205(3).

789 Ibid s 205(4).

790 Ibid ss 208(1) and (2).

791 Ibid, s 205(6)).

792 Ibid, s 208(4)).

9.4.3 Chief executive powers regarding amendment, including conditions, and suspensions

Prior to amendments in 2017, the chief executive of QCS was authorised to temporarily amend or suspend a parole order.[793] Since 3 July 2017, the chief executive can only temporarily amend a parole order (s 201; on the basis of a reasonable belief the prisoner has failed to comply with the order, poses a serious and immediate risk of harm to someone else or poses an unacceptable risk of committing an offence). The express example of amendment given is imposing a curfew. The power is exercised by written order, which has effect for not more than 28 days.

The Board may cancel the chief executive's order at any time.[794]

While the chief executive no longer has the power to suspend a parole order, they can ask the Board to suspend a parole order under section 208A of the CSA. The applicable grounds are the same as those that apply to temporary amendment in section 201, as well as a reasonable belief about the prisoner preparing to leave the State without permission.

When such a request is made, section 208B of the CSA requires the Board or a prescribed Board member[795] to urgently consider and decide whether or not to suspend the parole order. The only grounds permitting acceptance and suspension are the four upon which the chief executive can found the initial request.

If the Board decides to suspend, the decision is taken to have been made under section 205(2). If a Board member decides to suspend and issue a warrant for the prisoner's arrest, the Board must either confirm or set aside that decisions within two business days.[796] If the decision is set aside, the suspension and warrant stop having effect[797] and the prisoner is not taken to have been unlawfully at large over the period of time running from the member's decision to the Board's decision to set it aside.[798]

9.5 Statutory court ordered parole order cancellation

9.5.1 Under the CSA

A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.[799] This applies even if the period of the parole order has expired. However it does not apply if the further period of imprisonment:

- is required to be served in default of paying a fine or other amount or of making restitution as required under a court order, or
- is to be served as an ICO, is wholly suspended or is required to be served until the court rises.

This automatic statutory cancellation invokes a power of the Board to issue an arrest warrant, or to apply to a magistrate for an arrest warrant. When arrested, the prisoner must be taken to a prison to serve out the unexpired portion of the prisoner's period of imprisonment (s 210).

Section 211 of the CSA provides guidance on calculating the remainder of the sentence in the event of court ordered parole cancellation. If a prisoner's parole is cancelled under sections 209 or 205(2), the time for which the prisoner was released on parole before the relevant event happens, counts as time served under the prisoner's period of imprisonment. The relevant events are:

- when the prisoner failed to comply with the order;
- when the order was cancelled due to posing serious risk of harm to another/unacceptable risk of committing an offence/preparing to leave Queensland without permission; and
- the date of the commission of the offence leading to cancellation under section 209.

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793 Ibid, former ss 201(1) and (2), since amended by the *Corrective Services (Parole Board) and Other Legislation Amendment Act 2017* (Qld) ss 9 and 11.

794 *Corrective Services Act 2006* (Qld) s 202(4).

795 'Prescribed Board member' means the president, a deputy president or a professional board member: schedule 4, *Corrective Services Act 2006* (Qld).

796 *Corrective Services Act 2006* (Qld) s 208C.

797 Ibid s 208C(4).

798 Ibid s 208C(6).

799 Ibid s 209.

The Board can, by written order, direct that the prisoner serve only part of the unexpired portion of the period of imprisonment[800] and this is so even though section 206(3)(b) states that a prisoner arrested on a warrant issued because the Board cancels a prisoner's parole, must be taken to a prison to serve the unexpired portion of the period of imprisonment. However, the Board can only do this is if the prisoner goes through the entire process of re-applying for parole following cancellation of the parole order – whether a court ordered parole cancellation or a board ordered parole cancellation. Under the CSA, once a parole order (either court ordered or Board ordered) is cancelled the prisoner can apply at any time for parole.

A prisoner released on parole is taken to be still serving the sentence imposed.[801]

9.5.2 Under the PSA

Part 9, Division 3 of the PSA (ss 160-160H) deal with parole and court orders regarding parole eligibility and parole release dates. Sections 160B to 160D are the only law under which a court may, on sentence of an offender for an offence, make an order relating to a person's release on parole.[802] They apply if a court is imposing a term of imprisonment on an offender for an offence.[803] The focus of the provisions is on the imposition of the imprisonment and not the date of the commission of the offence.

Some of the general themes in Division 3 are:

- At any one time there will be only one parole release or eligibility date in existence for an offender.[804]
- The date fixed by the court must be a date relating to the offender's period of imprisonment as opposed to a particular term of imprisonment.[805]

A 'new' parole eligibility date required to be imposed as a result of further offending giving rise to imprisonment cannot be earlier than the release or eligibility date which it is replacing.[806] If the offender has had a court ordered parole order cancelled under sections 205 or 209 of the CSA during the offender's period of imprisonment, the court must fix the date the offender is eligible for parole – the certainty of a fixed release date is no longer an option.[807]

The PSA also contains an automatic cancellation provision regarding parole release and eligibility dates in section 160E. An existing parole release date is automatically cancelled when a Queensland court fixes another parole release or eligibility date, or imposes a term of imprisonment for a serious violent or sexual offence or term of imprisonment resulting in the period of imprisonment exceeding three years. A similar subsection regarding parole eligibility dates is also included. It makes no difference if the court setting the new sentence is of lesser jurisdiction to that which imposed the date being replaced.[808]

There can only ever be one parole release date, no matter how many times an offender is sentenced.[809] This means that if an offender is sentenced to a new term of imprisonment while serving a current sentence of imprisonment, a new parole release or eligibility date is set, replacing the parole release date under the previous sentence – this must not be earlier than the existing date.

Under section 160E(1) of the PSA, an offender's parole release date is automatically cancelled when:

- The court fixes another parole release date or parole eligibility date for the offender (under that division); or
- The court imposes a term of imprisonment for the offender for either a serious violent offence or sexual offence, or that results in a term of imprisonment being more than three years.

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800 Ibid s 211(3).

801 Ibid s 214.

802 *Penalties and Sentences Act 1992* (Qld) s 160A(2).

803 Ibid s 160A(1).

804 Ibid s 160F(1).

805 Ibid s 160F(2).

806 Ibid ss 160B(4), 160C(4), 160D(4).

807 Ibid s 160B(2).

808 Ibid s 160E(3).

809 Ibid s 160E(1).

9.5.3 Anomaly identified by the Court of Appeal: *R v Sabine* [2019] QCA 36 (18 February 2019)

The Court of Appeal has recently identified an anomaly in these provisions and called for legislative attention. In *R v Sabine*,[810] an offender had been sentenced for a drug offence by the Supreme Court in May 2018 to two years' imprisonment with a parole release date fixed after one year was served (17 May 2019). On 3 August 2018 he was sentenced by a magistrate to four months' imprisonment for other drug offences, to run concurrently with the Supreme Court sentence (thus ending in December 2018, and more than six months before the parole release date set by the Supreme Court). The Magistrate imposed a 'new' parole release date of the same date, 17 May 2019.

Morrison JA noted that the position prior to the Court of Appeal considering the application for leave to appeal can be summarised as follows, which demonstrated an anomaly in the provisions of Part 9, Division 3 of the PSA:

> (a) the Magistrate was obliged to fix a parole release date: s 160B(3);
>
> (b) for that purpose the Magistrate could fix "any day of the offender's sentence" as the offender's parole release date: s 160G(1);
>
> (c) any day of the four months imposed by the learned Magistrate was always going to be months earlier than the expiry of the then "current parole release date", set by the learned sentencing judge in [the Supreme] court; and
>
> (d) however, under s 160B(4), because the applicant had a current parole release date, the date that the Magistrate could fix could not be "earlier than the … current parole release date".[811]

At the appeal, Mr Sabine had served nine months of the sentence and argued that he should be resentenced to immediate release on parole.[812] He appealed against the Supreme Court sentence on the ground that it was manifestly excessive. He did not appeal against the Magistrates Court sentence.[813]

The commission date of the Magistrates Court offences must have pre-dated the Supreme Court sentence date.[814] It is not clear whether they were directly related to the drug offence dealt with in the Supreme Court. However, it does not appear there was any missed opportunity to transmit the Magistrates Court charges to the Supreme Court for sentence under section 651 of the *Criminal Code* (Qld): the Supreme Court matter had gone to trial and it appears that Mr Sabine did not have any declarable pre-sentence custody.

While the Court of Appeal refused the application for leave to appeal, it was agreed that there was no obvious way around the anomaly identified.[815]

Had the Court of Appeal granted the application, it would have had no power to order immediate parole release some 14 months prior to the existing release date. As Morrison JA wrote:

> Even if this court then concluded that immediate parole release was appropriate, the definition of "current parole release date" and the provisions of s 160B(4) of the Penalties and Sentences Act would mean that it could not set a parole release date other than at the date set by the Magistrates Court, that is, beyond when it determined the applicant should be released. This would be so even though the "current parole release date" was set by reference to the sentence that this Court had set aside.[816]

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810 *R v Sabine* [2019] QCA 36 (18 February 2019) 7 [32] – 10 [53] (Morrison JA, Holmes CJ and Philippides JA agreeing).

811 Ibid 9 [44] – [45] (Morrison JA, Holmes CJ and Philippides JA agreeing).

812 Ibid 4 [15].

813 Ibid 8 [34].

814 Because s 209 of the *Corrective Services Act 2006* (Qld) was not triggered by the imprisonment imposed by the Magistrates Court (that is, the parole order consequent upon the Supreme Court sentence was not automatically cancelled), it is clear that those summary drug offences were not committed during the period of the Supreme Court imprisonment (see also PSA s 160B(2)). Mr Sabine was also in custody from the date of the Supreme Court sentence.

815 *R v Sabine* [2019] QCA 36 (18 February 2019) 10 [47] (Morrison JA, Holmes CJ and Philippides JA agreeing).

816 Ibid 10 [46] (Morrison JA, Holmes CJ and Philippides JA agreeing).

Even other action (arguably artificial and impermissible,[817] for instance, imposing a suspended sentence instead) would not have helped because the Magistrates Court sentence stood. An analysis of a hypothetical reopening of the Magistrates Court sentence indicated that no resolution lay down that path.[818]

While no concluded view was expressed, possible answers were:

- specifying that a subsequent court which is sentencing an offender to a lesser period of imprisonment than an existing sentence, is not required to set a parole release date; or
- permitting the subsequent court in that case to set a parole release date at the limit of the term it imposes, but on the basis that that date does not cancel the later date set by the previous court.[819]

QUESTION 10: SETTING OF PAROLE RELEASE DATE

How should the anomaly identified by the Court of Appeal in *R v Sabine* [2019] QCA 36 (18 February 2019) be addressed?

9.6 Further offending on court ordered parole: CSA sections 209, 211, 215, PSA section 160B

Concerns have been raised by stakeholders concerning complexity and uncertainty around provisions of the CSA and PSA regarding parole in the context of further offending. A summary of the relevant PSA and CSA provisions as discussed in several judgments is at Appendix 6.

Some stakeholders have suggested considering simplifying the provisions. Two propositions discussed as reform options below in this paper may be viewed as potential remedies to the complexity and uncertainty observed:

- creating a 'dual discretion' for courts to choose between parole release and eligibility dates for all head sentences of up to five years; and
- expanding court ordered parole to apply to sexual offences.

Another suggestion from consultation is giving courts discretion to make the fact that an offence was committed while the person was on parole a factor that the court must consider in deciding whether to set a release or eligibility date.

The Court of Appeal's construction of the legislation has been endorsed as a 'coherent system where a prisoner commits an offence during the period of a parole order' by four Supreme Court judges.[820] However, the statutory regime has garnered some negative judicial descriptions in cases, such as:

- 'troublesome' partly because of the language of the PSA;[821] and
- having an 'evident lack of clarity'.[822]

The relevant decisions generally involve the question of whether a parole release or eligibility date was the necessary order to make in the case of an offender who had:

- been sentenced to imprisonment with a parole release date;[823]
- offended while on that court ordered parole order;

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817 And such action was not countenanced by the Court of Appeal. The Court most recently warned that it would not structure a sentence to evade the consequence for parole that is mandated by statute (in a different legislative and factual context though – the serious violent offence scheme) in *R v Carrall* [2018] QCA 355 (18 December 2018) 5 [23] Sofronoff P, citing *R v Crossley* (1999) 106 A Crim R 80, [30] per McPherson JA (Jackson and Bowskill JJ agreeing). Also, Mr Sabine had not performed well on a probation order (*R v Sabine* [2019] QCS 36 (18 February 2019) 6 [20]). As to examples of where the Court of Appeal has recognised the need for an offender to be subject to supervision and the corollary undesirability of instead imposing a suspended sentence, see *R v Farr* [2018] QCA 41 (20 March 2018) 8 (Philippides JA, Gotterson JA and Douglas J agreeing) and *R v Wano; Ex parte Attorney-General* (Qld) [2018] QCA 117 (12 June 2018) 8 [44]-[45] (Henry J, Fraser JA and North J agreeing).

818 *R v Sabine* [2019] QCA 36 (18 February 2019) 10 [48]-[52] (Morrison JA, Holmes CJ and Philippides JA agreeing).

819 Ibid 10 [53] (Morrison JA, Holmes CJ and Philippides JA agreeing).

820 *R v Smith* [2015] 1 Qd R 323, 327 [30] (Morrison JA, Muir JA and Daubney J agreeing); Dalton J agreeing in her judgment in *R v Hall* [2018] QSC 101 (18 May 2018) 4 [16].

821 *R v Hall* [2018] QSC 101 (18 May 2018) 2 [1] (Dalton J).

822 *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013), 14 [34] (Long SC DCJ).

823 The issue does not arise where the original order involved a parole eligibility date. An offender to be sentenced under s 160B who had a board ordered parole order cancelled will fall under s 160B(2) and the court must fix a parole release date. See also *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487 (16 December 2010) Rafter SC DCJ 8 [32].

- been subsequently sentenced to actual imprisonment for the 'new' offence; and
- the subsequent sentence included an eligibility date (thus requiring an application to the Board), as well as, in some cases, serving further time being the 'unexpired portion' of the first sentence.

A number of District Court judgments initially addressed the issues, and two more recent Court of Appeal judgments brought further clarity, followed by two single Supreme Court judge decisions which provided further explanation. The relevant decisions, in chronological order, are:

- *R v Bond* [2009] QDC 28 (26 February 2009);
- *Kim v Arbuckle* [2009] QDC 267 (3 July 2009);
- *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487 (16 December 2010);
- *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013);
- *Wiggins v Commissioner of Queensland Police* [2013] QDC 286 (25 November 2013);
- *R v Smith* [2015] 1 Qd R 323;
- *R v Bliss* [2015] QCA 53 (14 April 2015);
- *R v BLJ* [2018] 3 Qd R 255; and
- *R v Hall* [2018] QSC 101 (18 May 2018).[824]

9.6.1 The Court of Appeal: *R v Smith* [2015] 1 Qd R 323

Morrison JA, with whom Muir JA and Daubney J agreed, noted in *R v Smith* that section 209 of the CSA 'contemplates at least two situations: first, where the offence and the sentence both occur within the period of the parole order; and secondly, where only the offence occurs during the period of the parole order, with the sentence occurring subsequently',[825] including even after the period of the parole order has expired.[826]

In relation to section 210 of the CSA, the judgment noted that 'there is no definition of what an 'unexpired portion' is'[827] but:

> The meaning is revealed by s 211 … the time up until the commission of the offence will count as time served under the period of imprisonment, but the balance will not. On that basis the balance of the parole period is not time served under the period of imprisonment, but is the "unexpired portion of the prisoner's period of imprisonment" for the purposes of s 210(3) of the CSA.[828]

The judgment then explained the operation of section 209 of the CSA:

> [27] Cancellation under s 209 occurs automatically if the prisoner is sentenced for an offence committed during the period of the parole order, even if that sentence comes after the expiry of the period of the parole order. In that situation, the parole order will have expired and will have been cancelled under s 209. That situation does not come within s 215 of the CSA, which only operates where a parole order has expired without being cancelled under s 209.
>
> [28] With that analysis in mind one can conveniently summarise the operation of s 209 of the CSA.
>
> [29] Section 209 makes provision in respect of two different things, namely a parole order in subsection (1), and the period of the order under subsection (2). It is the parole order which is the subject of automatic cancellation under s 209(1). That cancellation can occur even after the period of the order has expired: s 209(2). Where that happens, the prisoner will not be taken to have served the period of imprisonment because s 215 is not engaged. Rather, s 211(2)(c) applies so that the only time served by the prisoner under the prisoner's period of imprisonment is that which was served prior to committing the offence which subsequently, by way of sentence, results in the automatic cancellation of the parole order.
>
> [30] The construction above provides for a coherent system where a prisoner commits an offence during the period of a parole order. Where that occurs the prisoner becomes subject to a contingent liability that the sentence for that offence will have the result of automatically cancelling the parole order under s 209(1), even if the sentence bringing about that result occurs after the period of the parole order has expired: s 209(2). In that situation the contingent liability in terms of the period to be served is made clear by s 211(2)(c) of the CSA, which provides that the time served under the parole order up to the commission of the relevant offence is taken to be time served

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824 *Bliss* [2015] QCA 53 and *R v Hall* [2018] QSC 101 (18 May 2018) were noted with approval by the Court of Appeal in *R v Brunning* [2018] QCA 263 (9 October 2018) 2 (Davis J, Philippides and McMurdo JJA agreeing).

825 *R v Smith* [2015] 1 Qd R 323, 326 [21] (Morrison JA, Muir JA and Daubney J agreeing).

826 Ibid 326 [22] (Morrison JA, Muir JA and Daubney J agreeing).

827 Ibid 326 [23] (Morrison JA, Muir JA and Daubney J agreeing).

828 Ibid 326 [24] (Morrison JA, Muir JA and Daubney J agreeing), noting at [25] and [26] that CSA sections 214 and 215 also support this approach. See also *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013), 11 [29] (Long SC DCJ).

under the period of imprisonment, but the balance of the period is not. The balance of the period is the "unexpired portion" which must be served if the prisoner is arrested: s 210(3) of the CSA.

[31] It does not matter to that analysis that a prisoner is outside prison when the prisoner is on parole. Section 214 of the CSA makes it clear that a prisoner released on parole is still taken to be serving the sentence. Further, if the contingent liability comes to pass, in the sense that a parole order is cancelled under s 209, the prisoner will not be taken to have served the period of imprisonment.[829]

9.6.2 The Court of Appeal: *R v Bliss* [2015] QCA 53 (14 April 2015)

Smith was applied by the Court of Appeal in *R v Bliss*.[830] Jackson J, with whom McMurdo P and Holmes JA agreed, found, applying *Smith*:

- The sentencing judge was required to fix a parole eligibility date because Mr Bliss had a court ordered parole order cancelled under section 209 of the CSA 'during the offender's period of imprisonment'.[831]
- Although the full time discharge date for the first sentence pre-dated the second sentence date, the effect of the second sentence was to cancel parole on the first sentence retrospectively to the date of the first offence committed during release on parole.[832]
- Accordingly, the 28 day period between the commission date of the first offence committed on parole and parole cancellation (cancelled, it appears, by the Board) became time he was required to serve in prison, quite apart from any term of imprisonment ordered upon the new sentence. That time period became part of the applicant's 'period of imprisonment' within the meaning of section 160B(2) of the PSA.[833]

District Court judges were alive to the retrospectivity issue in earlier single judge decisions. In *Coolwell v Commissioner of the Queensland Police Service*, Rafter SC DCJ wrote:

> If the aim of section 160B(2) PSA is to require an offender whose court ordered parole order was cancelled under CSA s 205 or 209, to apply for parole rather than having a parole release date fixed by the court, then it is difficult to see why the cancellation itself must occur during the period of imprisonment. An offender might commit an offence at any time

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829 Ibid 327 [27]–[32] (Morrison JA, Muir JA and Daubney J agreeing). In *R v Hall* [2018] QSC 101 (18 May 2018), Dalton J explained 'the primary sentencing Judge in *Smith* made an additional, and slightly unusual, order as part of the sentencing, and that order led to some problematic statements in the final paragraphs of *Smith*' (4 [18]); but: 'If and insofar as these paragraphs imply that, absent the order which "backdated" the stealing sentence, s 160B(2) would not have applied, then they are, with respect, incorrect. In the absence of the "backdating" order, a parole eligibility date was nonetheless required for the reasons given at [17] above. This is consistent with the decision in *Bliss* which was relevantly on all fours with *Smith* factually, except that there was no "backdating" order' (5 [21]). As to the reasons at 4 [17], Dalton J wrote: 'Having regard to the legislative provisions just detailed, the primary Judge in *Smith* was right to impose a parole eligibility date pursuant to s 160B(2) of the PSA. At the time the primary Judge imposed a sentence, Smith began a term of imprisonment pursuant to that sentence. As well, because some of the offences for which Smith was sentenced had taken place during Smith's release on parole, at the time the sentence was pronounced Smith also began to serve part of the term of imprisonment imposed on 24 July 2012. Thus, when sentence was pronounced by the primary Judge in *Smith*, the defendant began serving a period of imprisonment consisting of these two terms. When sentence was pronounced, that triggered the cancellation of the parole order under s 209 of the CSA. In that sense the cancellation happened "during the offender's period of imprisonment" within the meaning of s 160B(2) of the PSA. That period of imprisonment was an unbroken period of imprisonment including both the term imposed by the primary sentencing Judge (in accordance with the definition at s 160 of the PSA) and the term imposed by the Magistrate in July 2012'.

830 *R v Bliss* [2015] QCA 53 (14 April 2015). The two sentences in question were:

Sentence one:

Sentence date 25 July 2012

Sentence: 3 years imprisonment (329 days pre-sentence custody)

Parole release date: 7 August 2012

Full time discharge date: 1 September 2014

Offences committed on parole – first on 29 October 2012

Parole cancelled – 26 November 2012 (28 days from first breaching offence, which pre-dated the final 'new' offence by 2 days)

Sentence two (subject of the appeal):

Sentence date 10 September 2014

Sentence: 2 years, 8 months, 15 days; cumulative on sentence 1 (8 days pre-sentence custody)

Parole eligibility date: 2 March 2015.

831 *R v Bliss* [2015] QCA 53 (14 April 2015) 4 [11] (Jackson J, Margaret McMurdo P and Holmes JA agreeing).

832 Ibid 4 [14] (Jackson J, Margaret McMurdo P and Holmes JA agreeing).

833 Ibid 4 [10], [14] (Jackson J, Margaret McMurdo P and Holmes JA agreeing).

> during the period of a court ordered parole order but the offence might not be detected for some time. There may be a delay in apprehending the offender or in the matter being dealt with by the court.[834]

Long SC DCJ noted this point in *Soanes v Commissioner of Police*, and added:

> The expiry of the period of the parole order may not coincide with the expiry of the parole order.[835]
>
> There may be an analogy drawn with the position of an offender who is convicted of an offence that has occurred well in the past. Despite any intervening legislative changes and subject to s 11 of the *Criminal Code*, the position as recognised by s 20 of the *Acts interpretation Act 1954*, is that any accrued liability under the laws existing at the time of the commission of the offence, is preserved and later brought into effect by any subsequent conviction.[836]

9.6.3 Pre-sentence custody

In *Kim v Arbuckle*, Robin QC DCJ considered that time spent in custody on remand did not constitute a 'period of imprisonment' for the purposes of section 160B(2) of the PSA:

> The question becomes whether, retrospectively, on a sentence when pre-sentence custody is made the subject of a declaration, a period of imprisonment whose status was unclear then becomes identifiable and must be treated as a period of imprisonment. That strikes me as unfair to an offender given the consequence that all he or she can then expect is the less satisfactory order for a parole eligibility date rather than a fixed date.[837]

In *Coolwell v Commissioner of the Queensland Police Service*[838] Rafter SC DCJ noted this as 'the view [Robin DCJ] formed'.[839] In *R v Bliss*,[840] the sentence date also post-dated the expiry of the parole period and the 8 days' pre-sentence custody seems to have linked the two. Apart from stating them, the judgment in *Bliss* does not comment on the periods of pre-sentence custody.

In *R v Hall*, Dalton J stated:

> The application of s 160B(2) cannot depend on stochastic factors [i.e. factors randomly determined][841] such as whether or not there is an order of the type made by the primary Judge in Smith;[842] whether there was a declaration of time served, or whether the full-time release date of the prior sentence had passed at the time of the second sentencing occasion.[843]

9.6.4 Cumulative terms under section 156A of the PSA

In *Soanes v Commissioner of Police*,[844] an order for imprisonment with a parole release date was set aside and a wholly suspended sentences was supplemented. There was a totality issue in respect of section 156A of the PSA. That section requires that imprisonment imposed for a schedule 1 PSA (serious violent offences) offence be served cumulatively with any other term of imprisonment the offender is liable to serve if the schedule 1 offence was committed while the offender was serving a term of imprisonment or released on parole.

Section 209 of the CSA does not apply to ICOs or wholly suspended sentences.[845] In Mr Soanes' case, a wholly suspended sentence meant that:

> There would be no cancellation of the parole order, and therefore, at the time of sentence, no liability to serve any part of the earlier period of imprisonment and therefore nothing upon which to make such an order operate cumulatively, under section 156A of the PSA.[846]

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834 *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487 (16 December 2010) 7 [26] (Rafter SC DCJ).

835 *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013) 14 [35] (Long SC DCJ).

836 Ibid 15 [37] (Long SC DCJ).

837 *Kim v Arbuckle* [2009] QDC 267 (3 July 2009) 5 (Robin QC DCJ).

838 *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487 (16 December 2010) 6 [24] (Rafter SC DCJ).

839 Ibid 6 [24] (Rafter SC DCJ).

840 *R v Bliss* [2015] QCA 53 (14 April 2015).

841 Having a random probability distribution or pattern that may be analysed statistically but may not be predicted precisely. *Oxford English Dictionary* (online at 14 April 2019) 'stochastic'.

842 A 'backdated' order.

843 *R v Hall* [2018] QSC 101 (18 May 2018) 5 [25] (Dalton J), citation omitted.

844 *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013).

845 *Corrective Services Act 2006* (Qld) s 209(3)(b) and see *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013) 9 [23] (Long SC DCJ).

846 *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013) 9 [23] (Long SC DCJ) and see 23 [58].

Otherwise:

> [47] …once a scheduled offence is committed in the period of the parole order, a liability to serve the then unexpired portion of the period of imprisonment arises, which liability is contingent on the fact of conviction of that offence, even if that occurs after the end of the period of the parole order.
>
> [48] In that sense and because of that contingent liability and if the contingency is effected, there is no unbroken liability to serve a period of imprisonment. The nexus is maintained because, when engaged, s 156A requires that any additional term of imprisonment be served "cumulatively with any other term of imprisonment that the offender is liable to serve" and s 210(3) of the CSA has the effect of the offender being "taken to prison to serve the unexpired portion of the prisoner's period of imprisonment". In this sense, s 209 of the CSA does not operate, in such circumstances, to create some new and separate liability to serve the previously unserved portion of any prior period of imprisonment.
>
> [49] If an order for imprisonment of a kind which engages s 209 of the CSA is made, it is necessarily an order which would also engage s 156A of the PSA. Therefore what is required is an order that the relevant terms of imprisonment be required to be served cumulatively.[847]

In *Addo v Senior Constable Jacovos*,[848] Morzone QC DCJ dealt with an appeal against sentence imposed for offences committed while existing board ordered parole[849] with an eligibility date was suspended. His Honour wrote:

> [37] The appellant argues that the offence was committed when he was "unlawfully at large"850 and liable to serve the suspension period, but was not serving the sentence the subject of his parole pursuant to s 214 of the [CSA]. For this reason, it was submitted that the appellant was not then "released on a parole order" for the purposes of s 156A(1)(b)(ii) of the PSA. It seems to me that the appellant's argument would place a non-compliant and suspended parolee in a better position than an otherwise compliant parolee who reoffended.
>
> [38] The respondent relies on the continuum of the parole conditions, including that the parolee is under the chief executive's supervision "until the end of the prisoner's period of imprisonment" [CSA s 200(1)(a)(i)].
>
> [40] Section 215 deals with the circumstances of cancellation by the Board under s 205 and the automatic cancellation effected by re-sentence under s 209. There is no similar provision for a suspension of a parole order. While a prisoner remains in the community following the suspension of a parole order he is said to be "unlawfully at large" as defined in the [CSA]. Pursuant to s 206 of the [CSA], he was liable "to be taken to a prison … to be kept there for the suspension period" of 31 days' imprisonment.
>
> [41] I do not accept the appellant's argument because I do not see the concepts as being mutually exclusive in the context of a parolee. Fundamentally, a suspension of a parole order does not end that parole order, instead its temporal operation is suspended until the parolee serves the suspension period. The parole order will continue until it is cancelled or the underlying term of imprisonment expires. Until his arrest a noncompliant parolee is unlawfully at large but remains in the community having been released on parole. In my view a noncompliant parolee remains "released on parole" until he is taken to prison to be kept there for the suspension period.
>
> [42] For these reasons, I conclude that the defendant did commit the subject offending while released on parole pending his arrest. Since the preconditions in s 156A(1)(a)(i) and s 156A(1)(b)(ii) are satisfied, a cumulative sentence was required by s 156A(2) of the [CSA] …
>
> [43] This mandatory sentencing requirement is a relevant to determining a punishment that is "just in all the circumstances" under s 9(1)(a) of the PSA. Section 156A was to be read as subject to the sentencing guidelines [in] s 9 … Where s 156A applied to an offender, the function of the sentencing court is to impose a sentence having regard to the criminality of the current offence. But in so doing the magistrate was required by s 9 to place the sentence in its proper context, namely that it would be imposed in circumstances where it would be cumulative upon completion of the sentence imposed for the past offences [*R v Shillingsworth* [2002] 1 Qd R 527].
>
> [44] In arriving at a just and appropriate sentence the court must avoid imposing artificially inadequate sentences in order to subvert or accommodate the rules relating to accumulation [ultimately His Honour held the aggregate of the relevant sentences, having regard to the non-parole period, would have been too crushing and disproportionate to the overall craiminality; the sentence was manifestly excessive – [72]].[851]

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847 Ibid 19-20 [47]-[49] (Long SC DCJ).

848 *Addo v Senior Constable Jacovos* [2016] QDC 271 (28 October 2016).

849 Therefore the discussion of this case centres on s 156A of the PSA and cumulative sentencing. It was held that a parole release date should have been ordered because the original order breached was board ordered parole arising from an eligibility date: [58].

850 For further information regarding a prisoner being unlawfully at large, see schedule s 4, s 112(4) and s 124 of the *Corrective Services Act 2006* (Qld).

851 *Addo v Senior Constable Jacovos* [2016] QDC 271 (28 October 2016) [36]-[44] (Morzone QC DCJ).

In *R v BLJ*[852] Henry J sentenced an offender for, inter alia, a trafficking offence with dates which spanned partly before and partly during the prior parole order. His Honour determined that this was an offence committed 'during the period of the order' for the purpose of section 209 of the CSA. Henry J stated that this was:

> A continuing offence committed throughout the charged period so that it was committed during the period of the parole order within the meaning of s 209. To put it another way, it was committed while the defendant was released on parole within the meaning of s 156A *Penalties and Sentences Act 1992*.
>
> It follows the sentences to be imposed here for both the trafficking and the possession, must be ordered to be served cumulatively on any other term of imprisonment the defendant is liable to serve. I should therefore sentence the defendant, taking into account, in the sense discussed in *R v Shillingsworth* [2002] 1 Qd R 527, that this sentence will trigger the defendant's service, first, of the earlier imposed sentence…[853]

QUESTION 11: COURT POWERS WHERE OFFENCE COMMITTED WHILE OFFENDER ON PAROLE (CSA, SS 209, 211, 215 AND PSA, S 160B)

11.1 Do the provisions relating to the powers of a court where there is further offending while an offender is on court ordered parole, such as sections 209, 211, 215 of the *Corrective Services Act 2006* (Qld) and section 160B of the *Penalties and Sentences Act 1992* (Qld), require amendment? What changes would you suggest be considered?

11.2 Should section 209 of the *Corrective Services Act 2006* (Qld) be amended so that if a court ordered parole order would, on the current provisions, be cancelled automatically by a new sentence of imprisonment, the sentencing court has a discretion to again set a parole release date if it considers court ordered parole is still appropriate?

9.7 The relationship between court ordered parole, pre-sentence custody declarations and unexpired portions of existing sentences

9.7.1 Part 9, Division 2 of the PSA, calculation – 'no other reason'

Sections 154 to 159A of the PSA (Part 9 Division 2) provide the legislative framework for sentence calculation by judicial officers imposing a sentence. Section 154 states that imprisonment for an offender sentenced on indictment starts 'on the day the court imposes the imprisonment'.[854] Imprisonment for an offender convicted summarily starts 'at the beginning of the offender's custody for the imprisonment'.[855] The exceptions are if the imprisonment is ordered to be served cumulatively,[856] the offender is on bail pending the determination of an appeal,[857] or the offender is unlawfully at large.[858]

Where an offender has served time in custody, section 159A of the PSA requires that time held in custody to be declared as time served, unless otherwise ordered. This section does not apply to a period of custody or imprisonment of less than one day, to a term of imprisonment that has been wholly suspended, or to the suspended part of a partly suspended prison sentence.[859]

For this section to apply, the offender must be 'held in custody in relation to proceedings for the offence and for no other reason'.[860] The term 'no other reason' has caused some difficulty for the courts. It has always existed in the section (in subsections (1) and (4)(b)), since the introduction of the PSA in 1992.

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852 *R v BLJ* [2018] 3 Qd R 255 (18 December 2017).

853 *R v BLJ* [2018] 3 Qd R 255, 257 [10]-[11] (Henry J), applying *R v Smith* [2015] 1 Qd R 323 and *R v Ianculescu* [2000] 2 Qd R 521, 528 [44] (Cullinane J).

854 *Penalties and Sentences Act 1992* (Qld) s 154(1)(a).

855 Ibid s 154(1)(b). It is unclear why there is different wording between a summary conviction and conviction on indictment. A possible explanation is that imprisonment can, in certain circumstances, be imposed on summary conviction in the absence of the offender: see sections 142 and 142A of the *Justices Act 1886* (Qld) which provides for a permissible procedure in the absence of the defendant in certain cases. This was discussed in *Kleinig v The Commissioner of Police* [2015] QDC 304 (27 November 2015).

856 *Penalties and Sentences Act 1992* (Qld) s 156(1).

857 Ibid s 158A.

858 Ibid s 159.

859 Ibid s 159A(2).

860 Ibid s 159A(1).

The provision excludes circumstances where there are multiple offences that are not all before the court at sentence, or where the offender is also serving a sentence for another offence. This is discussed further, with case examples, below.

9.7.2 Complexity in sentencing and in sentence administration

In referring the matter of whether legislative reform is needed to reduce the complexity of the sentencing calculation process, the Council's Terms of Reference cite Recommendation 2 of the 2016 Queensland Audit Office (QAO) report, *Criminal Justice System - Prison Sentences, Report 4: 2016-17* (QAO Report), that:

> The Department of Justice and Attorney-General in collaboration with the Queensland Police Service assess the need to review relevant sentencing legislation to reduce the complexity of sentence calculations.

Sentencing calculations, and section 159A of the PSA, are relevant in any event because of the interplay with court ordered parole and the statutory provisions that apply to where an offender has reoffended while on parole.

The QAO Report was an audit of public sector entities responsible for administering sentences following two previous reviews. It examined how the criminal justice system exchanges and records data to calculate and administer custodial sentences accurately in respect of adults in Queensland.[861]

Inaccurate sentence calculations can have serious risks. If the sentence calculation is incorrect a prisoner may be discharged earlier than the court intended (which poses a risk to the community), or unlawfully detained (which infringes on a prisoner's rights).[862] As well as these risks, errors in sentence calculations risk exposing the State to unnecessary costs.[863]

The QAO Report identified a number of administrative and operational errors which resulted in inaccurate sentence calculations:

- Process and communication issues within and between criminal justice entities were the most common type of error (73 per cent) - where there are failures in sending, receiving or actioning verdict and judgment records and court or parole orders, as well as instances of releasing the wrong prisoner;
- Incorrect data entry (15 per cent) - where court staff incorrectly interpreted the handwritten decision of a Magistrate or Judge or incorrectly entered the court result or discharge date; and
- Inaccurate sentence calculations constituted the remainder (12 per cent) - where staff have incorrectly calculated a prisoner's sentence.[864]

In respect of whether there was a need to review sentencing legislation, the QAO Report noted the following factors contributed to the complexity of sentence calculations:

- Where an offender has served time in custody prior to being sentenced (whether or not this is declared can make the start date of the sentence difficult to determine);
- Where an offender is sentenced for a large number of offences committed on different occasions (and sentences are ordered to be cumulative, concurrently or partially cumulative or a combination); and
- Where there is a change in an offender's sentence (for example, if an offender is sentenced for offences while undergoing an existing sentence; if the offender has been resentenced on appeal; or if an offender has been unlawfully at large).[865]

No specific provisions of the PSA or the CSA were identified as requiring legislative amendment in the QAO report.

The Department of Justice and Attorney-General's (DJAG) November 2016 response to the QAO report indicated that collaboration between justice entities had commenced with the recent re-establishment of the Lawful Detention Expert Reference Group (LDERG) consisting of senior representatives from Queensland Courts Services, QCS and QPS. It would identify, agree and implement inter-agency actions to mitigate the risk of unlawful detention or release of prisoners.[866]

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861 Queensland Audit Office, *Criminal Justice System – Prison Sentences. Report 4: 2016–17* (2016) 2.

862 Ibid 1.

863 Ibid 1. Costs such as 'managing prisoners beyond their sentence, locating and returning prisoners released in error and managing complaints, compensation, and legal costs'.

864 Ibid 3 and 29.

865 Ibid 13–15.

866 Letter from David Mackie, Director General, Department of Justice and Attorney-General, 24 November 2016, attached to Queensland Audit Office, *Criminal Justice System – Prison Sentences. Report 4: 2016-17* (2016), 2, 60-65.

The reply noted that DJAG would:

> Consult with stakeholders, both internal and external to Government, to assess whether discharge and detention errors are due in part to any complexity inherent in the relevant legislative provisions.
>
> This assessment will also consider any relevant findings and recommendations in the final report of the Queensland Parole System Review, led by Mr Walter Sofronoff QC…

The QAO's recommendation was subsequently referred to in the Council's current Terms of Reference.

Since the QAO's report, the LDERG has continued to report regularly, and also reports quarterly to an Oversight Committee (OC).

Membership of the LDERG and OC is at senior decision-making level providing visibility and awareness of cross agency issues and assists with the implementation of actions by the respective agencies.

The Council is liaising with members of the LDERG to identify specific provisions that give rise to sentence calculation errors. The complexity of the provisions discussed in this chapter highlights the challenges for courts and other agencies in determining appropriate orders that can (or must) be made and in calculating the sentence.

The Council also invites views of stakeholders on this issue. Relevant provisions of sentencing legislation are explored further below.

QUESTION 12: SENTENCE CALCULATION

Are there any particular sections of the *Penalties and Sentences Act 1992* (Qld) or *Corrective Services Act 2006* (Qld) that make the sentencing calculation process in Queensland unnecessarily complex? If so, how would you recommend the current level of complexity be remedied?

9.7.3 *R v McCusker* [2015] QCA 179 (29 September 2015) – an exception to the general rule

In *R v McCusker*,[867] the following occurred in chronological order:

- Mr McCusker unlawfully killed someone;
- he then committed unrelated property offences two months later;
- he was sentenced to imprisonment with a parole release date for the property offences (a wholly suspended sentence pre-dating all of these offences was also fully invoked but does not otherwise feature);
- he was later charged (initially with murder, although the Crown ultimately accepted a plea of guilty to manslaughter) during the non-parole period of the imprisonment for the property offences;
- he was not released on his parole release date purely because of the operation of section 199(2) of the CSA (because he was on remand for the murder charge, see below).

The relevant parole board did not take any action (such as suspension) because it was barred by statute from issuing the court ordered parole order in the first place. McMeekin J noted the relevant statutory provisions:

- PSA section 159A(1) (Time held in presentence custody to be deducted):
- If an offender is sentenced to a term of imprisonment for an offence;
- any time that the offender was held **in custody in relation to proceedings for the offence and for no other reason** (emphasis added);
- must be taken to be imprisonment already served under the sentence;
- unless the sentencing court otherwise orders.[868]
- PSA section 159A(10): 'proceedings for the offence includes proceedings that relate to the same, or same set of, circumstances as those giving rise to the charging of the offence'.
- CSA section 199 (Court ordered parole order): The chief executive (1) must issue a court ordered parole order for a prisoner in accordance with the date fixed for the prisoner's release on parole under the

867 *R v McCusker* [2015] QCA 179 (29 September 2015).

868 As to the words 'otherwise orders': 'That provision mandates that a declaration for presentence custody must be made by the court, if there is declarable presentence custody, unless the sentencing court otherwise orders. There is no discretion conferred to make a declaration in respect of presentence custody, where it is not declarable in accordance with the terms of the provision': *R v Carter* [2016] QSC 86 (14 April 2016) 8 [34] (Mullins J).

PSA – but (2) cannot do so if the prisoner is being detained on remand for an offence, unless bail is granted or the charge is withdrawn.

The primary judge had held that the time from the parole release date for the property offences, to the expiry of the period of that order could not be declared as time served under the subsequent manslaughter sentence:

> I should take into account (although not in a precise mathematical way) the fact that you were required to serve the whole of the sentence imposed on you on the earlier offences because of your arrest for [the murder charge].[869]

On this point, the Court of Appeal's judgment stated:

> The approach that her Honour took, or at least expressed, is a very common one. It applies in the more usual case where the prisoner before the court has no immediate right of release in respect of the other offences, offences not the subject of the proceedings, on which he or she is being held. Then there is a need to apply some judgment as to what part of the period ought to be brought into account. There is then some other reason for the incarceration of the prisoner. But that is not this case.[870]

> The approach the primary judge expressed -- that the applicant was "required to serve the whole of the sentence imposed on [him] on the earlier offences because of [his] arrest for this offence" -- while true as a statement of what had transpired, did not reflect any requirement of the legislation. The legislation did not "require" the applicant to serve any further imprisonment in relation to those earlier offences.[871]

Mr McCusker was in fact entitled to have the entire 553 days spent in pre-sentence custody from after the property offences parole release date to his manslaughter sentence declared to be time taken to be imprisonment already served on the latter sentence (as opposed to 35 days initially declared).[872]

It is clear that this time served was in large part Mr McCusker simultaneously serving out his entire head sentence for the property offences in addition to being held on remand on the murder charge (which triggered s 199(2)). It was 'obvious', though, that the only reason for Mr McCusker's incarceration after his parole release date was that he faced a murder charge:

> Hence, the argument that there was some reason other than that "the offender was held in custody in relation to proceedings for the offence" before the court -- that offence being the murder charge -- was technical at best. In justice, whether declarable or not, there was no reason why that time in custody should not have been treated -- in full -- as time served under the sentence imposed for the unlawful killing ...[873]

Section 199(1) of the CSA otherwise entitled Mr McCusker to be released on his property offences parole release date.[874] Had the sentence taken place on that parole release date, he 'would have not served one day more of the sentence imposed for the prior and unrelated offences'.[875] McMeekin J noted that:

> This was an unusual case ... The considerations surrounding the pre-sentence custody served, while not unique, are not usually found.[876]

9.7.4 The 'more usual' case

In *R v Carter*,[877] Mullins J considered McCusker and concluded:

> *McCusker* represents an exception to the general rule that a declaration for presentence custody is not made where an offender is held on remand for a particular offence at the same time as serving an actual sentence for another offence. The exception was justified, however, by reference to the effect of s 199 of the CSA.[878]

Further:

> What can be noted about s 159A of the PSA (and s 161 as it stood when Mr Carter was sentenced at the trial) is that its focus is on giving credit to an offender for "presentence" custody, while the proceedings for the relevant

869 *R v McCusker* [2015] QCA 179 (29 September 2015) 4 [9] (McMeekin J, Morrison and Philippides JJA agreeing).

870 Ibid 6 [25].

871 Ibid 6 [20].

872 Ibid 6 [26].

873 Ibid 5 [15].

874 Ibid 6 [19].

875 Ibid 6 [20].

876 Ibid 4 [7].

877 [2016] QSC 86 (14 April 2016) 6 [20]-7 [27] (Mullins J).

878 Ibid 7 [26].

> offences have not been finalised. In general terms, it does not apply to presentence custody where an offender is held on remand for a particular offence at the same time as serving an actual sentence for another offence.[879]

Mr Carter was convicted of murder after a retrial and sentenced to the mandatory life sentence, with 54 days of pre-sentence custody declared as time served. Earlier, at his first murder trial, he had pleaded guilty to other offences resulting in an effective concurrent two year sentence (with 70 days declared for all non-murder offences). His appeal against the initial murder conviction was allowed about five weeks after the date he would have been released if he had only been sentenced to the two-year term. He was released from custody on bail on the murder charge the following month. At the second murder sentence, Mr Carter sought unsuccessfully to reopen his sentence, seeking:

> Credit against his current sentence of life imprisonment for the period of 487 days that he served as imprisonment on account of the sentence imposed for the offence of murder at the first trial which was served at the same time as he was serving the sentences for the [other offences resulting in the two-year term].[880]

After commenting on *McCusker* as above, Mullins J noted:

> Mr Carter did, in fact, get the benefit of a presentence custody declaration on the basis of analogous reasoning to McCusker in respect of the period he had been in presentence custody between [the release date on the concurrent two-year term] and [the date of release on bail after the successful murder conviction appeal] on the basis that he would have been released from custody for the [non-murder offence on its release date].[881]

Mullins J held that the 487 days Mr Carter sought credit for, were attributable to the earlier sentence imposed at the first trial,[882] which constituted a different reason for the prior period of imprisonment.[883] Her Honour noted that 'there is no discretion conferred to make a declaration in respect of presentence custody, where it is not declarable in accordance with the terms of the provision'.[884]

> In the normal course, where an offender who is being sentenced has been held on remand, but cannot get the benefit of presentence custody which is not otherwise attributable to any sentence, but for some other reason is not declarable under s 159A, it is usual for the sentencing judge to take that non-declarable presentence custody into account by reducing the sentence and/or the period before which the offender is eligible for parole.[885]

There are numerous examples of sentence appeals in Queensland Court of Appeal judgments where this relief was sought by applicants who had reoffended while on parole, having had to return to custody to complete the unexpired portion of their existing sentence (s 211 CSA) and who had spent periods of time in custody that could not be declared under section 159A of the PSA.[886]

Such appeals typically involve complaints regarding:

- inadequate application of the totality principle (expressed in the context of the global head sentence[887] or because no allowance was made for a consequence of the commission of the offences being that the applicant had to serve a further period being the balance of previous sentences);[888]
- failure to give sufficient weight to the period of non-declarable pre-sentence custody.[889]

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879 Ibid 5 [19].

880 Ibid 3 [6]. The version of s 159A at play in this case was an effectively an older, pre 2004 version – see 4 [13]. But this does not appear to alter the relevance of the case.

881 Ibid 7 [27]. See for example, *R v Smith* [2018] QCA 228 (21 September 2018) 3 [7], 13 [4] (Henry J, Sofronoff P and Morrison JA agreeing);

882 Ibid 7 [32].

883 Ibid 8 [32].

884 Ibid 8 [34].

885 Ibid 8 [355, cited with approval in *R v Gray* [2016] QCA 322 (2 December 2016) 8 [37] (Morrison JA, McMeekin J agreeing). See also *R v Skedgwell [*1999] 2 Qd R 97; *R v Holton* [1998] 1 Qd R 667; *R v Jones* [1998] 1 Qd R 672.

886 Because there was 'another reason', including, as well as return to custody because of reoffending on parole, absence of a summary charge which also related to the remand period (*R v Smith* [2018] QCA 228 (21 September 2018) 3 [7]; *R v Vidler* [2018] QCA 232 (24 September 2018) 3, *R v NT* [2018] QCA 106 (5 June 2018) 5 [13]) and because the applicant had been on a supervision order made pursuant to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld): *R v Hansen* [2018] QCA 153 (6 July 2018).

887 *R v Macklin* [2016] QCA 244 (30 September 2016); *R v McAnally* [2016] QCA 329 (9 December 2016) 3 [7] (Morrison JA, Fraser and McMurdo JJA agreeing).

888 As in *R v Mohammed* [2018] QCA 289 (24 October 2018) 1 (McMurdo JA, Gotterson JA and Douglas J agreeing).

889 *R v Macklin* [2016] QCA 244 (30 September 2016); *R v NT* [2018] QCA 106 (5 June 2018); *R v Gray* [2016] QCA 322 (2 December 2016) 3 [8] (Morrison JA with McMeekin J agreeing, McMurdo P dissenting).

A sentencing judge is not obliged to take into account time spent in pre-sentence custody that is not declarable under section 159A — some allowance can be made for it, but it is not required to be the entirety of the pre-sentence custody.[890] Furthermore, it is not mandatory to do so at the first opportunity, although this is generally desirable:[891]

> Where a period of custody cannot be declared, the sentencing judge should 'make it plain in the sentencing remarks whether and to what extent and in what manner, such an allowance is being made on account of a period of that custody'.[892]

While this 'is an important guidance for sentencing judges, it does not prescribe a legal requirement, a noncompliance with which will necessarily involve an error in the exercise of the sentencing discretion'.[893] A judge is 'not obliged to announce effectively two sentences, one which would be imposed apart from this period, and the other sentence, which would be imposed by bringing it into account'.[894]

9.7.5 The complication of mandatory sentencing on pre-sentence custody and totality issues

In Chapter 5 of this paper, we discussed how mandatory sentencing provisions can limit courts' discretion and give rise to uncertainty about their intended application.

Mandatory sentence provisions which cannot be mitigated or varied, such as those that apply to murder,[895] weapons[896] and dangerous prisoner offences,[897] also operate to constrain the ability of courts to make allowance for non-declarable time served. For example, by not allowing courts to reduce head sentences or non-parole periods in the ways detailed above.

This was highlighted in the case of *R v Fox*.[898] In that case, the offender was on bail for attempted murder. While on bail, the offender committed further offences, including murder. He was arrested on 1 February 1997 and held for 98 days before his bail for the attempted murder was revoked on 9 May 1997. Until his conviction he was held in custody for both sets of offences (totalling 371 days). At sentence, only the 98 days was declared as time served.[899] This was the subject of appeal, with the Court of Appeal finding:

> … in the case of the appellant, it is not open to this Court, any more than it was to the trial judge, either to reduce the period to be served under the head sentence of life imprisonment, or to accelerate the date of eligibility of parole, by reference to the period spent in custody after 9 May 1997. In making the declaration that 98 days of that period of custody was to be treated as time served under the sentences imposed, his Honour acted in accordance with *R. v. Blake* [1995] 2 Qd.R. 167; but the law allowed him to go no further than that in recognising and giving effect to the 371-day period of pre-trial custody. It seems pointless to continue urging that the drafting and interaction of these provisions is obscure, and in need of legislative attention: see *R. v. Blake* [1995] 2 Qd.R. 167, 170; but little harm can be done by repeating the plea on this occasion.[900]

9.7.6 Pre-sentence custody in other jurisdictions

A review of the relevant provisions in NSW, Victoria, the ACT, Tasmania, South Australia, Western Australia and Northern Territory illustrates the different ways pre-sentence custody can be taken into account. While these provisions operate within the wider context of the sentencing regimes within those jurisdictions, comparing how they operate in the context of mandatory sentences (being the most restrictive on judicial discretion) can highlight whether such provisions may complicate sentencing.

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890 *R v McAnally* [2016] QCA 329 (9 December 2016) 11 [52] (Morrison JA, Fraser and McMurdo JJA agreeing).

891 *R v Vidler* [2018] QCA 232 (24 September 2018) 3 (McMurdo JA, Sofronoff P and Henry J agreeing) citing *R v Fabre* [2008] QCS 386 [14]. See also *R v Heta* [1997] QCA 179 (30 May 1997) (Fraser JA). The same point was made in *R v NT* [2018] QCA 106 (5 June 2018) 7 [27] (Atkinson J, Gotterson and Morrison JJA agreeing).

892 Ibid, 4 citing *R v Skedgwell* [1999] 2 Qd R 97, 100 (McPherson JA, Davis JA and Shepherdson J agreeing).

893 Ibid. See also *R v Mohammed* [2018] QCA 289 (24 October 2018) 5 (McMurdo JA, Gotterson JA and Douglas J agreeing) commenting on *R v Macklin* [2016] QCA 244 (30 September 2016).

894 Ibid.

895 *Criminal Code* (Qld) s 305.

896 *Weapons Act 1990* (Qld) ss 50(1)(d); 50(1)(e); 50B(1)(e); 65(1)(c).

897 *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) s 43AA(2) (contravening a relevant order by removing or tampering with a stated device for the purpose of preventing the location of the released prisoner to be monitored – minimum penalty —1 year's imprisonment served wholly in a corrective services facility; maximum penalty—5 years imprisonment).

898 [1998] QCA 121 (12 June 1998).

899 The previous section was 161 of the *Penalties and Sentences Act 1992* (Qld).

900 *R v Fox* [1998] QCA 121 (12 June 1998), 19 (McPherson JA, Pincus JA and Thomas J agreeing). Note: At the time the relevant provisions were sections 158 and 161 of the *Penalties and Sentences Act 1992* (Qld).

As discussed above, the Queensland regime requires that the sentence begins on the day of sentence, with pre-sentence custody recognised as a declaration of time served under the sentence. Complexity in sentencing can occur where the offender is in custody other than 'for no other reason', such as if there are multiple offences or because the offender is detained for another reason[901] or is serving a sentence.

In the ACT, NSW, Tasmania, South Australia, Western Australia and the Northern Territory, legislation provides for 'backdating' the start of the sentence to an earlier date to take into account pre-sentence custody. A discretion to set a date for the sentence to commence prior to the sentence date may allow a court to recognise pre-sentence custody which, under the current Queensland regime, could not otherwise be reflected.[902]

Some jurisdictions (Victoria and the ACT) refer to an offender being 'continuously in custody since arrest'. There was similar wording in the Queensland legislation and the practical difficulties were discussed in the 2002 decision of *R v Guthrie*.[903] In 2004 the wording of section 161(4) [now s 159A(4)] was amended to remove the requirement for the offender to be in custody 'continuously' from arrest.[904]

NSW

Under section 24 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a 'court must take into account any time for which the offender has been held in custody in relation to the offence'. There is no limitation for when there are multiple offences or if an offender is held in custody for another reason.

The Judicial Commission of NSW has noted:

> The ambit of the phrase in s 24(a) — "any time for which the offender has been held in custody in relation to the offence" — has been a source of ambiguity. The provision is silent on the question of whether pre-sentence custody attributable both to other offences and the offence for which the offender stands for sentence should be taken into account. The section also leaves the issue of exactly how such time is to be taken into account to the sentencer's discretion.[905]

Under the NSW sentencing regime, a court also has a general power to reduce the penalty imposed on an offender, even if it is a life sentence,[906] unless the offence is the murder of a police officer[907] or assault causing death when intoxicated.[908]

Victoria

Section 18 of the *Sentencing Act 1991* (Vic) provides that any period an offender was held in custody 'must be reckoned as a period of imprisonment or detention already served unless the sentencing court… otherwise orders.' Where there are multiple offences, section 18(6) provides:

> If a person charged with a series of offences committed on different occasions has been in custody continuously since arrest, the period of custody for the purposes of subsection (1) must be reckoned from the time of his or her arrest even if he or she is not convicted of the offence with respect to which he or she was arrested or of other offences in the series.

Potentially, the wording 'been in custody continuously since arrest' could result in additional complexity if an offender has been granted bail prior to sentence and the time has not been 'continuous'. However, the provision does provide a basis to declare time where there are multiple offences.

The Victorian Court of Appeal has also affirmed its inherent jurisdiction to take into account pre-sentence custody independently of the operation of section 18 the *Sentencing Act 1991* (Vic) at the first opportunity (known as the

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901 For example, an offender could be detained under the *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) ss 8, 13 or 21; or an offender could be detained by virtue of an interstate warrant as occurred in *R v Guthrie* (2002) 135 A Crim R 292, 297 [28] (Mullins J, de Jersey CJ and Williams JA agreeing).

902 See *R v Fox* [1998] QCA 121 (12 June 1998) and *R v Carter* [2016] QSC 86 (14 April 2016).

903 (2002) 135 A Crim R 292, 293–294, [5]–[9] (Williams JA).

904 In the Explanatory Notes, Justice and Other Legislation Amendment Bill 2004 (Qld) at 16 it was explained that: 'Section 161(4) [now 159A(4)] has been redrafted to replace the term "series of offences" with "a number of offences" to clarify that a connection between the offences is not required, and to remove the requirement in existing section 161(4)(b) [now 159A(4)(b)] for the offender to be in custody "continuously" from arrest'.

905 Judicial Commission of NSW, *Sentencing Bench Book* (last updated September 2018) [12-500].

906 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21 and 61.

907 *Crimes Act 1900* (NSW), s 19B.

908 *Crimes Act 1900* s 25B.

'*Renzella* discretion' after the Court of Appeal decision that first affirmed this).[909] This mirrors the situation in Queensland in *R v Fabre*[910] and subsequent decisions as discussed above.

In Victoria there is a standard sentence scheme, but there is discretion for the fixing of non-parole periods.[911]

The ACT

Under section 63 of the *Crimes (Sentencing) Act 2005* (ACT), the court may 'backdate' sentences. Where there is pre-sentence custody, 'the court must take into account any period during which the offender has already been held in custody in relation to the offence'.[912] Where there are multiple offences and the offender has been in custody continuously since arrest, the period of custody 'must be worked out from the time of the offender's arrest'.[913] This applies even if the offender is not convicted of an offence for which they were arrested.[914]

Similar to Victoria, the words 'continuously since arrest' may be problematic if an offender has been released on bail. However, there is a discretionary power for courts to reduce the penalties imposed, even where an offender is liable to imprisonment for life.[915]

Tasmania

In Tasmania, section 16 of the *Sentencing Act 1997* (Tas) provides that when sentencing an offender to a term of imprisonment, a court 'must take into account any period of time during which the offender was held in custody in relation to, or arising from, that offence' and may order that a sentence can commence on a day earlier than the sentence date.

The wording does not limit a court's discretion where an offender has been held in custody on multiple offences. The regime in Tasmania also provides courts with a discretionary power in respect of mitigating a life sentence for murder,[916] and mandatory minimum sentences for causing serious bodily harm to a police officer can be mitigated if there are exceptional circumstances.[917]

South Australia

Section 44 of the *Sentencing Act 2017* (SA) provides that where there is pre-sentence custody, the court may take into account the time spent in custody and either make an appropriate reduction or direct the day the sentence will commence (either on the day the offender was taken into custody or on a date specified after the offender was taken into custody but before the day of sentence). If a court fails to specify when the sentence is to commence and the offender is in custody for the offence, the sentence will commence on the day the offender was last taken into custody.[918] If a court fails to specify when the sentence is to commence and the offender is in custody for some other offence, the sentence will commence on the day of sentence, unless the sentence is cumulative.[919]

In South Australia, where there is a mandatory period of imprisonment, if the court is satisfied 'that special reasons[920] exist for fixing a non-parole period shorter than the prescribed period' the court can impose that period.[921]

Western Australia

In the *Sentencing Act 1995* (WA), section 87 allows pre-sentence custody to be taken into account if the offender has spent time in custody for the offence or if the offender is in custody on another offence but on bail for an offence to be sentenced (unless the time in custody has already been taken into account).

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909 See *R v Renzella* [1997] 2 VR 88; and *R v Arts* [1998] 2 VR 261 cited by Freiberg, above n 117, 821–826.

910 *R v Fabre* [2008] QCA 386 (4 December 2008) at [14] (Fraser JA, Keane and Muir JJA agreeing).

911 *Sentencing Act 1991* (SA) ss 5A, 5B(4)(b), 11 and 11A.

912 *Crimes (Sentencing) Act 2005* (ACT) s 63(2).

913 Ibid s 63(4).

914 Ibid ss 63(4) and (5).

915 Ibid s 32.

916 *Criminal Code* (Tas) s 158.

917 *Sentencing Act 1997* (Tas) s 16A.

918 *Sentencing Act 2017* (SA) s 44(6)(b).

919 Ibid s 44(6)(c).

920 'Special reasons' are limited to the matters in s 48(3) of the *Sentencing Act 2017* (SA).

921 *Sentencing Act 2017* (SA) s 48.

The court can take the pre-sentence custody into account in one of two ways, either by reducing the appropriate period if sentenced to a 'fixed term'[922] or order the sentence to have begun on a specified date (between when custody began but no later than the sentence date).[923] An order for a sentence to begin prior to the sentence would apply to offences such as murder where there is no discretion to mitigate the sentence.[924]

Northern Territory

Section 63(5) of the *Sentencing Act 1995* (NT) states that where an offender has been in custody on account of the arrest, the court may order that the imprisonment commences on the day the offender was arrested or any other day (until the sentence date).

The provision does not restrict a court ordering a sentence to begin prior to the sentence date which may allow a court to recognise time spent in custody if there are multiple offences or the offender is in custody for another reason. In the Northern Territory, while there are non-parole periods for the offence of murder, there is a discretion for a court to fix a non-parole period that is shorter than the standard non-parole period[925] if there are exceptional circumstances.[926]

QUESTION 13: TIME IN PRE-SENTENCE CUSTODY WHICH IS DECLARABLE

13.1 Should section 159A(1) of the *Penalties and Sentences Act 1992* (Qld) be amended to allow the court an ability to declare pre-sentence custody in circumstances where this is currently not permitted (e.g. by removing the words 'for no other reason')?

13.2 Should section 159A(4)(b) be similarly amended, or greater clarity provided as to its application? Are there risks regarding unintended consequences if such an amendment was made?

9.8 Parole System Review Final Report Recommendation 3: fixing release for a head sentence of over 3 years where there is time on remand and a short time to release

Time on remand can run to such a length that it represents a large proportion of the ultimate head sentence. If that head sentence is over three years, there can be no fixed parole release date. The end result may be a prisoner serving most of the head sentence in custody, with little or no rehabilitation to benefit either the prisoner or the community. The unfairness of this is exacerbated if the prisoner pleaded guilty.

A court may struggle within such confines to create a sentence that is just, reflects a guilty plea, allows for supervision and reflects the time served on remand. For example, a stakeholder noted that a judge may order a fixed parole release date, but not declare the time served and instead take it into account, reducing the head sentence to three years, to allow for immediate release on parole. The negative consequences of such a course are:

- It gives a false picture when reviewing sentencing statistics.
- It means that the actual/effective sentence is not reflected in the person's criminal history.
- It can unfairly give the impression that the sentence does not reflect the seriousness of the offence.

After discussing the difficulties with a proposal, discussed below, to extend court ordered parole as a matter of discretion to sentences of more than three years, the Parole System Review Final Report went on to make Recommendation 3 in the alternative:

> A Court should have the discretion to set a parole release date or a parole eligibility date for sentences of greater than three years where the offender has served a period of time on remand and the Court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence.

922 Meaning 'a term that is not life imprisonment': *Sentencing Act 1995* (WA), s 85.

923 *Sentencing Act 1995* (WA) ss 87(1)(c) and (d).

924 Ibid s 90.

925 *Sentencing Act 1995* (NT) s 53A(6).

926 Ibid s 53A(7).

The power to make a parole eligibility date in such circumstances merely represents the status quo.[927] It appears to be included in the recommendation to make it clear that in this context, courts would have a dual discretion[928] in order to fix the following 'anomaly':[929]

> However, there is a limited set of circumstances in which the Court faces a real difficulty when sentencing an offender who has served a long period on remand. If the Court considers that the best interests of the community would be served if only a further short period of time in custody is served before release under supervision but that appropriate head sentence is greater than three years the Court cannot give effect to that conclusion. The Court is deprived of the flexibility in those circumstances to fix a parole release date. The Court's options, in those circumstances, are limited to either:
>
> (a) imposing a suspended sentence, which would ensure the date of release but not provide for supervision and rehabilitation in the community through Probation and Parole; or
>
> (b) imposing a sentence with a parole eligibility date which may have the consequence that the prisoner would serve a longer period in custody than intended by the Court while awaiting the outcome of her or his application to the Parole Board and without any rehabilitative programs being offered during that further custodial period.[930]

Recommendation 3 would ensure an offender sentenced in such circumstances would be 'placed upon the most appropriate order'.[931] The Report noted the following factors in support of the recommendation:

- Defendants may be held on remand because they were refused bail, did not apply for it, or for reasons beyond the person's control (for instance, referral to the Mental Health Court or delays in the disclosure of prosecution material).[932]
- Seventy per cent of the 5,193 remand prisoners in 2015-16 were ultimately sentenced to imprisonment.[933]
- About 48 per cent of prisoners spent less than two months on remand.[934]
- When offenders spend long periods on remand prior to sentence, a Court is limited by the sentencing options available when taking into account the time served on remand by the offender.[935]
- The Court should be able to assess the offender's risk to the community and whether release on parole is appropriate, because the date of release from custody is soon after the time of sentence.[936]

There would still be gaps. Sexual offences and head sentences of four to five years would not be affected.

Some stakeholders cautioned that a broader, more general approach regarding how such a discretion is exercised should be considered. Overly structured, inflexible amendments could lead to unintended consequences when applied practically and unnecessarily fetter the discretion of the individual judge.

The issue of balancing flexibility versus sentencing complexity was also raised, including how sentence calculation of such provisions would be effectively implemented.

9.8.1 Data analysis - the current situation

The Council analysed data regarding court ordered parole.[937] From the 2015-16 to 2016-17 financial years, there were a total of 22,366 adult offenders who were sentenced to imprisonment of any length or a partially suspended sentence of imprisonment for their MSO. Of these, 20,462 offenders (91.5%) were potentially eligible for court

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927 'The option should still be available to the Court to set a parole eligibility date if they deem it appropriate that the offender should undergo the parole application process': Queensland Parole System Review, above n 9, 96 [467].

928 See Queensland Parole System Review, above n 9, 6 [45] and 95 [463] where the recommendation text is cast without the reference to a parole eligibility date.

929 Ibid 6 [43].

930 Ibid 95 [462].

931 Ibid 96 [468].

932 Ibid 96 [464].

933 Ibid 96 [465].

934 Ibid 96 [466].

935 Ibid 96 [466].

936 Ibid 96 [467].

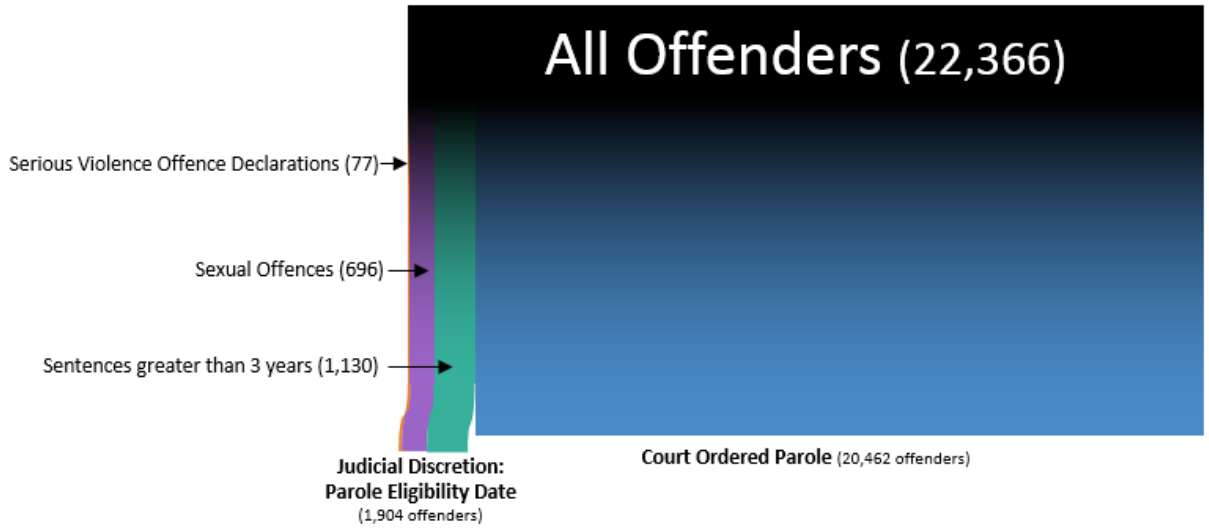
937 Data in this paper includes offenders who were sentenced to either a single and current sentence of imprisonment, or a partially suspended sentence of imprisonment. Sentences imposed in the 2015-16 to 2016-17 financial years were analysed. For offenders who were subject to multiple sentencing orders in a single court event, only the most serious offence (MSO) has been included in the analysis. All data was extracted from the QGSO Courts Database in September 2018.

ordered parole. The remaining 1,904 offenders (8.5%) could receive a parole eligibility date at the discretion of the sentencing judge – see Figure 9-1.

Offenders were not eligible for court ordered parole for one of three reasons:

- In 77 cases (0.3%), a serious violent offence declaration was made.
- 696 sentences (3.1%) were imposed for sexual offences.[938]
- 1,130 sentences (5.1%) had a head sentence duration exceeding three years.

Figure 9-1: Offenders sentenced to an actual term of imprisonment (any length) (or a partially suspended sentence) who were potentially eligible for court ordered parole, 2015-16 to 2016-17



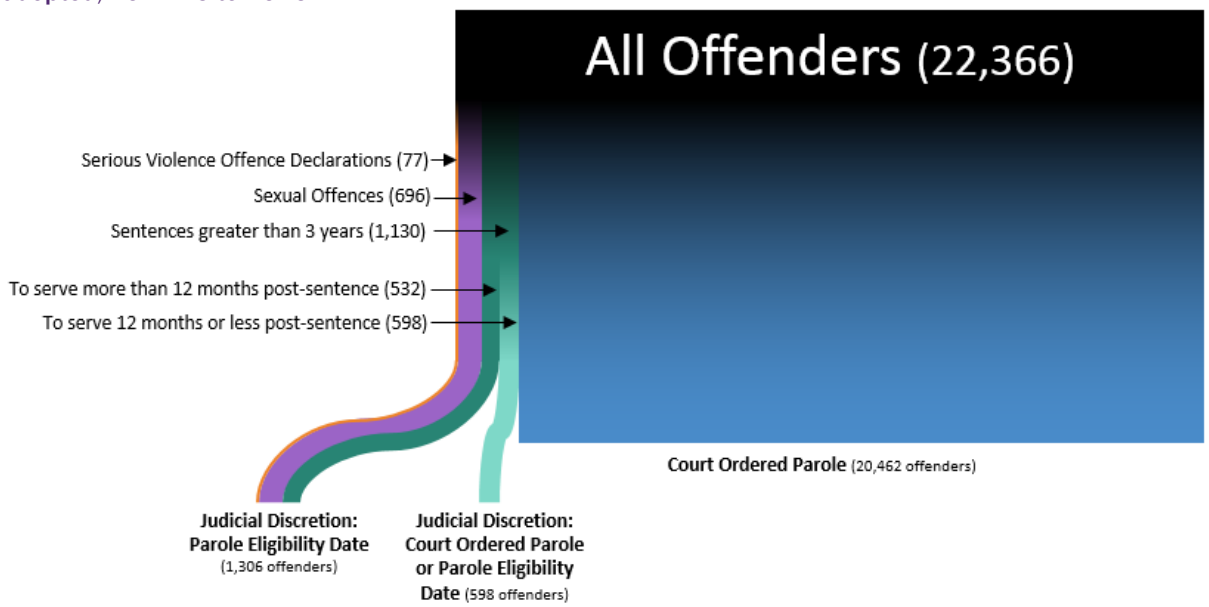
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Notes:
This analysis includes cases finalised between 2015-16 and 2016-17 that involve adult offenders.
Only cases where the Most Serious Offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases). Offenders that fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

9.8.2 What cohort of offenders would be affected if Recommendation 3 were adopted?

The Council used data to consider how many offenders may have potentially been affected if Recommendation 3 had been implemented two years ago. Figure 9-2 shows that, of the 1,130 offenders with sentences more than three years' imprisonment, approximately half of these offenders were sentenced to less than 12 months in actual custody post-sentence (either by way of a partially suspended sentence, or by way of a parole eligibility date). **A total of 598 offenders may have been affected if Recommendation 3 was adopted and would have been eligible for court ordered parole at the courts' discretion.** The remaining 532 offenders were to serve more than 12 months in post-sentence custody and would not have been affected over this period by this recommendation.

938 Of the 696 offenders sentenced for a sexual offence, 255 had sentences of greater than three years and would not be eligible for court ordered parole. The remaining 441 offenders with sentences of three years or less may have been eligible for court ordered parole if Recommendation 5 of the Parole Review Final Report was accepted.

Figure 9-2: Offenders who would have been eligible for court ordered parole if Recommendation 3 had been adopted, 2015-16 to 2016-17



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Notes:

This analysis includes cases finalised between 2015-16 and 2016-17 that involve adult offenders.

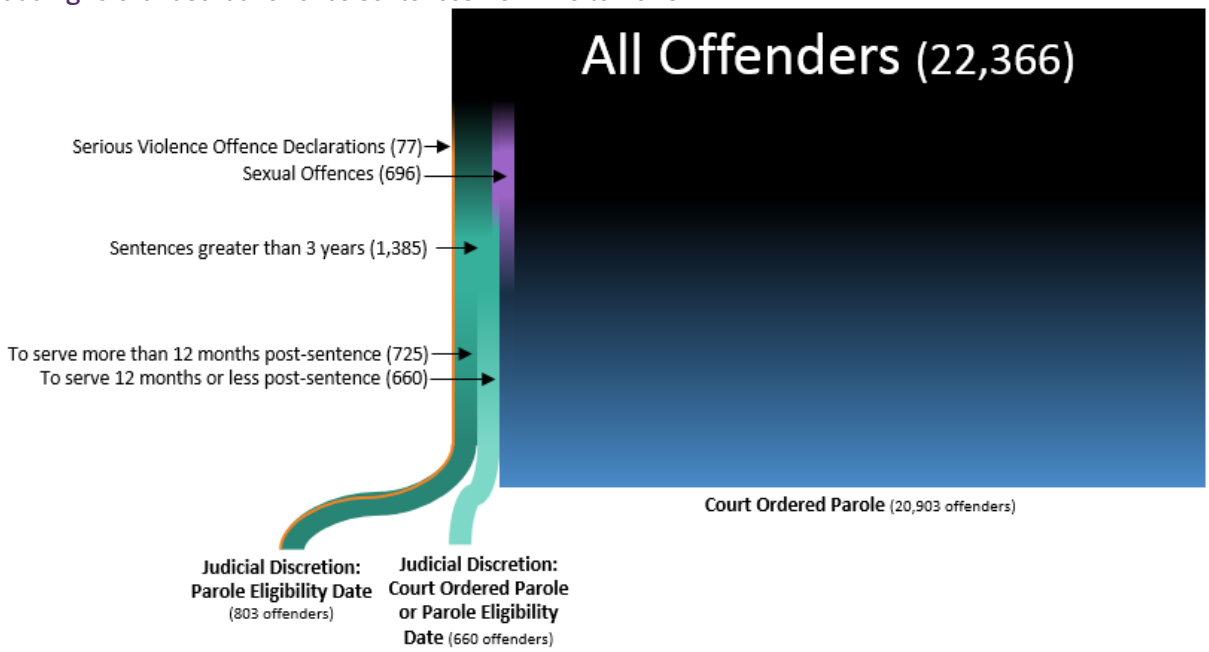
Only cases where the Most Serious Offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases). Offenders that fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.

It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

9.8.3 Adding sexual offences to Recommendation 3

Recommendation 5 of the Parole System Review Final Report (that court ordered parole should apply to a sentence imposed for a sexual offence) is covered in Chapter 10 of this paper. However, for the purpose of fully exploring Recommendation 3, the Council also analysed sentencing outcomes of sexual offences in a limited Recommendation 3 context: offenders sentenced to more than three years' imprisonment, where time has been spent on remand, and the appropriate remaining time in custody is less than 12 months – see Figure 9-3. **A total of 62 extra offenders (additional to the 598 identified above) would be affected and would be eligible for court ordered parole at the court's discretion over the two-year period.**

Figure 9-3: Offenders who would have been eligible for court ordered parole if Recommendation 3 was adopted, adding relevant sexual offence sentences 2015-16 to 2016-17



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Notes:

This analysis includes cases finalised between 2015-16 and 2016-17 that involve adult offenders.

Only cases where the Most Serious Offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases). Offenders that fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.

It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

9.9 Extending court ordered parole from a cap of 3 year sentences, to 5 year sentences

The Parole System Review Final Report acknowledged a suggestion that:

> On sentences involving a head sentence of more than three years, but less than five, the court should have the discretion to order a parole release date or a parole eligibility date. This change would in effect extend court ordered parole as a matter of discretion to sentences of more than three years.[939]

For consistency with existing provisions, this proposal might involve extending court ordered parole to head sentences of more than three years and up to five years or less, at the court's discretion.[940]

If this were the only change made, it would effectively create a third, middle rung between what would be amended PSA sections 160B (0-3 years release only) and 160C (more than five years but eligibility only). However, this change might arguably contribute to the greatest degree of complexity. There are multiple possible variations, below, which could increase court discretion while simplifying processes.

The deeming provision in section 184(2) of the CSA regarding eligibility after half of a sentence is served (which applies if the court does not exercise its discretion regarding an eligibility date under PSA sections 160C or 160D) would continue to operate with any necessary amendments.

939 Queensland Parole System Review, above n 9, 94–95 [458].

940 Reflecting the wording of '3 years or less' in s 160B PSA, and '5 years or less' in s 144(1) of the PSA.

9.9.1 Aligning parole eligibility dates and board ordered parole?

The interrelationship with board ordered parole is another issue, options being:

- board ordered parole stays applicable, as is, to head sentences of over three years; or
- **Removing the three-year starting point for board ordered parole** so that courts also have a simultaneous discretion to set an eligibility date for all sentences of actual imprisonment.
- This would in turn necessitate **removing the requirement in section 160B(2) of the PSA that court ordered parole must be ordered in certain circumstances**.
- This co-existence of eligibility and release date powers could be termed a 'dual discretion'. In order for a 'dual discretion' to exist, neither parole type can be mandatory.
- It would rely on a common sense judicial approach in refusing to apply board ordered parole to short sentences. Such sentences would be constructive sentences of full-time imprisonment with no parole release, given the time required for an application to the Board. Legislative guidance could be provided in this regard.
- Setting a five-year cap for all offence types could arguably avoid unintended impacts of a three-year cap – in particular, the likely continued use by courts of partially suspended sentences (ordered alone or in combination with a community based order) to achieve the same outcome as court ordered parole (certainty about the release date of an offender from custody). This is discussed further below.

9.9.2 Section 209 CSA and automatic cancellation

If a court ordered parole order was cancelled by the Board after its consideration of the relevant circumstances under section 205 of the CSA, court ordered parole would remain unavailable. However, if a court ordered parole order would, on the current provisions, be cancelled automatically by a new sentence of imprisonment in accordance with section 209 of the CSA, courts could be given a discretion to decide if court ordered parole is still appropriate.

9.9.3 Including sexual offences in any changes?

Chapter 10 addresses Recommendation 5 of the Parole System Review Final Report that court ordered parole should apply to a sentence imposed for a sexual offence. If Recommendation 5 were adopted, any variation above could be made to apply equally to sexual offences.

The PSA regime would be further simplified if a dual discretion for terms of imprisonment of up to five years were extended to include sexual offences. Sexual offences receiving a term of actual imprisonment currently cannot attract a parole release date at all; the sentencing court may fix the date the offender is eligible for parole unless the offender had a current parole eligibility or release date, in which case the court must fix an eligibility date (s 160D of the PSA).

Some concerns were expressed in consultation regarding the use of suspended sentences for sexual offences for the purposes of punishment, proportionality and certainty, but to the exclusion of supervision. A recent example is *R v Wano; Ex parte Attorney-General* (Qld):[941]

> [44] A curious feature of the sentence proceeding is that no-one identified any basis at all as to why a partly suspended sentence was preferable to one which would involve at least some ongoing supervision on the respondent's release, as for example occurs when a prisoner is released on parole. The respondent was a long remanded teenager, without tangible rehabilitative progress or family support, whose continued burglary offending had disturbingly escalated to accompanying sex offending. The need for him to be under supervision when released back into the community was compelling.
>
> [45] It follows that, further to the above identified specific error, the imposition of a sentence involving no element of supervision on his release was so inadequate to the circumstances of this case as to manifest error.

9.9.4 Why the Parole System Review Final Report did not support expanding the court ordered parole cap, except in limited circumstances

The Parole System Review Final Report instead made Recommendation 3, discussed above. Relevantly to this issue though, the report noted the court's function 'to determine the appropriate time an offender deserves to spend in custody for the offence committed', but identified 'some difficulties' with this proposal:[942]

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941 *R v Wano; Ex parte Attorney-General (Qld)* [2018] QCA 117 (12 June 2018) 7 [39]-8 [45] (Henry J, Fraser JA and North J agreeing).

942 Queensland Parole System Review, above n 9, 95 [459]. Recommendation 3 of the Report was then made following these considerations.

- The Board should play a crucial role in determining whether an offender is an unacceptable risk to be released into the community.[943]
- The process a prisoner must undertake when applying for parole has tangible benefits for offenders in requiring them to undertake programs in custody, prepare and make plans for their release, obtain suitable accommodation and be assessed by a psychiatrist or a psychologist as required.[944]
- While a sentencing Court is best placed to assess the suitability of an offender for release on parole on a particular date if the date of parole is close to the date of sentence, it is not in the best position to determine whether an offender should be released on parole months or even years in advance, without being able to revisit the matter[945] This point in particular was also made by some stakeholders. It was pointed out, for instance, that housing is one of the highest risk factors for recidivism on release and an important factor in terms of community reintegration. Obviously, the further away a release date is, the less likely any meaningful analysis of this can occur.

9.9.5 Potential benefits of such a change

A five-year ceiling for the availability of court ordered parole would align with the suspended sentence regime in Part 8 of the PSA (sections 143-151A) which allows wholly and partially suspended sentences to be imposed for any offence punishable by imprisonment provided the head sentence does not exceed five years.[946]

Such amendments arguably should not compromise community safety, as the Board can set the same conditions on a court ordered parole order as for a board ordered parole order (the greatest distinction between the two orders is that court ordered parole offers certainty for an offender about their release date, whereas board ordered parole does not).

Even when combined with a community based order, such as probation, this approach has limitations. While applications to amend or revoke a community based order need to be made to a court, the Board has the power to amend, suspend or revoke parole orders relatively quickly, meaning these orders may allow QCS to better respond to issues of escalating risk. This has been the subject of competing views among different stakeholders as to whether it is a positive or a negative.

The maximum duration of a probation order is also shorter than suspended sentences (three years versus five years), meaning offenders may be left unsupervised for the final portion of effectively parallel community based and suspended sentence orders.

Arguably, for higher risk offenders, allowing for the use of court ordered parole therefore is preferable to the possibility of courts ordering a wholly or partially suspended sentence in combination with a community based order. Based on current experience with sexual offenders, there is a real possibility that courts may prefer a partially suspended sentence over a term of imprisonment if they only have the power to set a parole eligibility date rather than a release date. This may result in offenders being left unsupervised.

9.9.6 Potential negatives of such a change

There would potentially be a significant workload impact for the Board if the change were made and resulted in a shift from court ordered parole orders to parole eligibility dates and board ordered parole orders. However, if the amendment discussed above regarding automatic cancellation and section 209 of the CSA were made, and courts responded by ordering release dates on subsequent sentences of 'breaching' offences instead of the current mandated eligibility date, this might ameliorate such effects.

As highlighted in the Parole System Review Final Report, using court ordered parole instead of board ordered parole for offenders sentenced to actual custody for longer periods may result in reduced offender motivation to be proactive in rehabilitation efforts and planning for release, given the certainty of the release date.

Making court ordered parole more readily available might also see higher risk offenders being placed on court ordered parole (noting that assessment of risk would ride on the quality of pre-sentence assessment, with corresponding resource and delay issues).

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943 Ibid 95 [460].

944 Ibid.

945 Ibid 95 [461].

946 *Penalties and Sentences Act 1992* (Qld) s 144.

As noted in the Parole System Review Final Report, concerns were raised by multiple stakeholders about a court's ability to assess future risk. It was suggested that the need for supervision for the purposes of rehabilitation cannot (or perhaps should not) be made at sentence, the better approach being to set a parole eligibility date.

Pre-sentence reports (defence sourced) were criticised by some as often not very useful and not providing sufficient information to aid decision making. This could impact on the ability to make assessment of risk into the future.

The proposed change may further be unlikely to have much of a positive impact in reducing prisoner numbers, including because following this change, courts may be more likely to order imprisonment with parole than make use of alternative forms of orders – in particular, partially suspended sentences (see further, Chapter 10 on how this applies to the sentencing of sexual offences). However, there may be a slight positive effect on prisoner numbers because fewer people who otherwise would have a parole eligibility date, would be required to apply for parole to the Board due to the broader availability of court ordered parole.

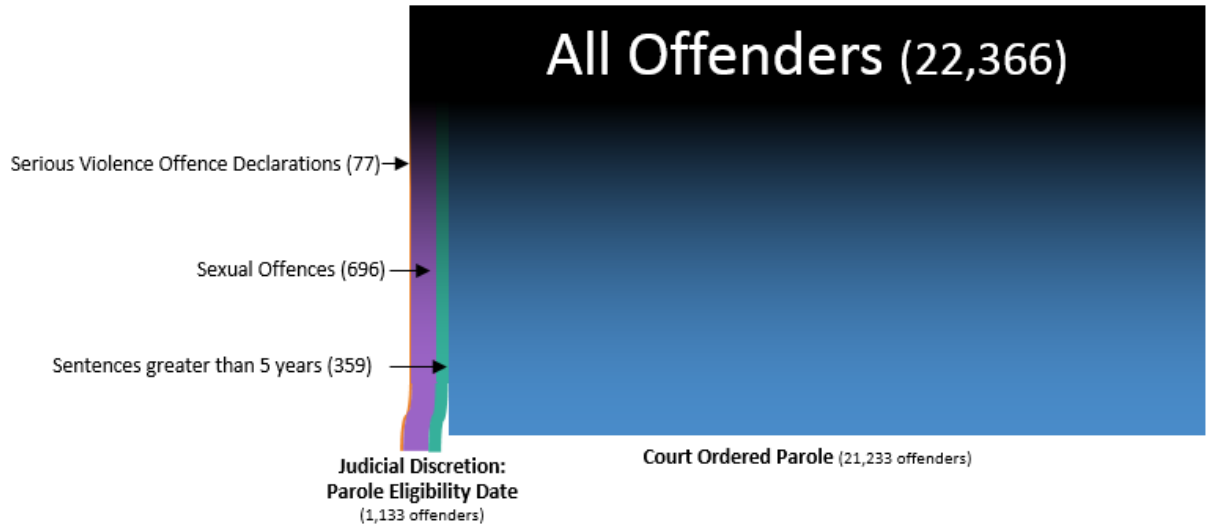
9.9.7 Data regarding extending court ordered parole from a cap of 3 year sentences, to 5 year sentences

The same approach to modelling the potential impact of the option based on Recommendation 3 of the Parole System Review Final Report (see Figure 9-2 above), has been applied to extending court ordered parole from a cap of 3 year sentences, to 5 year sentences.

9.9.8 Extending court ordered parole to sentences less than 5 years

If court ordered parole were extended to also be available to offenders sentenced to a period of five years or less, **an additional 771 offenders (3.4%) would have become eligible for court ordered parole** in the past two years (2015-16 to 2016-17). In this scenario, 94.9 per cent of offenders sentenced to a period of imprisonment would be eligible for court ordered parole, compared to 91.5 per cent currently – see Figure 9-4.

Figure 9-4: Offenders who would have been eligible for court ordered parole if discretion was extended to head sentence of 5 years or less, still excluding sexual offences, 2015-16 to 2016-17

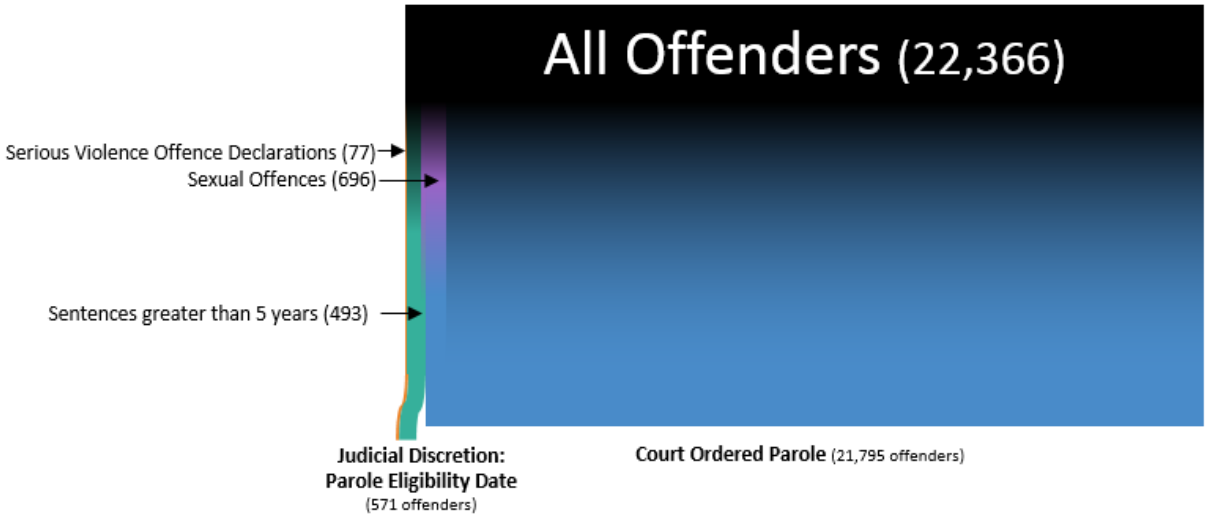


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018
Notes:
This analysis includes cases finalised between 2015-16 and 2016-17 that involve adult offenders.
Only cases where the Most Serious Offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases). Offenders that fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

9.9.9 Extending court ordered parole to sentences less than 5 years and sexual offences

If court ordered parole were to be made available to offenders sentenced to a period of five years or less, and also to offenders who committed a sexual offence, **an additional 1,333 offenders (5.9%) would become eligible for court ordered parole** compared to the current situation. In this scenario, 97.4 per cent of offenders sentenced to a period of imprisonment would be eligible for court ordered parole, compared to 91.5 per cent currently – see Figure 9-5.

Figure 9-5: Offenders who would have been eligible for court ordered parole if discretion was extended to head sentence of 5 years or less, including sexual offences, 2015-16 to 2016-17



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Notes:
This analysis includes cases finalised between 2015-16 and 2016-17 that involve adult offenders.
Only cases where the Most Serious Offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases). Offenders that fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

9.10 Other issues

9.10.1 Judicial power to order parole conditions for court ordered parole orders

In a 2017 review of the system used to classify child exploitation material (CEM) for the sentencing process (the CEM Report), the Council recommended:

> Adding a section to the *Penalties and Sentences Act 1992* (Qld) giving judicial officers discretion to order additional requirements of a parole order (including to submit to medical, psychiatric or psychological assessment) when ordering a parole release date.[947]

The Government has not as yet responded to that report.

This would give courts a discretionary power regarding court ordered parole akin to that held by the Board using its combined legislative powers in sections 200(3) and 205(1)(b) of the CSA – extra conditions beyond the mandatory ones in section 200(1) of the CSA.

However, it would also create the scenario where the Board may amend or cancel specific conditions imposed by a court, not least because circumstances have changed since the sentence date and the Board has new information.

947 Queensland Sentencing Advisory Council, *Classification of Child Exploitation Material for Sentencing Purposes - Final Report* (2017) 47, Recommendation 2, and see pages 42 and 43 for discussion.

The language used in the recommendation reflects that adopted in sections 94(a) and 115(a) of the PSA regarding ICOs and probation orders, save that the Council used the word 'assessment' instead of 'treatment'. This reflects concerns raised by QCS about the problems associated with mandatory treatment, and their preferred approach that mandatory assessments instead be ordered to identify offender treatment needs.[948]

The approach of mandating assessment rather than treatment recognises that the inclusion of additional requirements for court ordered parole is very different to including treatment requirements as part of a probation order or ICO as, unlike these other forms of sentencing orders, the offender does not need to consent to the order being made and to comply with its conditions as a pre-condition to the order being made.

Also, in contrast to offenders sentenced to imprisonment with a parole eligibility date, an offender's release on court ordered parole does not rely on the offender applying for release and agreeing to comply with release conditions, but rather is directed under legislation, subject to limited exceptions (see s 199 of the CSA).

The CEM Report recommendation was made in the context of the possibility that recommendation 5 of the Parole System Review Final Report might be accepted, meaning that court ordered parole would then become available for sexual offences. The Council's current review gives this recommendation a potentially wider scope, if for instance, court ordered parole is extended from three years to five years, including for sexual offences.

Stakeholders have noted:

- There would need to be proper investigation into availability and appropriateness of programs. This could be supported through the preparation of pre-sentence reports, which would require additional funding. This might be achieved by expanding the court advisory service provided by Probation and Parole currently operating in Brisbane. This service helps courts to understand, at the time of sentencing, the availability and timeframes regarding the effective delivery of programs that would enable an offender to comply with specific conditions.
- Special conditions should only be made where release on court ordered parole is ordered immediately, or almost immediately, when the judge would be best placed to assess the need for extra conditions.
- Courts must have discretion to amend or remove special conditions as well as impose them (similar to the current process for probation), rather than it being left as a matter for the Board.
- Increasing conditions may risk setting offenders up to fail.
- The limited number of programs available in the community is another issue that needs to be considered.
- The imposition of more generalised conditions on an order, such as to submit to assessment and treatment directions, allows more flexibility and should be preferred over more specific conditions that may not be able to be serviced.

9.10.2 Short sentences

What is a short sentence?

'Short sentences' featured in the historical context part of this chapter in section 9.1. The Council discusses 'short sentences' in this section in the context of head sentences of six months or less, but acknowledges that the content may also be of relevance to sentences of imprisonment of up to three years.

There is no uniform definition of a short sentence by reference to duration.

The Parole System Review Final Report acknowledged that the CSA amendments meant that 'prisoners on short sentences received automatic parole' (head sentences of three years or less).[949] On several occasions it referred to short sentences in the context of head sentences of 12 months or less.[950]

948 See discussion at page 44 of the Council's report.

949 Queensland Parole System Review, above n 9, 56 [256].

950 Ibid 78 [363], 79 [368], 90 [430], 91 [441], 149 [742].

The ALRC report *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* referred to short sentences initially as a period of six months or less, and ultimately as two years or less.[951]

A QCS research paper considered short sentences as sentences of three years or less (which aligns with the court ordered parole regime) and sentences of 12 months or less as shorter sentences.[952]

Short sentences and parole

In the QUT study on sentencing orders (see section 3.3), research suggests that periods of imprisonment under 12 months are the least effective at reducing recidivism, with offenders sentenced to imprisonment for less than six months having the highest reoffending rates. In comparison, academic literature shows that probation is more effective at reducing recidivism than short terms of imprisonment (12 months or less).[953]

The Parole System Review Final Report noted the need for a review of sentencing options available to the court in cases calling for short sentences, where supervision of an offender is desirable and where no time is to be served (leading, at least in part, to the Council's current review).[954] It outlined the intention of the court ordered parole system in applying to short sentences as being:

> To divert low-risk offenders from custody whilst ensuring post release supervision. As well as providing truth in sentencing and the benefit of supervision, court ordered parole also aimed to address the over-representation of short sentenced, low-risk prisoners. These prisoners were responsible for a high degree of turnover in the prison population. Court ordered parole was to be used to divert these offenders from custody, while providing post release support and supervision.[955]

Despite this, the Parole System Final Report noted that allowing parole on short sentences 'provides limited benefit to the prisoner or to the community and is an ineffective aspect of the parole system'.[956] If further suggested there was:

> a huge latent issue the existence of which has not been appreciated by courts, by the legislature or by the legal profession. It has ramifications for proper sentencing, for prisons, for the parole system and for the use of precious public moneys.[957]

Ultimately, the Parole System Review Report concluded that 'to recommend the removal of this option without proper consideration of the flow-on effects to prison population and court workloads would be imprudent'.[958]

The criticisms of using parole for short sentences were discussed:

> In sentencing offenders to a period of parole with the parole release day at the first day of the sentence, the Court did not intend to impose a sentence where these offenders would serve actual periods of time in custody. However, as demonstrated above, in reality many of these offenders are serving long periods of time in custody because of suspensions that ensue. The decision to suspend parolees and take them into custody is being exercised administratively and appears to be inconsistent with the intention of the sentencing judge.[959]
>
> It is difficult to reconcile allowing an offender to be sentenced to a period of imprisonment to be served entirely on parole with the purpose and intended operation of parole. The purpose of parole is to allow a prisoner to serve part of her or his period of imprisonment in the community so as to reintegrate the prisoner following a period of imprisonment through supervision and rehabilitation [this is expressly recognised in the Council's Terms of Reference]. Without serving any actual period in custody, the offender does not require such reintegration.[960]

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951 Australian Law Reform Commission, above n 26. The consultation materials indicate a period of 6 months or less - *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (DP 84) stated, at 81 (footnote 32) 'for the purposes of this Discussion Paper, the phrase 'short terms of imprisonment' should be read to mean terms of 6 months or less, unless otherwise specified'. However, the report proper stated (40 [1.12]): 'The recommendations in this Report are primarily focused on reducing the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples who are cycling through the criminal justice system serving short sentences of two years and under. This group of offenders represent some 45% of all Aboriginal and Torres Strait Islander people entering into prisons'.

952 Queensland Corrective Services, *Court Ordered Parole in Queensland*, Research Paper No.4 (2013) 15.

953 See Chapter 3 and Appendix 3.

954 Queensland Parole System Review, above n 7, 94 [456].

955 Ibid 57 [263].

956 Ibid 92 [446].

957 Ibid 94 [455].

958 Ibid 92 [446].

959 Ibid 94 [453].

960 Ibid 94 [454].

> I am of the view that sentences involving court ordered parole where no actual time is served are a use of parole that was not envisaged at the time of implementing a parole regime in Australia and philosophically, is not the proper use of a parole order. However, with court workloads alarmingly high and the prison population drastically overcapacity, a dramatic change to sentencing options could successfully alleviate pressure on the system or be the straw that breaks the camel's back.[961]

Risks identified by the Parole System Review Report with abolishing court ordered parole included:

- If court ordered parole were abolished, and if the Board was unable to efficiently manage applications for parole by offenders on short sentences, the prison population would rapidly expand.[962]
- Currently the majority of prisoners are serving short terms of imprisonment. Management of the current prison population relies very heavily on court ordered parole.[963]
- It is unlikely that the Court would respond to a removal of court ordered parole for short sentences by ordering that the whole length be served in custody. However, without adequate alternatives, the Court may be placed in a situation where it is constrained by precedent and is unable to fashion an appropriate order without ordering the offender be sentenced to a significant custodial sentence when they otherwise would have served the majority on parole.[964]

Overview of position in other Australian jurisdictions

Queensland is alone in allowing parole to be ordered for short periods of imprisonment.

NSW expressly precludes parole from prison terms of six months or less.[965] Other jurisdictions (ACT, Northern Territory, South Australia, Tasmania, Victoria) restrict the availability of parole to sentences of imprisonment exceeding 12 months.[966]

Western Australia has completely abolished short prison sentences.[967] In 1995, prison sentences of three months or less were abolished on the basis they provided little utility since they do not deter, provide community protection or address offending behaviour. In 2003, the threshold for imposing a sentence of immediate imprisonment was increased to six months.[968] The abolition of short prison sentences extends to a six month minimum for suspended sentences.[969]

The Department of the Attorney General in Western Australia conducted a statutory review of the *Sentencing Act 1995* (WA) in 2013 and referred to an internal evaluation which revealed that offences which had previously attracted sentences of less than six months were now receiving longer sentences, suggesting 'sentence creep' was occurring.[970] The review reflected on the comments from magistrates that mandating a minimum custodial sentence reduced flexibility in their sentencing considerations. Stakeholders also cited a 'sentencing creep' and unanimously advocated for the abolition of the prohibition on sentences of six months or less.[971] The review recommended that minimum imprisonment sentences be returned to three months as initially legislated.[972]

The review did not consider any changes over this period in the profile of offenders coming before the courts, and the Western Australian Crime Research Centre data did not show any evidence that magistrates began imposing longer sentences following these changes being introduced.[973] In 2016, amendments were introduced to reduce

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961 Ibid 94 [455].

962 Ibid 86 [402].

963 Ibid 86 [402].

964 Ibid 92 [445].

965 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

966 *Crimes (Sentencing) Act 2005* (ACT) s 65; *Sentencing Act 1997* (NT) s 53; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(a); *Sentencing Act 1991* (Vic) s 11; *Sentencing Act 1995* (WA) s 89(2); *Corrective Services Act* (Tas) ss 68 and 70.

967 *Sentencing Act 1995* (WA) s 86.

968 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 33(3).

969 *Sentencing Act 1995* (WA) s 86.

970 Department of the Attorney General, *Statutory Review of the Sentencing Act 1995 (WA)* (October 2013), 57, citing Department of Corrective Services, Unpublished, *Report on the Effects of Rates of Imprisonment following Sentencing Legislation Reforms of 2003* (June 2007).

971 Department of the Attorney General, *Statutory Review of the Sentencing Act 1995 (WA)* (October 2013) 57.

972 Ibid.

973 Don Weatherburn, 'Rack 'em, Pack 'em and Stack 'em: Decareration in an Age of Zero Tolerance' (2016) 28(1) *Current Issues in Criminal Justice* 147.

the minimum period for which a sentence of imprisonment can be imposed from six to three months.[974] This is yet to be proclaimed.

In effect, the reforms mean that parole is not available for short prison sentences (as a court cannot impose a sentence of less than six months).

Victoria abolished suspended sentences in 2014.[975] However, this change was made in the context of introducing a new form of intermediate sentencing order (the CCO) which provided the courts with an alternative sentencing option. The Victorian sentencing legislation expressly provides that a CCO 'may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole or part that sentence of imprisonment'.[976]

The ALRC's findings

The ALRC report *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* focused on the issues associated with short sentences rather than short sentences with parole.

It noted that 'short sentences of imprisonment are highly problematic. However, in the absence of implementing the preceding recommendations [regarding availability of appropriate community based sentencing options], the abolition of short sentences is likely to be detrimental'.[977] It therefore recommended that short sentences not be abolished, 'in the absence of the availability of appropriate community based sentencing options'.[978] For the same reasons, it recommended retaining suspended sentences.[979] It made other recommendations which also recognised the continued availability of short sentences under its reform proposals:

> Recommendation 9–1: State and territory corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations that address offending behaviours and/or prepare people for release. These programs should be made available to, inter alia, prisoners serving short sentences.
>
> Recommendation 9–2: To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should:
>
> - introduce statutory regimes of automatic court-ordered parole for sentences of under three years, supported by the provision of prison programs for prisoners serving short sentences; and
> - abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.

Issues

The concerns raised by the Parole System Review Report, the ALRC and others reflect the complexity of the considerations also relevant to this review in that a holistic analysis of all community based sentences is required in determining potential solutions. Any amendments to community based orders may need to be implemented and evaluated first before the issue of whether immediate release (or any release) on parole for short sentences serves any useful purpose is considered further. The Government position that court ordered parole should be retained, is also clear.

The problems with short terms of imprisonment were also mentioned by stakeholders in consultation undertaken as part of this current review. Comments included:

- They are highly damaging, particularly for women. They often disrupt housing, childcare and healthcare arrangements.
- They can be problematic when combined with community based supervision, risking a disproportionately punitive effect.
- To the extent they are needed, they should be focussed on rehabilitation and imposing realistic conditions on offenders.
- Offenders serving short periods of imprisonment or time on remand prior to sentence are not able to address offending behaviour prior to their release from custody. They are either ineligible or not referred for most rehabilitation programs inside prison.

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974 *Sentence Legislation Amendment Act 2016* (WA) s 73. This amendment is yet to commence by proclamation.

975 The *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

976 *Sentencing Act 1991* (Vic) s 36(2).

977 Australian Law Reform Commission, above n 26, 268 [7.151].

978 Ibid Recommendation 7–5.

979 Ibid Recommendation 7-4.

- Overwhelmingly, drivers of prison overcrowding (lack of housing, or appropriate housing, mental health issues and court ordered order violations) relate to people subject to short head sentences of up to two-and-a-half years.
- A minimum of 12 months is usually required to engage prisoners in intensive interventions in custody.

Trends in use of short sentences in Queensland

The Council collated data for the period 2005–06–2017–18 (the data period) to analyse the trends in the use of short sentences by Queensland courts. A 'short sentence' for these purposes was defined as a term of imprisonment of six months or less that was not wholly or partially suspended. The data also considered sentencing trends by gender and Aboriginal and Torres Strait Islander status.

In summary, the data shows:

- The imposition of short sentences has increased over the data period;
- Non-Indigenous male offenders are the most common demographic to receive a short sentence (59.4%);
- Short sentences imposed on non-Indigenous female offenders over the data period have increased the most compared to other demographic groups (241%);
- The most common offence type to receive a short sentence of imprisonment is a breach of violence order (12.9%), followed by breach of bail – failure to appear (10.5%).[980]

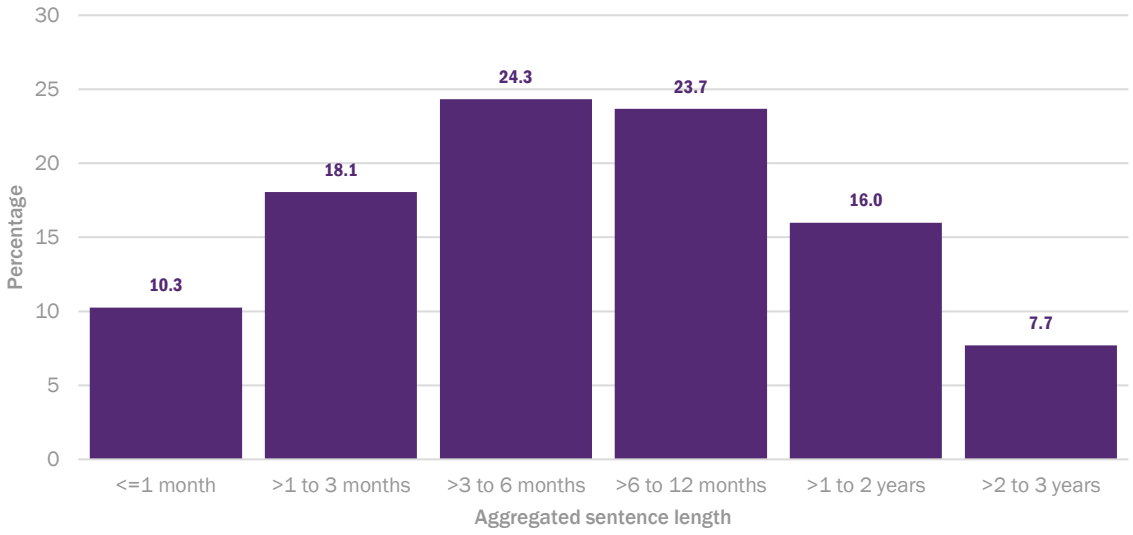
This data is useful when considering the type of offences and profile of offenders currently receiving a short sentence of imprisonment with court ordered parole (and potentially receiving a limited benefit from the short duration of supervision). The data could assist when considering alternative sentencing options to short sentences (see below).

Over the data period, 95.6 per cent (n=50,990) of sentenced events where a short sentence of imprisonment was imposed for the MSO sentenced were imposed by the Magistrates Courts. Only 3.9 per cent (n=2,078) were imposed by the District Court and 0.5 per cent (n=253) by the Supreme Court. This reflects both the volume of matters dealt with and the different criminal jurisdiction of these courts, with more serious matters dealt with by the higher courts which are likely to attract longer prison sentences.

The data in Figures 9-6 through to 9-11 below in this section relate to Queensland Magistrates Courts and higher courts combined.

Figure 9-6 shows sentenced events during the data period where the offender received a term of imprisonment (not wholly or partially suspended) of three years or less (MSO). Of the sentenced events (n=101,296), over half (52.6%; n=53,282) were sentences of six months or less.

Figure 9-6: Aggregated sentence length of imprisonment sentences three years or less (MSO), 2005-06 to 2017-18

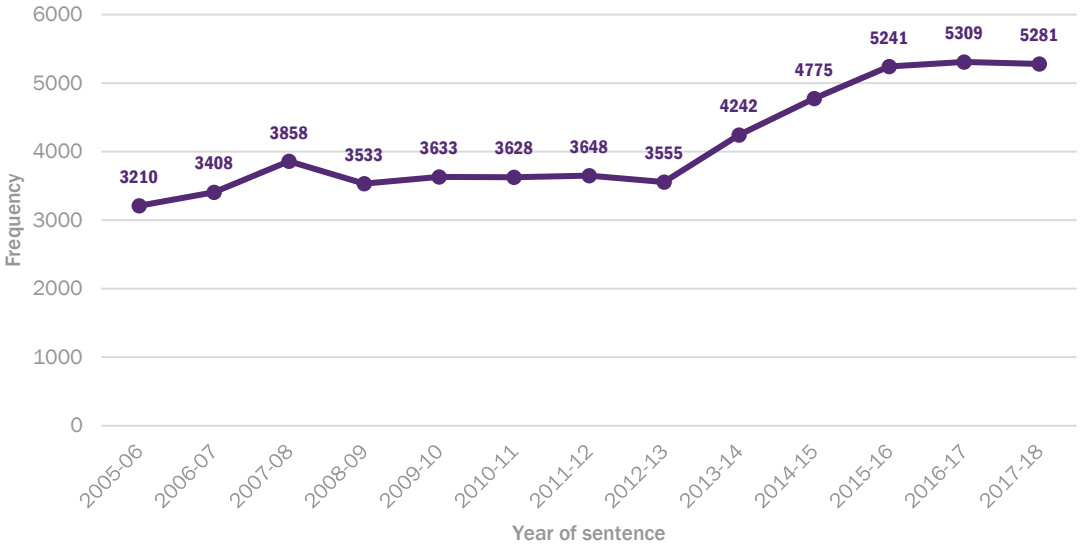


Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

980 Further on this point, see section 12.3 regarding the high volume of imprisonment in Magistrates Courts for breaches of domestic violence orders and bail orders.

A short sentence was defined as imprisonment of six months or less imposed for a MSO which was not wholly or partially suspended. The number of short sentences has increased over the data period by 64.5 per cent, as shown in Figure 9-7.

Figure 9-7: Number of imprisonment sentences six months or less (MSO) by year of sentence, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

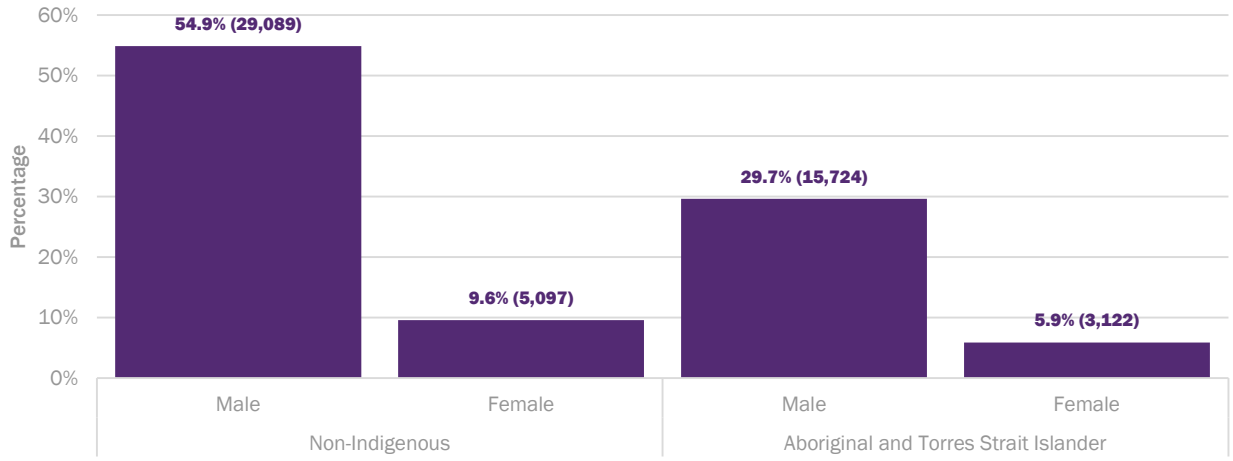
Figure 9-8 shows a breakdown by Aboriginal and Torres Strait Islander and gender status of those people sentenced to short sentences (MSO) over the data period. Taking into account the profile of offenders sentenced over this same period receiving any form of penalty (that is, not just a short term of imprisonment)[981] this shows:

- non-Indigenous men represented 65.9 per cent of all people sentenced, and 54.9 per cent of those receiving short prison sentences;
- non-Indigenous women were 17.6 per cent of all people sentenced, and 9.6 per cent of those receiving short prison sentences;
- Aboriginal and Torres Strait Islander men were 11.4 per cent of all people sentenced, but 29.7 per cent of those receiving short prison sentences; and
- Aboriginal and Torres Strait Islander women were 5.1 per cent of all people sentenced, representing 5.9 per cent of those receiving short prison sentences.

This analysis shows Aboriginal and Torres Strait Islander men are significantly overrepresented among those receiving a short prison sentence. This does not, however, take into account factors such as offence type, the seriousness of the offence for which the person is being sentenced, or prior criminal history. It also does not take into account changing trends in the use of short sentences over time, which is discussed below.

[981] Over the data period there were 1,862,681 sentenced events in all Queensland Courts. Of these, in 109,358 cases (5.5%) gender and/or Aboriginal and Torres Strait Islander status was unknown and have not been included in these calculations.

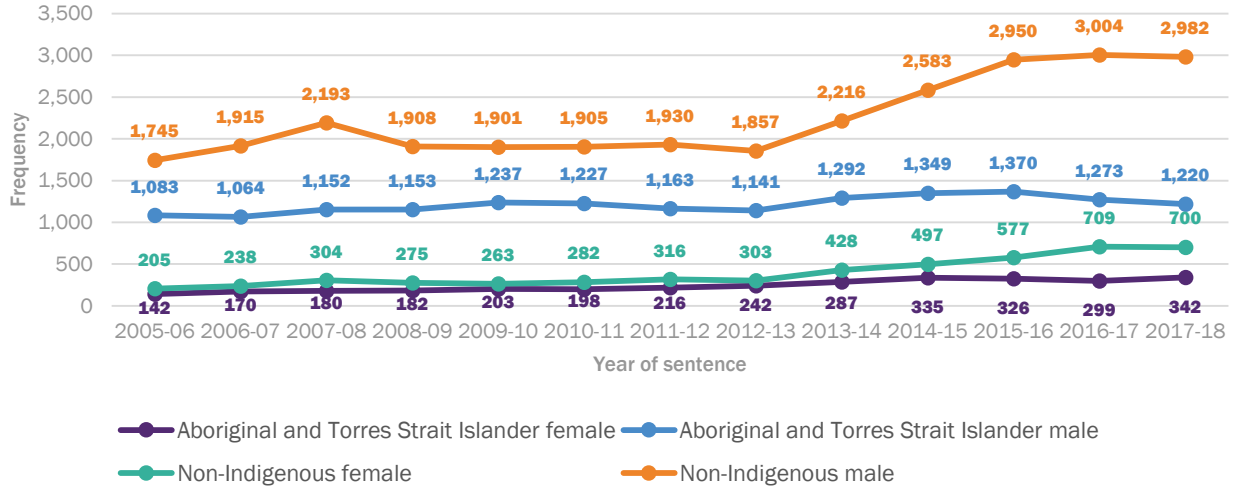
Figure 9-8: Gender and Aboriginal and Torres Strait Islander status of offenders sentenced to imprisonment six months or less, 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

Figure 9-9 highlights trends in short sentence events according to gender and Aboriginal and Torres Strait Islander status (MSO). Male offenders remain the group receiving the highest number of short sentences. Overall, there has been a 241 per cent increase in non-Indigenous female offenders receiving short sentences. Short sentences imposed on Aboriginal and Torres Strait Islander women have increased by 141 per cent. Non-Indigenous men show a 71 per cent increase in short sentences, with a sharp increase in 2017–18, while Aboriginal or Torres Strait Islander male offenders remained relatively consistent in comparison, increasing by 13 per cent over the data period.

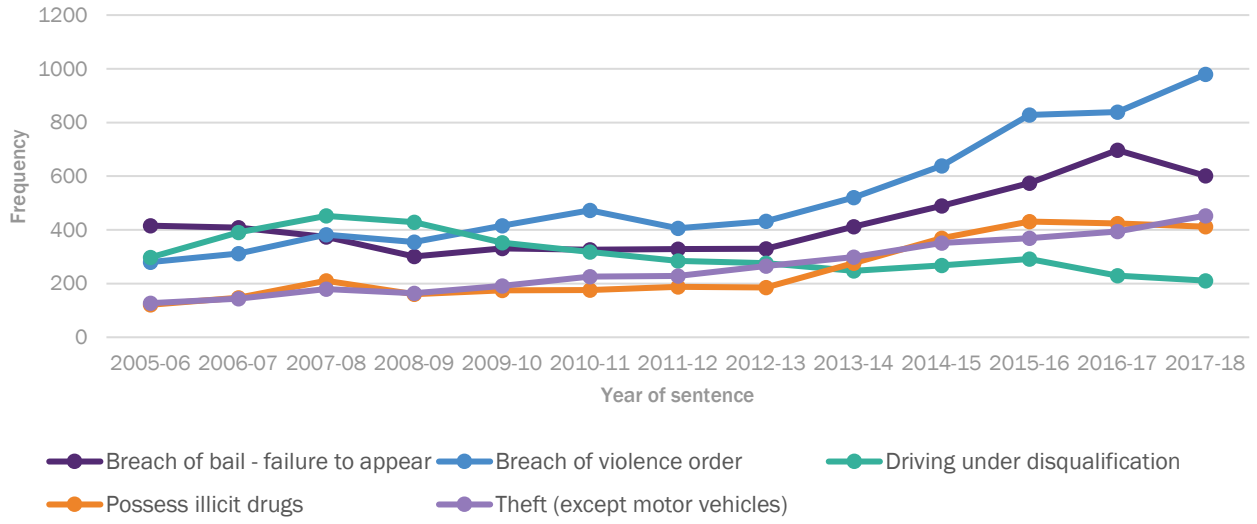
Figure 9-9: Number of imprisonment sentences six months or less (MSO) by year of sentence, and gender and Aboriginal and Torres Strait Islander status, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Figure 9-10 below shows the trends in the top five offences (MSO) for which offenders received short sentences over the data period. Short sentences for breach of violence order, theft (except motor vehicles), breach of bail – fail to appear and possess illicit drugs increased considerably. Driving under disqualification was the only offence to decrease over the data period.

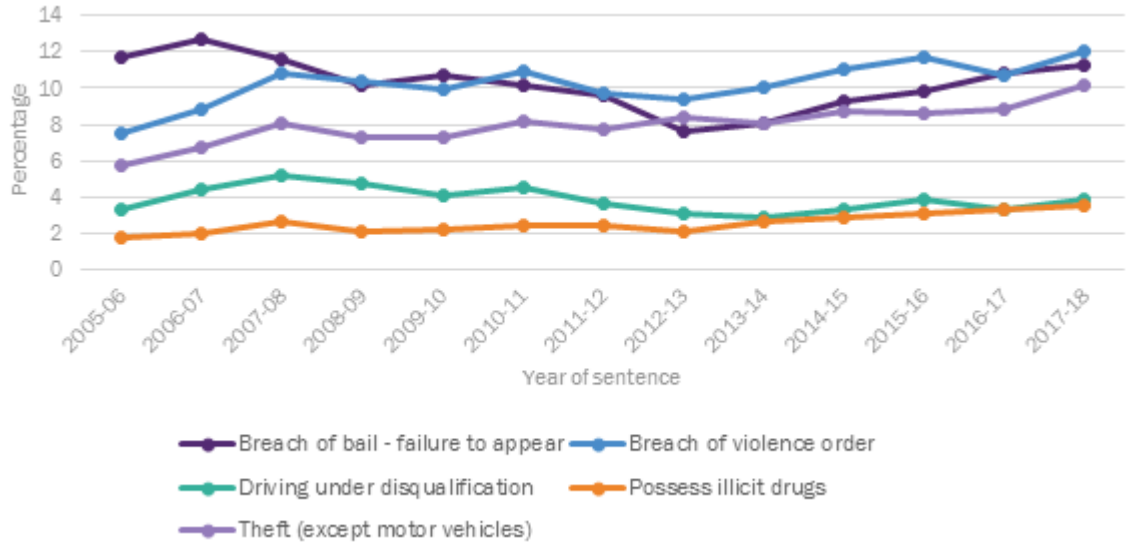
Figure 9-10: Number of imprisonment sentences six months or less (MSO) by offence type and year of sentence, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

Figure 9-11 below shows the trends for the top five offences (MSO) for which offenders received short sentences in the use of short terms of imprisonment (as a proportion of all sentences imposed) over the data period.

Figure 9-11: Proportion within each offence type (MSO) that received a short imprisonment sentence by year of sentence, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018

In the case of breach of bail – fail to appear and possess illicit drugs, the increasing numbers of short prison sentences in more recent years reflects an overall increase in the number of these offences coming before the courts for sentence, with the proportion of these offences resulting in a short prison sentence being imposed remaining relatively stable.[982]

For the categories of breach of a violence order and theft (except for motor vehicles), the picture is somewhat different, with both offence categories experiencing a significant increase in the numbers of offences being sentenced, as well as an increasing proportion of offences sentenced resulting in a short term of imprisonment:

- there was a 399 per cent increase in the use of imprisonment for breach of violence order (MSO) over the data period; 7.5 per cent of sentenced offences falling within this offence category resulted in a short term of imprisonment in 2005–06, rising to 12.0 per cent in 2017–18; and

[982] Over the data period, the proportion of offences (MSO) sentenced resulting in a short term of imprisonment for these offences increased only slightly (in the case of driving under disqualification, from 3.3 per cent in 2005–06 to 3.8 per cent in 2017–18, and for possession of illicit drugs, from 1.8 per cent in 2005–06 to 3.5 per cent in 2017–18.

- for theft (except motor vehicles), there was a 326 per cent increase in the use of imprisonment over the data period; 5.7 per cent of sentenced for these offences received a short prison sentence in 2005–06, rising to 10.1 per cent in 2017–18.

The majority of prison sentences imposed for these two offence categories were short terms of imprisonment of six months or less, although the overall proportion of short prison sentences (as a percentage of all prison sentences imposed) for these offence categories decreased — suggesting courts are imposing longer prison sentences. In 2017–18, 61.9 per cent of sentenced breach of violence order offences that resulted in a term of imprisonment were sentences of six months or less (down from 88.6% in 2005–06). For theft (except motor vehicles), the percentage of prison sentences that were for six months or less was higher at 78.8 per cent (down from 94.1% in 2005–06).

A potential explanation for the increase in the use of short sentences of imprisonment in preference to non-imprisonment penalties for a breach of violence order, and the move to longer sentences is likely to be the introduction of the *Domestic and Family Violence Protection Act 2012* (Qld) which increased the penalty for contravening a domestic violence order,[983] thereby signalling to courts the increased seriousness with which these offences are to be viewed.

In addition to these changes: the PSA was amended in 2014 to remove the principle of imprisonment as a sentence of last resort.[984] In 2016, this principle was reinstated.[985] In 2016, amendments were also made to section 9 of the PSA inserting a new subsection (10A) that requires a sentencing court to treat the fact an offence is a domestic violence offence as an aggravating factor unless the court considers it is not reasonable because of the exceptional circumstances of the case.[986]

Similar trends in the use of sentences of imprisonment for theft have been observed in England and Wales, which some commentators have attributed to prior offending histories for these offences influencing courts' use of imprisonment as a penalty in preference to non-custodial penalties.[987]

Figure 9-12 shows the profile of offenders for the top five offences attracting a sentence of imprisonment of six months or less. Aboriginal and Torres Strait Islander offenders and non-Indigenous male offenders were most likely to be sentenced to a short sentence for a breach of violence order (46.8% equally). In all of the other top five offence types, non-Indigenous male offenders were most likely to receive a short sentence.

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983 Previously, under section 80 of the *Domestic and Family Violence Protection Act 1989* (Qld) the maximum penalty was, if the respondent had previously been convicted on two different occasions within three years – two years' imprisonment; otherwise 40 penalty units or one year's imprisonment. When the *Domestic and Family Violence Protection Act 2012* (Qld) was introduced the penalty was, if the respondent had previously been convicted within five years – three years' imprisonment, otherwise two years' imprisonment. In 2015 the penalty was increased to a maximum penalty of five years' imprisonment (if there was a previous conviction) otherwise three years' imprisonment: *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld).

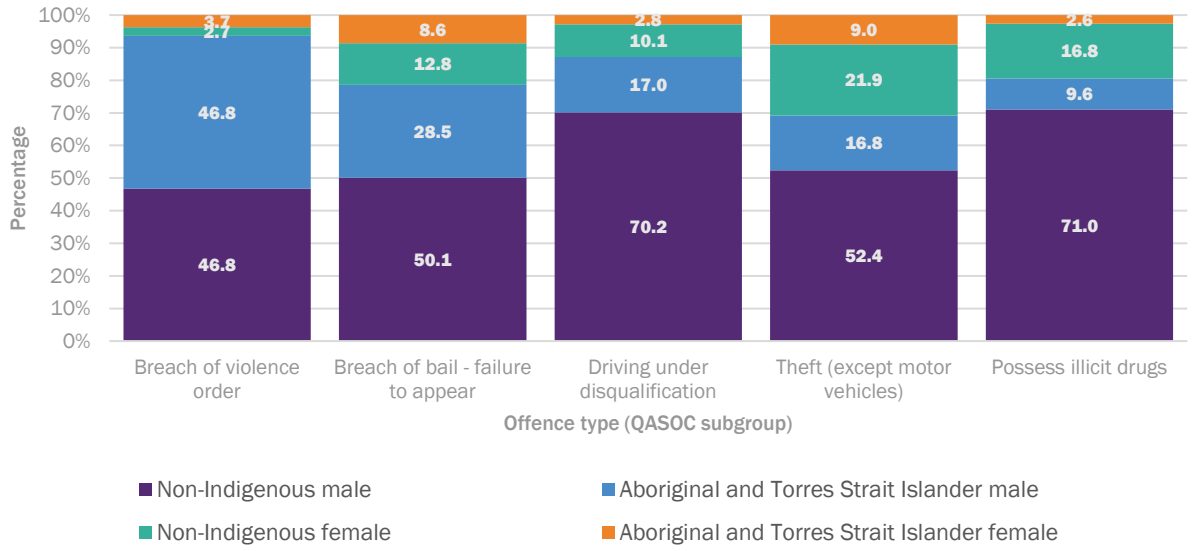
984 *Youth Justice and Other Legislation Amendment Act 2014* (Qld) s 13.

985 *Youth Justice and Other Legislation Amendment Act (No.1) 2016* (Qld) s 61.

986 Inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 5.

987 Roberts and Harris, above n 137, 491–492. These comments related both to the use of immediate imprisonment and suspended sentences.

Figure 9-12: Top five offences (MSO) sentenced to imprisonment six months or less by gender and Aboriginal and Torres Strait Islander status, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

An alternative to court ordered parole for short sentences

The Parole System Review Report posed two questions in respect of court ordered parole for short sentences:

> *First*, if the purpose of parole is to allow a prisoner to serve part of his or her sentence in the community so as to facilitate the prisoner's reintegration into the community, why are offenders being sentenced to parole directly from Court without having served any time in custody?
>
> *Secondly*, if there is no or little rehabilitative benefit in short sentences with short periods on parole, what is the value in allocating precious resources in the provision of community supervision with the danger of further imprisonment but not the benefit of rehabilitation and re-integration?[988]

Removing short sentences from court ordered parole would reduce the number of offenders on parole, which could result in more resources being available to administer parole supervision of offenders who have committed more serious offences.[989] However, the Report cautioned that if parole for short sentences was removed as a sentencing option and a court ordered a prisoner to serve the entirety of that sentence in custody, this would catastrophically exacerbate the over-population in Queensland's prison system.[990] Therefore, any change to sentencing legislation must provide the court with an adequate alternative, so as to avoid offenders being sentenced to significant custodial sentences where they would otherwise have served the majority on parole.[991]

In consideration of the Parole System Review Report, the Council invites submissions on whether sentences of six months or less should be excluded from having either a parole release or parole eligibility date set, which would bring Queensland more closely in line with other Australian jurisdictions which limit the availability of parole to longer sentences. If this change were implemented in Queensland, a court could still order that the sentence be suspended in whole or in part, or order imprisonment combined with a probation order (or, under other reforms proposed, a CCO). If, as a result of amendments, a court's discretion is extended to allow for a suspended sentence and a community based order to be imposed on a single offence, this option would also be available for a short-term sentence which would otherwise be ordered to be served on parole.

QUESTION 14: AVAILABILITY OF PAROLE FOR SHORT SENTENCES OF IMPRISONMENT

14.1 Should parole for short sentences of imprisonment of six months or less be abolished, meaning the sentence would need to be served in full, unless suspended in whole or in part?

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988 Parole System Review Report, above n 9, 91 [439]–[440].

989 Ibid 91 [442].

990 Ibid 91 [443].

991 Ibid 92 [445].

Note: Under the Council's preferred option for reform of suspended sentences, courts would have an ability under the *Penalties and Sentences Act 1992* (Qld) to combine a suspended sentence with a community based order when sentencing an offender for a single offence, in addition to their existing power to combine these orders when imposing sentence for two or more offences.

14.2 If a court's ability to set a parole release or eligibility date for short sentences of six months or less is abolished, should there be any recognised exceptions. For example, should this apply:
(a) to activation of a suspended term of imprisonment on breach by reoffending?
(b) if an offender has an existing parole date and reoffends while on parole?

14.3 What might some of the risks of the above reforms be?

9.11 Options and preliminary Council views

Options identified by the Council for potential reform of court ordered parole are:

- Option 1: Retain court ordered parole in its current form, with no changes to eligibility criteria or the circumstances in which a parole release data can be set.
- Option 2: Reform court ordered parole by increasing the current three-year cap (retaining other criteria, but applying the same principles to sexual offences) by giving courts discretion to set either a parole release or eligibility date in one of the following three circumstances (which are intended to be alternatives):
  (a) for sentences over the three-year cap, if the appropriate release date is no more than 12 months from date of sentence (Parole Review Report Recommendation 3); or
  (b) for sentences of over three years, and up to five years; or
  (c) for all sentences up to five years (aligning with suspended sentence regime).
- Option 3: Removing the cap for the setting of a parole release date altogether, giving courts full discretion to set either a parole release or a parole eligibility date, and extending this discretion to all offences, other than serious violent offences, offences for which a life sentence is imposed, or other offences or circumstances which are expressly excluded (such as through the operation of mandatory sentencing provisions).

As a matter of principle, the Council would prefer an option that gives courts the greatest level of discretion. Under the proposals set out below, this would be achieved by removing mandatory requirements for both parole release and eligibility dates in Part 9 Division 3 of the PSA, and creating a dual discretion for a court to order either a parole release date (giving rise to a court ordered parole order) or a parole eligibility date (giving rise to a board ordered parole order) for any head sentence of up to five years for any offence (apart from a declared serious violent offence or other mandatory term), or setting no upper limit for the court's ability to set a parole release date.

The lack of clear evidence on the relative effectiveness of court ordered versus board ordered parole has presented challenges for the Council in considering which of these options should be preferred.

The Council's concern is that the existing evidence about the efficacy of court ordered parole is not robust enough to support an extension of court ordered parole beyond those offences to which it currently applies, or to apply it to longer sentences.

The Council has not had time to investigate the effectiveness of the court ordered parole scheme beyond a high level review of available research and administrative data (which for the reasons discussed earlier in this chapter at section 9.2, is limited), but considers this is to be an important area of future investigation and research.

The Council invites further views, including on future research that may be required to test effectiveness in this regard.

For the reasons outlined above, the Council presents the options below, with no preferred option identified.

As an alternative suggestion, consideration could be given to providing courts with a discretion to order either a parole release date or eligibility date when sentencing for current offences to which the court ordered parole scheme applies, but without extending the availability of court ordered parole beyond this period or to other offences until such time as the effectiveness of the scheme has been further evaluated. This could also be extended to allow a court to set a release date, where appropriate, in circumstances where it would currently be precluded from doing so due to the operation of section 209 of the CSA (see further section 9.6 and associated questions). The Council's findings on the potential impact of this scenario if adopted is presented earlier in this chapter.

Issues, data and legal analysis regarding use of custodial orders for sexual offences is explored in detail in Chapter 10. The discussion of the options in this chapter therefore should be read in the context of Chapter 10.

As is discussed in section 10.5.3, a high proportion of sexual offenders are currently placed on unsupervised forms of orders served in the community – most probably, partly as a result of these offences not being included within the court ordered parole scheme. Council data (2005-06 to 2017-18) shows imprisonment was the most common penalty imposed for a sexual offence, although a significant proportion of the sentences imposed were suspended:

- imprisonment with parole: 27.4 per cent;
- partially suspended sentences: 27.2 per cent; and
- wholly suspended sentences: 19.2 per cent.

As to order combinations, well over half of the 1,642 wholly suspended sentences (61.4%) and three-quarters of the 2,324 partially suspended sentences imposed for a sexual offence (76.7%) had another penalty imposed alongside the MSO penalty attracting the suspended sentence. However, most commonly, such orders were combined with other orders of the same type (on different counts).

Probation was combined with suspended sentences in about a quarter of court events involving a sexual offence (MSO), specifically:

- In 24.7 per cent of those where a wholly suspended sentence was imposed, and
- In 22.9 per cent of those where a partially suspended sentence was imposed.

Combining probation with imprisonment (whether in the form of suspended sentence and probation, or imprisonment plus probation) arguably does not manage risk well as QCS has to make an application to a court to have the probation revoked or varied, with limited grounds for variation.

Extending availability of court ordered parole to sexual offences would mean more sexual offenders are placed on parole, meaning that the Board could respond to issues of escalating risk more quickly than applications to court currently allow.

9.11.1 Option 1 – No change to court ordered parole (retain status quo)

Option 1: No change to court ordered parole
Keep three-year cap and current criteria and exclusions (including exclusion of sexual offences)

Arguments in favour of keeping the current three-year cap for court ordered parole, eligibility criteria and exclusions include:

- The current three-year cap for court order parole captures the majority of parole orders currently made, so extending the availability of court ordered parole would not make a substantial difference.
- For offenders subject to automatic release on court ordered parole serving longer sentences who would previously have had a parole eligibility date set, there may be little incentive to complete programs while in custody.
- Given the mandatory effects of reoffending on parole, extending its reach could risk increasing strain on the Board through increased workload, and unintended injustices if people are caught in the system and cannot get out.
- Courts at the time of sentence are not as well placed as the Board to assess issues of future risk and factors that might affect an offender's risk level (such as whether the offender will have suitable accommodation on their release, and their behaviour while in custody).
- Changes proposed to allow courts greater discretion to set a parole release date or eligibility date (including in circumstances where they current must set a release date) would increase workload of the Parole Board and courts may not have sufficient information at the time of sentence to decide whether it is more appropriate to set either a release or eligibility date.

However, keeping the court ordered parole system in its current form would not address the issues identified in this chapter, or identified in the Parole System Review Final Report. Other sentencing reforms would need to be relied upon to effect any positive change.

Allowing courts greater flexibility in setting either a parole release or eligibility date has a number of potential advantages, including reducing legislative complexity, while still allowing courts to set an eligibility date where risks posed by an offender warrant this. It may also enhance the potential of court ordered parole to divert offenders from

prison and reduce length of stay as courts can fix a parole release date in a broader range of circumstances. There would remain a safeguard that the Board can set additional conditions where required for court ordered parole orders and, if the risk of reoffending is unacceptably high, can amend, suspend or cancel the parole order prior to the offender's release.

9.11.2 Option 2 - Reform court ordered parole by giving courts discretion to set either a parole release or eligibility date (including for sexual offences)

Option 2: Reform court ordered parole to extend availability
Increase three-year cap for court ordered parole (retaining other criteria, but applying the same principles to sexual offences) by giving courts discretion to set either a parole release or eligibility date: (a) for sentences over three-year cap, if appropriate release date is no more than 12 months from date of sentence (Parole System Review Report Recommendation 3), or (b) for sentences of over three years, and up to five years, or (c) for all sentences up to five years (aligning with suspended sentence regime). Option to require a pre-sentence report be prepared to inform a court's decision about whether to set a parole release date for longer sentences (e.g. sentences over three years).

The three sub-options in Option 2 respond to issues raised in the Parole System Review Final Report.

Option 2(a) may assist courts in creating just sentences which give certainty to offenders who are close to completing the period of actual custody required. As noted in this chapter, there would still be gaps in that head sentences of four to five years would not be affected.

Creating a discretion to fix either a parole release date or eligibility date may reduce legislative complexity, while still allowing courts to set an eligibility date where risks posed by the offender warrant this. This could have positive flow on effects for complex areas such as automatic cancellation of orders upon reoffending during a parole period, and use of pre-sentence custody for such offending.

The potential positive and negatives of these options are discussed above in this chapter. In brief these options may enhance the potential of court ordered parole to divert offenders from prison (at least in the first instance, subject then to an offender's ability to comply with parole) and reduce their length of stay as courts could fix a parole release date in a broader range of circumstances.

Offenders subject to a parole release date, who would be subject instead to an eligibility date if no change was made, may find the greater certainty assists with pre-release planning. However, these offenders might also have less incentive to complete programs while in custody.

It may arguably be simplistic to limit the availability of court ordered parole on the basis of head sentence length and/or offence seriousness. These factors are not always a good proxy for levels of risk and do not take into account the potential impact of any future offending (for example, if a person is at risk of committing violent offences, versus low level property offending).

As to risk, the court ordered parole safeguard would remain for those orders made for head sentences exceeding three years: the Board can set additional conditions where required for court ordered parole orders and, if risk is high, it can amend, suspend or cancel the parole order prior to release.

There could be resource implications - the Board's workload would likely increase. As mentioned under Option 1, there is an argument that because of problems assessing future risk, release of offenders sentenced to longer prison sentences should be a matter for the Board to determine, not a court.

Courts may not have sufficient information at the time of sentence to decide whether to fix a release date, or even an eligibility date in some cases (in which case, the statutory 50% rule regarding eligibility would usually operate). There would likely also be a greater need for pre-sentence assessment to inform court decisions.

One further option, relevant to options 2 or 3, is to require that a pre-sentence report be prepared to inform a court's decision about whether to set a parole release date in the case of longer sentences (for example, sentences over three years).

9.11.3 Option 3 - Reform court ordered parole removing cap

Option 3: Reform court ordered parole to extend availability by removing cap
Remove the cap for the setting of a parole release date altogether, giving courts full discretion to set either a parole release or a parole eligibility date, and extending this discretion to all offences, other than serious violent offences, offences for which a life sentence is imposed, or other offences or circumstances which are expressly excluded (such as through the operation of mandatory sentencing provisions). Option to require a pre-sentence report be prepared to inform a court's decision about whether to set a parole release date for longer sentences (e.g. sentences over three years).

This option would give the greatest amount of discretion to a court but would also permit setting release dates much further into the future, exacerbating problems regarding assessing future risk and limited prisoner incentive levels.

9.12 Conclusion

In this chapter, we have considered the operation of the current court ordered parole provisions in Queensland and potential reforms to simplify and extend their operation. We have also acknowledged shortcomings in data and evidence which are important factors in evaluating such large-scale potential reform.

The impact of any changes to parole are likely to be significant given the large numbers of offenders subject to the court ordered parole scheme currently, and current workload impacts for the Board.

In the following chapter, we consider particular issues as these apply to the sentencing of sexual offences.

Resourcing issues are discussed briefly in section 11.2.

Chapter 10 Use of custodial orders for sexual offences

This chapter explores issues discussed in earlier chapters of this paper as they apply to the sentencing of offenders for sexual offences. It discusses the current legal framework that applies to the sentencing of sexual offences both in Queensland and other Australian and international jurisdictions, and Queensland sentencing trends.

It considers issues and potential impacts should the recommendation made by the Parole System Review Report that court ordered parole apply to a sentence imposed for a sexual offence be adopted.[992]

The Council has not considered the impact or operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* or *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) on the basis that these are post-sentencing orders and are not matters taken into account by a court in sentencing.[993]

10.1 The current legal framework for sentencing sexual offenders

The PSA provides guidance and direction to courts on the principles to be applied when sentencing an offender for a sexual offence. A court can only set a parole eligibility date for sexual offences, as defined for the purposes of the Act.[994]

In accordance with this definition,[995] a 'sexual offence' is an offence listed in Schedule 1 of the CSA. Those offences also form the basis of the analysis of penalties given to people convicted of a sexual offence in Queensland between 2005–06 and 2017–18 discussed below, to the extent this analysis has been possible.[996]

10.1.1 Imprisonment orders

The PSA provides separate sentencing regimes for the sentencing of offenders for a sexual offence depending on the age of the victim.

Where the victim is under 16 years

When sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the court must have regard primarily to considerations listed in section 9(6) of the PSA. These considerations include the risk of the offender reoffending,[997] and their prospects of rehabilitation including the availability of any medical or psychiatric treatment.[998] In addition, the principle that imprisonment should only be imposed as a last resort does not apply,[999] and the Act provides that the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.[1000] An 'actual term of imprisonment' is defined in section 9(12) as 'a term of imprisonment served wholly or partially in a correctional services facility'.

In *R v Tootell; Ex parte Attorney-General (Qld)*,[1001] the Court of Appeal found:

> The intent of section 9(5)(b) [now s 9(4)(b)] is to make it the usual case that those who commit sexual offences against children will serve actual imprisonment. The intent should not be subverted, by for example, an over-readiness to regard as exceptional any circumstances peculiar to the prisoner's case.[1002]

Therefore, unless there are exceptional circumstances, all offenders convicted of a child sexual offence must be sentenced to a custodial sentence comprising one or more of the following orders:

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992 Queensland Parole System Review, above n 9, Recommendation 5.

993 Section 9(9) of the *Penalties and Sentences Act 1992* (Qld) expressly prohibits a court from having regard to whether or not the offender may become, or is the subject of, a dangerous prisoners application, or may become subject to an order because of such an application.

994 *Penalties and Sentences Act 1992* (Qld) s 160D(3).

995 Ibid s 160 and *Corrective Services Act 2006* (Qld) sch 4.

996 There are some limitations to the data collected. Not all of the offences in Appendix 7 are represented individually because the collection was based on the Most Serious Offence (MSO). In addition, some data was collected by using the Australian and New Zealand Society of Criminology (ANZSOC) definition of 'sexual assault'. It will be noted where this definition is used.

997 *Penalties and Sentences Act 1992* (Qld) s 9(6)(d).

998 Ibid s 9(6)(f).

999 Ibid s 9(4)(a).

1000 Ibid s 9(4)(b) and see s 9(5) regarding closeness in age between the offender and the child being a factor in deciding whether there are exceptional circumstances. Exceptional circumstances were considered in *R v Quick; Ex parte Attorney-General* (Qld) [2006] QCA 477 (17 November 2006), *R v Pham* [1996] QCA 003 (6 February 1996).

1001 *R v Tootell; Ex parte Attorney-General (Qld)* [2012] QCA 273 (9 October 2012).

1002 Ibid 8 [19] (Holmes and Fraser JJA and Henry J).

- a term of imprisonment (with a parole eligibility date);[1003]
- a partially suspended sentence;[1004] or
- a prison/probation order.[1005]

However the general principles in section 9(2) 'must' also be considered to the extent to which they apply.

Similar considerations must also be taken into account when sentencing offenders for child exploitation related offences, although there is no express requirement that the offender must serve an actual term of imprisonment unless there are exceptional circumstances.[1006]

An adult offender convicted of a 'repeat serious child offence' must be sentenced to life imprisonment.[1007] A 'serious child sex offence' for the purposes of this regime is defined as:

> an offence against a provision mentioned in schedule 1A, or an offence that involved counselling or procuring the commission of an offence mentioned in schedule 1A, committed—
>
> (a) in relation to a child under 16 years; and
>
> (b) in circumstances in which an offender convicted of the offence would be liable to imprisonment for life.[1008]

The offences listed in Schedule 1A of the PSA include rape, incest, maintaining a sexual relationship with a child, and carnal knowledge with or of children under 16.[1009]

Where the victim is 16 years and older

Where the victim is 16 years and older, the court must have regard to the general principles set out in section 9(2). In such cases, the court has more sentencing options available to it. In addition to the imprisonment orders noted above, a judge or magistrate can order:

- an ICO;[1010]
- a wholly suspended term of imprisonment;[1011] or
- a non-custodial order such as probation,[1012] community service,[1013] fine[1014] or recognisance (good behaviour bond).[1015]

However in cases that involve violence (or counselling or procuring the use of, or attempting or conspiring to use violence) or result in physical harm to another person, the principle that imprisonment should only be imposed as a last resort does not apply.[1016] In those cases the sentencing court is required to have primary regard to section 9(3) of the PSA. Under this subsection the court must have regard to a number of considerations including the risk of harm to the community if a custodial sentence was not imposed[1017] and the need to protect any members of the community from that risk.[1018]

10.2 Exclusion of sexual offences from court ordered parole

Under section 160D of the PSA, offenders sentenced to a term of imprisonment for a serious violent offence or a sexual offence are excluded from being eligible for court ordered parole. For these offenders the court is required to set a parole eligibility date if it imposes a term of imprisonment that is not suspended.

1003 *Penalties and Sentences Act 1992* (Qld) s 160D.

1004 Ibid s 144.

1005 Ibid s 92 (1)(b).

1006 Ibid ss 9(6A) and 9(7).

1007 Ibid s 161E.

1008 Ibid s 161D.

1009 Ibid Schedule 1A.

1010 Ibid Part 6.

1011 Ibid Part 8.

1012 Ibid Part 5 Division 1.

1013 Ibid Part 5 Division 2.

1014 Ibid Part 4 Division 1.

1015 Ibid Part 3 Division 3.

1016 Ibid s 9(2A).

1017 Ibid s 9(3)(a).

1018 Ibid s 9(3)(b).

When court ordered parole was introduced in 2006 the reason for excluding sexual offences and serious violent offences from the scheme was explained by the then Minister for Police and Corrective Services in her Second Reading Speech as being their higher level of risk:

> Those prisoners who are sentenced to three years or less and who are sex offenders or serious violent offenders will not have their parole date set by a court. These types of prisoners pose a serious risk to the community and no matter how long or short their sentence is they will either have to serve their full term in jail, or be deemed suitable by a parole board before being released. In short there will be two options available to prisoners: serve your entire sentence behind bars or be deemed suitable by a court or parole board to serve some of your sentence in the community under supervision on parole.[1019]

The 'provision of programs to sex offenders and violent offenders to address criminogenic needs and reduce recidivism risk' was identified by the Minister as of primary importance in the management of these offenders.[1020] As considered by the Queensland Court of Appeal, '[t]he evident intent [of excluding these offenders from the scheme] is that each offender would be considered individually with respect to suitability for early release into the community'.[1021]

10.3 The approach to court ordered parole for sexual offences in other jurisdictions

As part of its work on the review, the Council has undertaken a cross-jurisdictional analysis of parole and sentencing orders across Australia and internationally, with a focus on England and Wales, Canada and New Zealand. As discussed in Chapter 9 regarding court ordered parole, while there are some similarities in terms of a court setting a parole date which then becomes a statutory release date, Queensland's parole system is not directly analogous to other Australian models (nor the United Kingdom, Canada or New Zealand).

Of the jurisdictions reviewed, four have a similar (though not directly analogous) parole regime to court ordered parole in the sense of these schemes providing for a person to be released at a set date, without Board review. These jurisdictions are NSW, South Australia, the UK and New Zealand. General details regarding these parole regimes are outlined in the document *Community based Sentencing Orders, Imprisonment and Parole: Cross-jurisdictional Analysis*, which can be found on the Council's website.

Of the Australian jurisdictions with some form of automatic release on parole:

- NSW does not exclude any offences from its statutory parole scheme which applies to sentences of more than six months[1022] up to three years;[1023]
- South Australia, which has a system of automatic parole release for sentences of 12 months or more, and less than five years where a non-parole period has been fixed,[1024] excludes a number of listed sexual offences from the scheme.[1025]

New Zealand allows an offender sentenced to a short-term sentence (a sentence of two years or less[1026]) to be released after serving half of their sentence on conditions set by the court.[1027] This also applies to a person sentenced to a short-term sentence for a 'serious violent offence' provided the person has not previously been convicted of a serious violent offence and has not received a formal court warning of the consequence of committing a further offence of this nature.[1028] The definition of a 'serious violent offence' includes a number of sexual offences.[1029]

1019 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 942 (Judy Spence, Minister for Police and Corrective Services).

1020 Ibid 941.

1021 *R v Waszkiewicz* [2012] QCA 22 (24 February 2012) 7 [32] (White JA).

1022 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

1023 *Crimes (Administration of Sentences) Act 1999* (NSW) s 158.

1024 *Sentencing Act 2017* (SA) s 47 (Duty of court to fix or extend non-parole periods); and *Correctional Services Act 1982* (SA) s 66 (Automatic release on parole for certain prisoners).

1025 The sexual offences excluded from automatic release on parole include: rape, compelled sexual manipulation, indecent assault, an offence involving unlawful sexual intercourse, persistent sexual abuse of child, and an offence involving an acts of gross indecency: *Correctional Services Act 1982* (SA) ss 4 (definition of 'sexual offence') and 66(2)(a).

1026 *Parole Act 2002* (NZ) s 4 (definition of 'short-term sentence').

1027 Ibid ss 14 and 86 (1); *Sentencing Act 2002* (NZ) s 93.

1028 *Parole Act 2002* (NZ) s 86 (1).

1029 *Sentencing Act 2002* (NZ) s 86A. Sexual offences included in this definition include: sexual violation (which encompasses rape), sexual connection with child, indecent act on child and indecent assault.

10.4 How are sexual offences sentenced in Queensland?

10.4.1 Queensland trends

Data over a 13-year period from 1 July 2005 to 30 June 2018[1030] (the data period) has been analysed by the Council to identify offence and sentencing trends for adult offenders sentenced in the Supreme and District Courts (combined) and the Magistrates Courts.

Broadly, the data shows that the number of sexual offences sentenced has increased over time (although as a proportion of all sentencing events it has decreased slightly). For sentences where the sexual offence was the MSO, the data shows:

- the majority of offenders are non-Indigenous males;
- the majority of offenders plead guilty, and
- the majority of offenders receive a sentence of imprisonment (including wholly and partially suspended sentences).

This data is a useful tool when considering Recommendation 5 of the Parole System Review Report — that court ordered parole should apply to a sentence imposed for a sexual offence. Data has been analysed to show the custodial penalty type imposed for the top five sexual offences (MSO) receiving sentences of three years or less. The top five offences have been selected on the basis that they constitute the majority of the sentenced offences within the cohort (87.6% of all sexual offences (MSO) receiving a custodial sentence of three years or less, and 78.7% of those receiving a custodial sentence of any length) .

The data has also been analysed by penalty type for sentences above three years and up to five years. Consideration of sentencing trends where the term of imprisonment is between three and five years has some application to Recommendation 3 from the Parole System Review Report which, together with the extension of court ordered parole to sexual offences, recommended that a court have discretion to set a parole release date in circumstances where an offender had served a substantial period on remand and the court considered the appropriate further period to be served prior to release was 12 months or less. As the maximum term of a suspended sentence is also five years, the data has been analysed to allow for some consideration of how the use of these orders might change if courts had the option to set either a parole release or a parole eligibility date for sentences up to this length.

The data shows that for sentences of three years or less, wholly and partially suspended sentences are the most common penalty imposed for sexual offences (MSO). For offences over three years and up to five years, imprisonment (with a parole eligibility date) is the most common penalty type used, however partially suspended sentences are still a common sentencing outcome. While the legislative intention was that offenders sentenced for a sexual offence 'will either have to serve their full term in jail, or be deemed suitable by a parole board before being released',[1031] the data illustrates the unintended consequence of excluding sex offenders from court ordered parole is that it has resulted in many sex offenders being subject to sentences that do not involve supervision. This was highlighted in the Parole System Review Report.[1032] The data and findings are explored further below.

It is important to note that the data has limitations:

- First, the data is based on 'sentenced events'. If a different sentence has been substituted for the original sentence on appeal, or a conviction quashed on appeal (meaning there is no conviction, and no sentence), this is not reflected in the data. The Council does not have information about how many matters relate to these circumstances.
- Over the 13 year data period, and in the years prior to this, there have been a number of changes to sexual offences likely to impact sentencing practices such as:

1030 Note Table 10-1 is an exception to this, covering 2005-06 to 2016-17.

1031 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 942 (Judy Spence, Minister for Police and Corrective Services).

1032 Queensland Parole System Review, above n 9, 102–103 [507]–[508].

- the introduction of new sexual offences[1033] and abolition of others (such as sodomy,[1034] which may impact on sentences for maintaining a sexual relationship with a child);[1035]
- changes to the type of conduct captured within different offence categories[1036] and maximum penalties;[1037]
- the introduction of new circumstances of aggravation;[1038]
- the introduction of new sentencing principles that apply in sentencing offenders for certain types of sexual offences — for example, to require an actual term of imprisonment to be served for offences committed against children under 16, unless there are exceptional circumstances.[1039]

Where data is analysed by offence type, the offences listed reflect the classifications assigned by the Queensland extension to the Australian Standard Offence Classification (QASOC), so offence categories do not necessarily align directly with how offences are classified under Queensland legislation.[1040] Under QASOC subgroups, 'aggravated sexual assault' are offences which involve:

- sexual intercourse;
- infliction of injury or violence;
- possession/use of a weapon;
- committed in company; or
- an offence where consent is proscribed / committed against a child.[1041]

Examples of 'aggravated sexual assault' are rape, incest, carnal knowledge and maintaining a sexual relationship with a child. 'Non-aggravated sexual assault' are offences of sexual assault which do not involve aggravating circumstances or threat of sexual assault.[1042] This category primarily includes indecent assault.[1043]

Offences classified as 'non-assaultive sexual assault' are grooming offences and procuring a child for prostitution/pornography. It does not include offences involving physical contact.[1044] 'Non-assaultive offences against a child' offences primarily include indecent treatment of a child under 16 (procure to commit) and using the internet to procure children under 16.[1045]

1033 New offences introduced in 2005: wilful exposure in the *Summary Offences Act 2005* (Qld) s 9; Child exploitation offences *Criminal Code* (Qld) (ss 228A–228D). Offences introduced in 2013 by amendments made to the *Criminal Code* (Qld) include: grooming children under 16 (s 218B); unlawful sodomy with a child who is also a person with an impairment of the mind (s 208(2A)); indecent treatment of children under 16 if the child is a person with an impairment of the mind (s 210(4A); Carnal knowledge with or of children under 16 if the child is a person with an impairment of the mind (s 215(4A); Using the internet to procure children under 12 (s 218A). In 2016, three new child exploitation material offences were created under the *Criminal Code* (Qld): Administering child exploitation material website (s 228DA), Encouraging use of child exploitation material website (s 228DB), and Distributing information about avoiding detection (s 228DC).

1034 *Health and Other Legislation Amendment Act 2016* (Qld) s 4.

1035 For example, the sentencing court re-opened the sentence on this basis in *CDE v The Queen* [2017] District Court of Queensland: Pretrial Rulings 2 (3 February 2017). While the conviction was appealed in *R v PAZ* [2018] 3 Qd R 50, the re-opening of the sentence by the court at first instance was mentioned at 89 [175] (Morrison JA).

1036 For example, the definition of rape was expanded 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 (previously captured within the offences of sexual assault and indecent treatment of a child) and the offence of sexual assault was recast by the *Criminal Law Amendment Act 2000* (Qld).

1037 For example, maximum penalties for Child Exploitation Material offences were increased by the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) ss 88–91.

1038 This applies both to new aggravated forms of existing offences introduced carrying higher maximum penalties — for example, a new circumstance of aggravation of a person using an anonymising service or hidden network in committing a child exploitation material offence (*Criminal Code* (Qld) ss 228A, 228B, 228C and 228D, 228DA, 228DB, 228DC) — and general aggravating factors introduced for the purposes of sentencing, such as the introduction of a serious organised crime circumstance of aggravation under s 161Q *Penalties and Sentences Act 1992* (Qld) and amendments that require a sentencing court to consider whether an offence is a domestic violence offence as an aggravating factor unless the court considers it is not reasonable because of the exceptional circumstances of the case: s 9(10A).

1039 *Penalties and Sentences Act 1992* (Qld) s 9(5) inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act* 2010 (Qld) s 5.

1040 Queensland Government, Office of Economic and Statistical Research, above n 2.

1041 Ibid 30.

1042 Ibid 32.

1043 *Criminal Code* (Qld) s 352.

1044 Queensland Government, Office of Economic and Statistical Research, above n 2, 33.

1045 *Criminal Code* (Qld) ss 210(1)(B); 218A(1).

10.4.2 Sentence events

Table 10-1 shows a breakdown of sexual offences sentenced in Queensland over the data period.[1046] Over the 13-year period there were 7,786 adult offenders sentenced for 29,273 sexual offences, of which 7,756 were classified as the MSO. A full list of offences which are classified as 'contact' and 'non-contact offences' is contained in Appendix 7. 'Contact offences' include sexual assault, indecent treatment of children under 16, rape, incest, maintaining a sexual relationship with a child and making child exploitation material. 'Non-contact offences' include offences such as grooming children under 16, possessing child exploitation material and other child pornography offences.

Table 10-1: Sexual offences sentenced in Queensland, 2005-06 to 2016-17[1047]

Offence type	Adult offenders	Sentencing events	MSO events	Sentenced offences	Penalties given
Sexual offences	7,786	8,276	7,756	29,273	30,892
Child specific sexual offences^	5,790	6,124	5,234	22,468	23,819
Contact offences#	5,980	6,295	5,907	20,463	21,485
Non-contact sexual offences#	2,936	3,080	1,849	8,810	9,407

Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.
^child specific sexual offences includes only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences;
'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).
Note: The sub-categories presented are not mutually exclusive and cases/offenders may be counted in more than one.

Table 10-2 shows the number of sentenced events involving a sexual offence has increased 19.1 per cent, from 706 events in 2005–06 to 841 events in 2017–18. However, as a proportion of all sentenced offences, sexual offences have decreased slightly from 1.1 per cent to 0.8 per cent.

Table 10-2: Change in sentenced sexual offences over time, 2005-06 to 2017-18

	Number of sentencing events involving a sentenced sexual offence			Proportion of all sentenced offences (%)	
Offence type	2005-06	2017-18	% change	2005-06	2017-18
Sexual offences	706	841	▲ 19.1	1.1	0.8
Child specific offences^	527	590	▲ 12.0	0.9	0.6
Contact offences#	577	604	▲ 4.7	0.7	0.6
Non-contact offences#	203	376	▲ 85.2	0.4	0.2

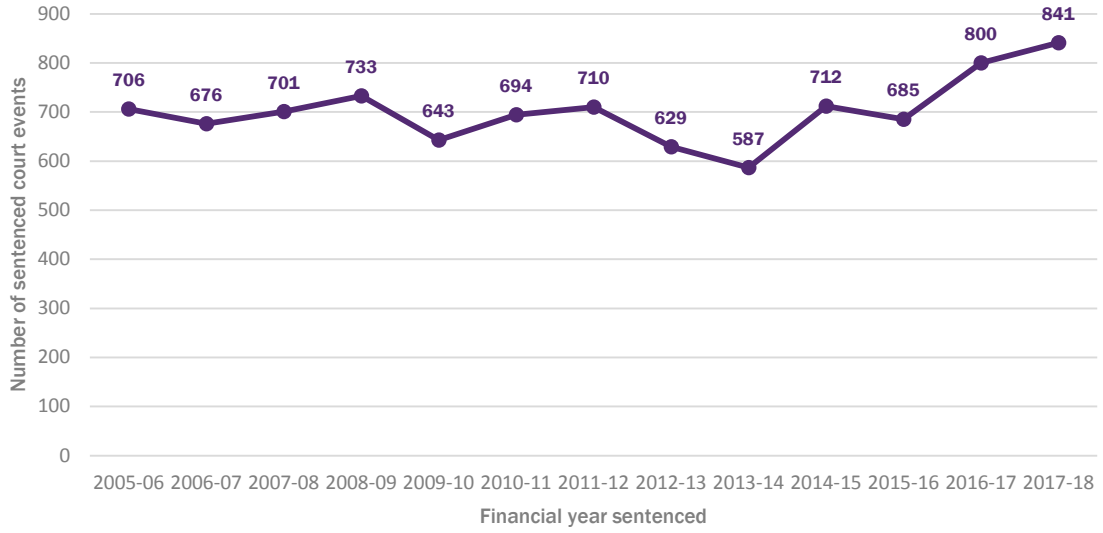
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018
^child specific sexual offences includes only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences;
'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).
Note: The sub-categories presented are not mutually exclusive and cases/offenders may be counted in more than one.

Figure 10-1 below, shows that the number of sexual offences sentenced by Queensland courts has remained fairly consistent, but has increased in recent years. The lowest point was in 2013–14, with 587 sentenced events. In the most recent financial year, 2017–18, there were 841 sentenced events involving a sexual offence.

1046 This table is limited to 2005–06 to 2016–17 only as unique adult offender data is not available for the second half of 2017–18.

1047 This table is limited to 2005–06 to 2016–17 only as unique adult offender data is not available for the second half of 2017–18.

Figure 10-1: Number of sentenced events involving sexual offence, 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

10.5 Offenders with a sexual offence as the MSO

10.5.1 Gender and Aboriginal and Torres Strait Islander status

The overwhelming majority of offenders sentenced for a sexual offence (MSO) were male (97.7%), and the majority of offenders were non-Indigenous (85.0%). Table 10-3 shows little difference in offence type (MSO) by gender, with male offenders overwhelmingly committing the majority of offences.

Table 10-3: Offence type for sentenced sexual offences by gender (MSO), 2005–06 to 2017–18

Offence type	N	Male (%)	Female (%)
Sexual offences (all)	8,552	97.7	2.3
Child specific offences^	5,740	97.5	2.5
Contact offences#	6,457	97.8	2.2
Non-contact offences#	2,090	97.7	2.3

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018
^child specific sexual offences includes only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences.
'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).

Table 10-4 shows that non-Indigenous male offenders are the vast majority of offenders (85.0%) sentenced for sexual offences (MSO). The proportion of offences committed by Aboriginal and Torres Strait Islander offenders was slightly higher for contact offences, and lower for non-contact offences.

Table 10-4: Offence type for Aboriginal and Torres Strait Islander people sentenced for sexual offences (MSO), 2005-06 to 2017-18

Offence type	N	Aboriginal and Torres Strait Islander (%)	Non-Indigenous (%)
Sexual offences (all)*	8,288	15.0	85.0
Child specific sexual offences^	8,840	11.1	88.9
Contact offences#	6,294	17.8	82.2
Non-contact offences#	1,989	6.4	93.6

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.
^child specific sexual offences includes only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences;
* where the Indigenous status of an offender was not known they have been excluded from the data (n=264).
# 'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).

10.5.2 Historical sexual offences

For the purpose of this chapter, historical offences are classified as sentences which were imposed 10 years or more after the offence date. A review of the 8,552 offenders sentenced for a sexual offence (MSO) in comparison to the offence date showed that 795 (9.3%) offenders were sentenced more than 10 years after the offence date. Of the 795 offenders in this cohort:

- 287 were sentenced 10 to 15 years after the offence;
- 145 offenders were sentence 15 to 20 years after the offence; and
- 363 offenders were sentenced more than 20 years after the offence.

Historical offences can affect the data in a number of ways, taking into account that some types of conduct may have fallen within a different offence category at the time of the offending (for example, indecent treatment of a child under 16, rather than rape), and that some offences at the time of the offending (the relevant period for the purposes of sentencing) would have carried a lower maximum penalty. As an example, the current maximum penalty for indecent treatment of a child under 12 years is 20 years, and 14 years if the child is 12 years or older, but under 16,[1048] whereas in 1999, the maximum penalties for this offence were 14 years for an offence involving a child under 12, and 10 years for an offence involving a child aged 12 years or older. Offences occurring even earlier than this carried an even lower maximum penalty (e.g. in 1995, the same conduct carried a maximum penalty of 10 years if committed against a child under 12 years, and 5 years if committed against a child 12 years or older). Because all sentencing data for a given year includes historical offences, this can affect reported average sentences.

Table 10-5 shows that of the 795 offenders sentenced 10 years or more after the offence, nearly half (49.2%, n=391) were sentenced for indecent treatment of a child as the MSO.

[1048] *Criminal Code* (Qld) ss 210(2)–(3). The higher maximum penalty of 20 years' imprisonment also applies if the child is, to the knowledge of the offender, his or her lineal descendant, is the guardian of the child or is in the offender's care or where the child has a mental impairment: ss 210(4)–(5). The latter sub-category is a relatively recent addition, being inserted in 2013 by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld) s 15.

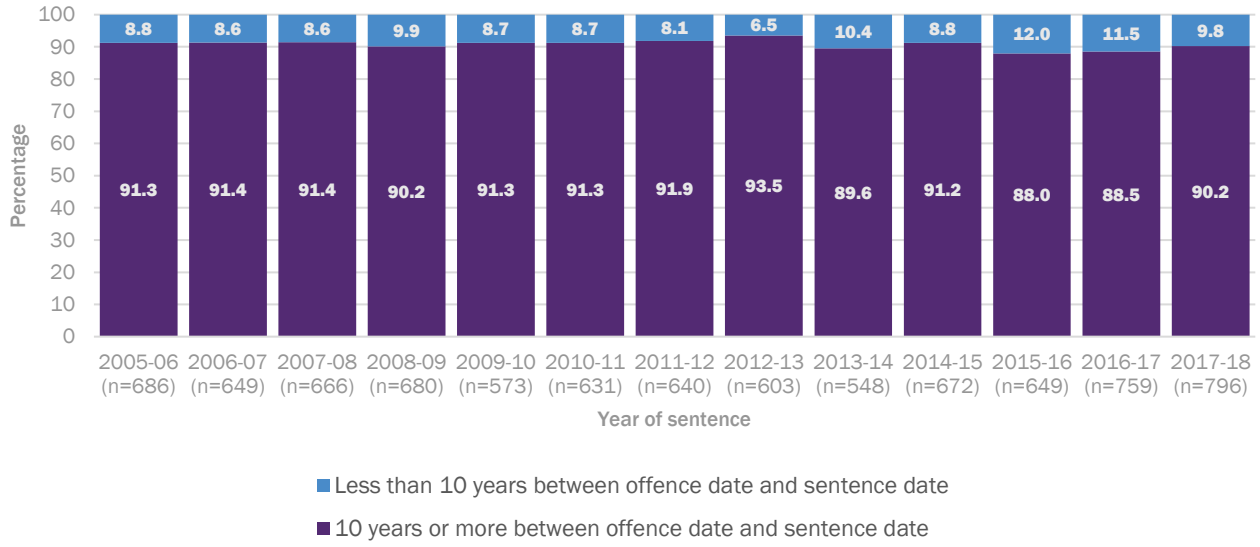
Table 10-5: Historical offences sentenced by offence type (MSO) 2005-06 – 2017-18[1049]

Offence type (QASOC subgroup)	N	Percent
Indecent treatment of a child	391	49.2
Maintaining a sexual relationship with a child	172	21.6
Rape	113	14.2
Carnal knowledge of children	42	5.3
Aggravated sexual assault	21	2.6
Incest	17	2.1
Non-assaultive sexual offences against a child	13	1.6
Attempted rape	9	1.1
Child pornography offences	9	1.1
Non-aggravated sexual assault	5	0.6
Administer harmful substances	1	0.1
Indecent treatment (consent proscribed)	1	0.1
Non-assaultive sexual offences	1	0.1
TOTAL	**795**	**100.0**

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.

Figure 10-2 shows the proportion of historical offences sentenced each year. The proportions have ranged between 6.5 per cent to 12 per cent of all sexual offences (MSO) sentenced.

Figure 10-2: The proportion of historical sexual offences sentenced 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.

1049 For definitions of QASOC subgroups 'aggravated sexual assault', 'non-assaultive sexual offences against a child' and 'non-assaulting offences' see above explanation under 'Queensland trends'.

Table 10-6: Type of penalties given for sexual offences (MSO), 2005-06 to 2017-18

		Custodial penalty (79.6%)										Non-custodial penalty (20.4%)									
	TOTAL	Imprisonment		Imprisonment with probation		Partially suspended sentence		Wholly suspended sentence		Intensive correction order		Probation		Community service		Fine		Good behaviour order		Convicted, not punished	
	N	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
Sexual offences (all)	8,547	2,340	27.4	217	2.5	2,324	27.2	1,642	19.2	282	3.3	927	10.9	286	3.4	307	3.6	192	2.3	25	0.3
Child specific sexual offences^	5,738	1,141	19.9	184	3.2	1,727	30.1	1,233	21.5	215	3.8	726	12.7	212	3.7	143	2.5	138	2.4	18	0.3
Contact sexual offences#	6,457	2,153	33.3	135	2.1	1,806	28.0	998	15.5	185	2.9	612	9.5	195	3.0	196	3.0	159	2.5	13	0.2
Non-contact sexual offences#	2,090	187	8.9	82	3.9	518	24.8	644	30.8	97	4.6	315	15.1	91	4.4	111	5.3	33	1.6	12	0.6

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

Notes: (1) rising of the court has been excluded (n=5); (2) the sub-categories presented are not mutually exclusive and cases/offenders may be counted in more than one;
^child specific sexual offences includes only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences;
'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).

10.5.3 Types of penalties imposed for sexual offences

Table 10-6 (above) shows that 79.6 per cent of all offenders sentenced for a sexual offence (MSO) received a custodial penalty (imprisonment with parole eligibility, a partially suspended sentence of imprisonment or a wholly suspended sentence).

Imprisonment was the most common custodial penalty, accounting for 27.4 per cent of all penalties given, followed closely by partially suspended and wholly suspended terms of imprisonment (27.2% and 19.2% respectively). Imprisonment was highest for contact sexual offences (MSO) and lowest for non-contact sexual offences. Probation was the most common non-custodial penalty (10.9% of all penalties given).

10.5.4 Plea type and court level

An analysis of the data period showed that of cases where the final plea type was known, the vast majority of offenders sentenced for a sexual offence (MSO) pleaded guilty (87.9%; n=7,376).

A plea of guilty is particularly important in offences of this nature, especially those involving children as victims. First, there is a utilitarian value, in the sense that by an early plea, the cost to the State of maintaining the criminal justice system is greatly reduced. Even if a small number of the offenders over the data period had pleaded not guilty and their case proceeded to trial, it would have resulted in substantial court backlogs and major delays in having cases finalised, at increased cost. Secondly, there is the possibility that the plea may be evidence of remorse which is in the community interest, because an offender with insight into the causes of his behaviour is more likely to be rehabilitated and less likely to reoffend. Thirdly, and perhaps most importantly, a plea of guilty obviates the need for the victim to be compelled to re-live the events, thereby avoiding the likely trauma caused by their involvement in the trial process, assisting with their recovery.[1050]

Reflecting the jurisdiction of these courts and their ability to deal with sexual offence matters, the vast majority of offenders sentenced for a sexual offence were sentenced in a higher court (86.9%; n=7,428), with only 13.1 per cent of offenders (n=1,124) being sentenced in the Magistrates Courts for a sexual offence over the data period.[1051] Of sexual offences dealt with by the higher courts, the overwhelming majority were sentenced in the District Court.

10.5.5 Custodial penalties

Court level

Over the data period, 6,805 offenders received a custodial penalty for a sexual offence (MSO), and 93.6 per cent were sentenced in a higher court (most usually, the District Court). The high proportion of custodial orders imposed for sexual offences by the higher courts is to be expected given the majority of sexual offences are dealt with in these courts, and the more serious nature of the offences dealt with in these courts when compared to those offences that can be sentenced in the Magistrates Court.[1052]

Penalty type and sentence length

Figure 10-3 shows that of the 6,805 offenders who received a custodial penalty in any court for a sexual offence (MSO), 71.8 per cent received a sentence involving actual imprisonment – 37.6 per cent a term of imprisonment, and a further 34.2 per cent a partially suspended sentence.

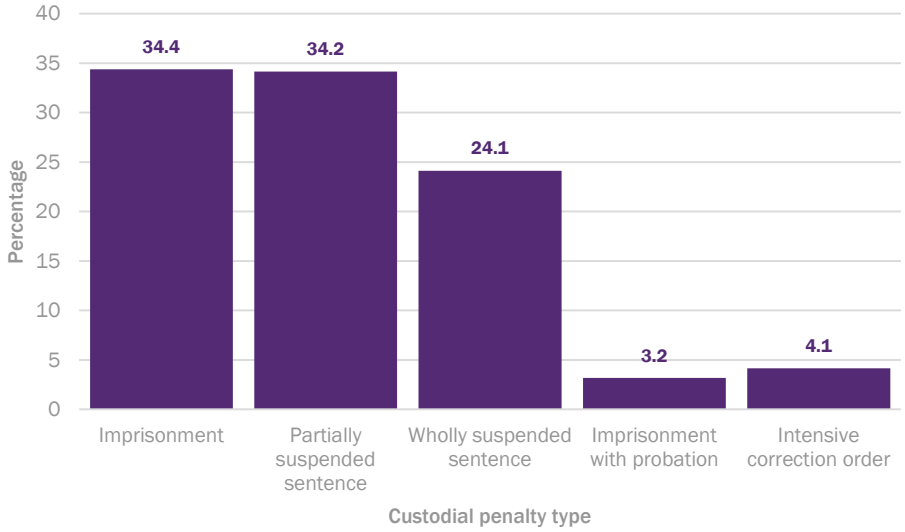
Almost a quarter of offenders (24.1%) who received a custodial penalty for a sexual offence (MSO) received a wholly suspended sentence. Only 4.1 per cent of offenders were given an ICO.

1050 These principles are captured in many cases including *R v Byrnes; Ex parte Attorney-General (Qld)* [2011] QCA 40 (11 March 2011) 7 [27] (Muir JA, de Jersey CJ and White JA agreeing).

1051 Prior to the reforms introduced by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld), the Magistrates Court did not have jurisdiction to deal with sexual offending.

1052 See also s 552B(1)(a) of the *Criminal Code* (Qld) where an offender can elect a trial by jury for a sexual assault.

Figure 10-3: Type of custodial penalty for sexual offences (MSO), 2005–06 to 2017–18

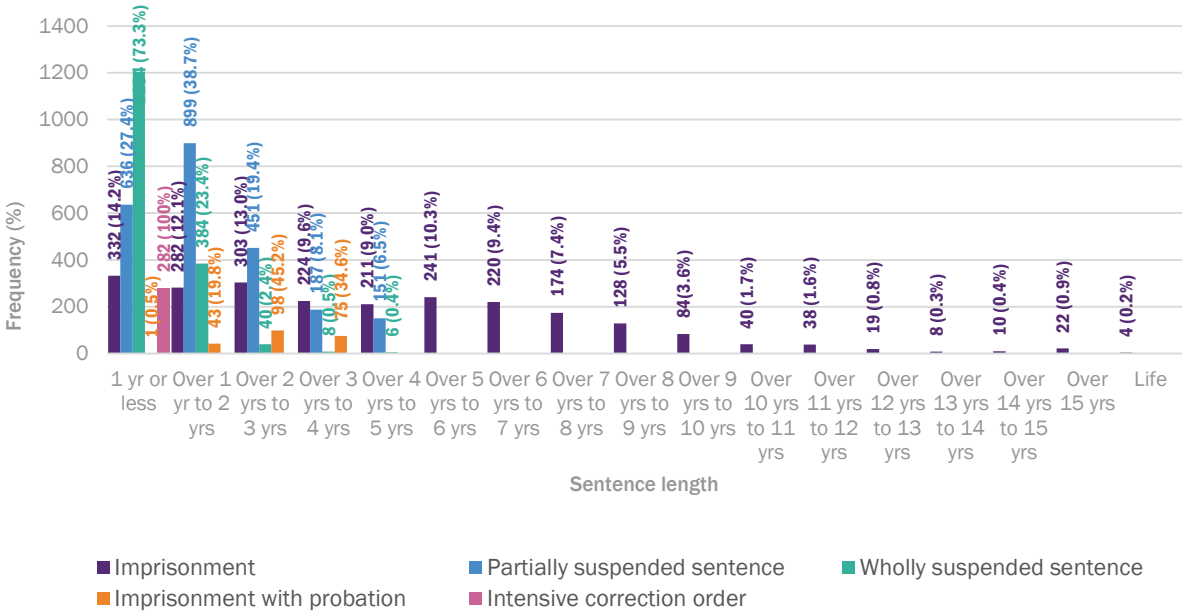


Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.

Figure 10-4 shows that of offenders who received a partially suspended sentence for a sexual offence (MSO) (n=2,324), two-thirds (66.1%) received a sentence equal to or less than two years, while nearly three-quarters (73.3%) of offenders sentenced to a wholly suspended sentence had a head sentence of one year or less. This means the majority of offenders sentenced to a suspended sentence for a sexual offence (MSO) received a sentence that would fall within the three year cap for court ordered parole.

Almost half (48.1%) of offenders sentenced to imprisonment were sentenced to four years' imprisonment or less. Only 5.9 per cent received a sentence of 10 years or longer, although four offenders given a life sentence were not included in this count.

Figure 10-4: Sentence length as a proportion of penalty type for sexual offenders (MSO) who received a custodial penalty, 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.
Note: The sentence length for imprisonment with probation is the sum of the imprisonment length and the probation period

Of all offenders sentenced to a custodial sentence for a sexual offence as their MSO (n=6,805), 85.5 per cent received a custodial sentence equal to or less than five years (68.0% of all offenders sentenced for a sexual offence (MSO)).

Sentence lengths for sexual offences differ by the type of custodial penalty, as show in Table 10-7. Excluding four offenders who received a life sentence,[1053] the average length of imprisonment imposed was 4.9 years. For those sentenced to a partially suspended sentence, the average sentence length was two years, suspended after the offender had served 7.2 months in custody (being just under one-third of the average partially suspended sentence length).

The median term of imprisonment for all sexual offences is 4.5 years, compared to 1.5 years for a partially suspended sentence, and 1.0 year for both wholly suspended sentences and ICOs.

Table 10-7: Custodial penalty sentence length for all sexual offences (MSO), 2005–06 to 2017–18

Custodial penalty type	N	Average	Median	Minimum	Maximum
Imprisonment (years)*	2,336	4.9	4.5	0.0 (3 days)	25.0
Partially suspended sentence					
Sentence length (years)	2,324	2.0	1.5	0.1 (42 days)	5.0
Time before suspension (months)	2,324	7.2	6.0	0.0 (1 day)	36.0
Wholly suspended sentence (years)	1,642	1.0	1.0	0.1 (28 days)	5.0
Imprisonment with probation (years)	217	2.6	2.5	1.0	4.0
Intensive correction order (months)	282	10.3	12.0	3.0	12.0

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.
*4 offenders received a life sentence which are not included in these calculations
Note: The sentence length for imprisonment with probation is the sum of the imprisonment length and the probation period.

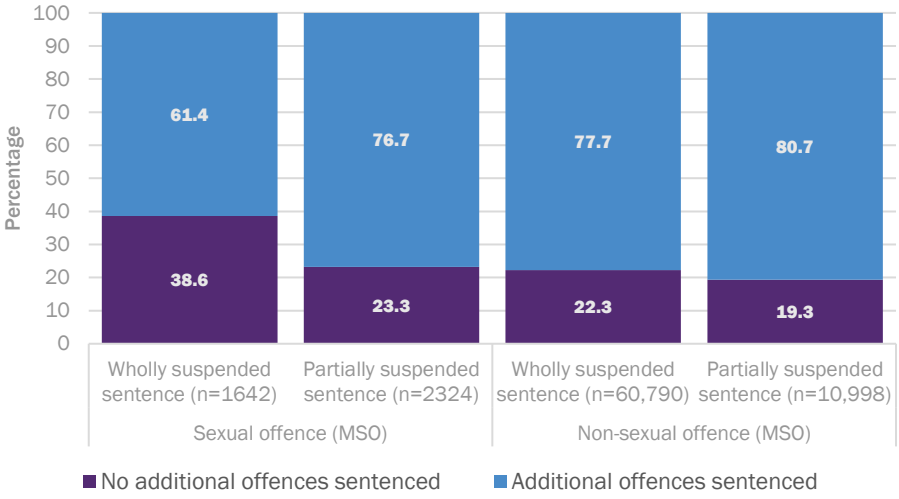
10.6 Multiple offences and penalties combined with probation

An analysis of court data for suspended sentences was conducted to explore whether courts are combining probation with a custodial sentence in circumstances where the person is being sentenced for multiple offences. Although suspended sentences in Queensland are not subject to conditions (other than that the person must not to commit an offence punishable by imprisonment during the operational period of the order), suspended sentences ordered alongside probation for a separate offence can be used to achieve supervision of the offender in the community. For this sentencing option to be available to a court, the court must be sentencing the person for more than one offence.

Figure 10-5 shows that where a suspended sentence was imposed, in between 61.4 per cent to 80.7 per cent of cases, the person was being sentenced for more than one offence. Overall, sexual offences (MSO) were less likely to be sentenced for an additional offence than for non-sexual offences, particularly where a wholly suspended sentence was imposed.

[1053] Offenders who received life imprisonment were excluded as there is no known numerical value that can be placed on 'life imprisonment'.

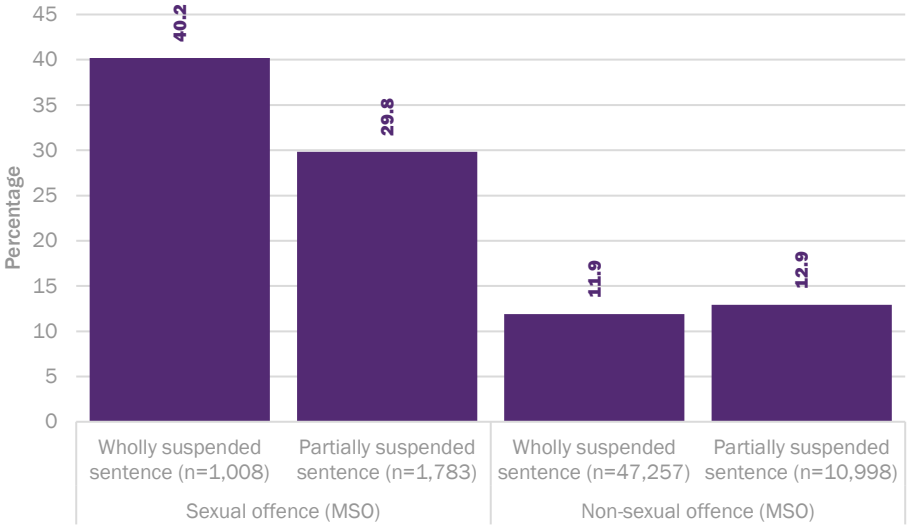
Figure 10-5: Proportion of cases that received additional penalties within a court event as a suspended sentence of five years or less, by offence type, 2005-06 to 2017-18(MSO)



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

Of sentencing events involving a person being sentenced for multiple offences, Figure 10-6 shows that combining probation orders with suspended sentences is more common where the MSO is a sexual offence compared to a non-sexual offence. When the MSO was sentenced with other offences and received a wholly suspended sentence, 40.2 per cent also received a probation order. This combination was observed in 11.9 per cent of court events with a non-sexual offence MSO. Similar proportions are seen when the MSO penalty was a partially suspended sentence, with 29.8 per cent of sexual offences (MSO) and 12.9 per cent of non-sexual offences (MSO) having a probation order ordered together with the partially suspended sentence.

Figure 10-6: Proportion of cases that received a probation order within the same court event as a suspended sentence of five years or less, by offence type (MSO), 2005-06 to 2017-18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

There are limitations to the use of a suspended sentence with probation in achieving a supervised form of imprisonment order with a set release date that can offer an effective form of supervision. First, an offender must be sentenced for multiple offences (see Figure 10-5 above). Second, if a partially suspended sentence is ordered alongside probation for a different offence, the term of imprisonment to be served prior to suspension must be no more than 12 months.[1054] Finally, while this approach is similar to court ordered

[1054] See *R v Hood* [2005] 2 Qd R 54, 67 [48] (Jerrard JA, McPherson JA and Helman J agreeing).

parole, probation conditions can only be amended, or the order cancelled, by a court (rather than, in the case of parole, by the Parole Board). This issue is discussed further below.

10.7 Sentencing outcomes for certain sexual offences

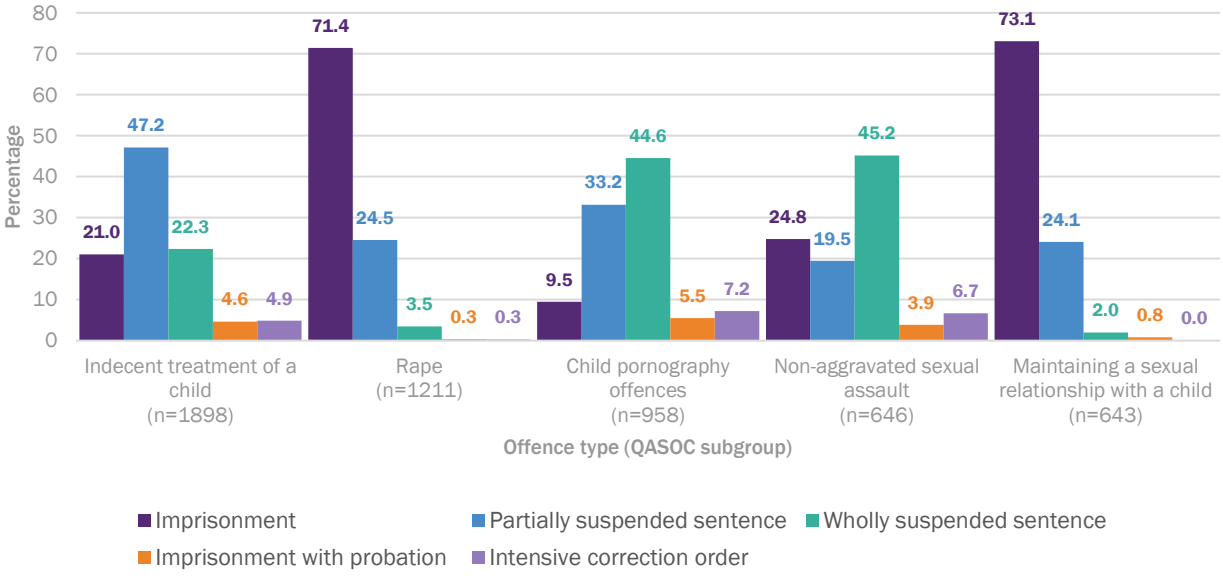
Sentences for the top five sexual offences to receive a custodial penalty (MSO) varied by offence type. Two offence categories used in Figure 10-7 and Figure 10-8 below are unique to QASOC[1055] subgroups and are explained here.

The category of 'non-aggravated sexual assault' consists of offences of sexual assault which do not involve aggravating circumstances or threat of sexual assault.[1056] 'Non-aggravated sexual assaults' primarily include indecent assault offences.[1057] They exclude 'aggravated sexual assaults' which are offences which involve: sexual intercourse; infliction of injury or violence; possession/use of a weapon; committed in company; or an offence where consent is proscribed/committed against a child.[1058] Examples of 'aggravated sexual assault' are rape, incest, carnal knowledge and maintaining a sexual relationship with a child.

Offences classified in the category of 'non-assaultive sexual assault' are offences such as grooming and procuring a child for prostitution/pornography. This offence category does not include offences involving physical contact.[1059] 'Non-assaultive offences against a child' offences primarily include indecent treatment of a child under 16 (procure to commit) and using the internet to procure children under 16.[1060]

Figure 10-7 shows that rape and maintaining a relationship with a child under 16 years were the offences most likely to receive an imprisonment sentence (71.4% and 73.1% respectively). Comparatively, a wholly suspended sentence was the most common penalty for non-aggravated sexual assault with (45.2%) followed closely by child pornography offences (44.6%). Close to half of the offenders (47.2%) sentenced to a custodial penalty for indecent treatment of a child (MSO) received a partially suspended sentence — the most common penalty outcome for this offence.

Figure 10-7: Penalty type for top five sexual offences that received a custodial sentence (MSO), 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

1055 Queensland Government, Office of Economic and Statistical Research, above n 2. The classifications assigned by the Queensland extension to the Australian Standard Offence Classification (QASOC) and do not necessarily align directly with how offences are classified under Queensland legislation.

1056 Ibid 32.

1057 *Criminal Code* (Qld) s 352.

1058 Queensland Government, Office of Economic and Statistical Research, above n 2, 30.

1059 Ibid 33.

1060 *Criminal Code* (Qld) ss 210(1)(B); 218A(1).

10.7.1 Sexual offenders (MSO) who received a custodial penalty of five years or less

As a result of recommendations made by the Parole System Review Report, the Council has been asked to consider whether court ordered parole should be made available to courts in sentencing for sexual offences, and also if changes should be made to allow courts to set a parole release date in cases where they consider the appropriate further period to be served in custody before parole should be no more than 12 months, but the sentence exceeds three years (the current cap for court ordered parole). This is also discussed further in Chapter 9.

To test the likely impact of these changes, the Council has considered how many sexual offenders might be captured should courts have a discretion to set either a parole release or a parole eligibility date for sentences of up to three years, as well as for sentences of over three, up to five years. The five year limit has been adopted on the basis that it is more straightforward to model than the proposal made by the Parole System Review Report which takes into account time spent on remand, and that five years aligns with the maximum term of a suspended sentence.

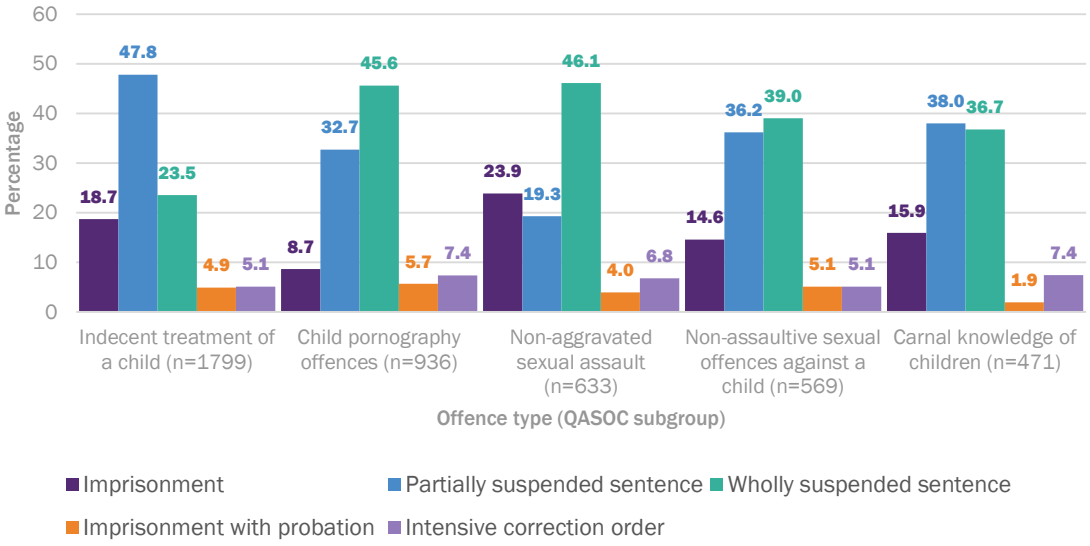
Of the 8,552 offenders sentenced for a sexual offence (MSO) over the 13-year data period, 5,817 offenders were sentenced to a custodial penalty of five years or less for a sexual offence (MSO) (68.0%). The majority of those offenders, (n=5,030; 86.5%) received a sentence of three years or less. A further 787 offenders (13.5%) received a sentence of more than three years, but less than five years.

10.7.2 Sexual offenders (MSO) who received a custodial penalty of three years or less

To explore penalties imposed for sexual offences in more detail, the Council examined custodial penalty types of five years or less for the top five sexual offences sentenced in Queensland. As shown in Figure 10-8, suspended sentences were the most common custodial penalty imposed among the five most common sexual offences that attracted a custodial penalty of three years or less (MSO), comprising between 65.4 and 78.3 per cent of custodial penalties. Wholly suspended sentences were the most common custodial penalty imposed for the top five sexual offences, with the exception of indecent treatment of a child, for which the use of partially suspended sentences was most common.

The offence category with the highest rate of imprisonment was non-aggravated sexual offences against a child, at 27.9 per cent, followed by indecent treatment of a child at 23.6 per cent.

Figure 10-8: Custodial penalty type for top five sexual offences that received three years or less (MSO), 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

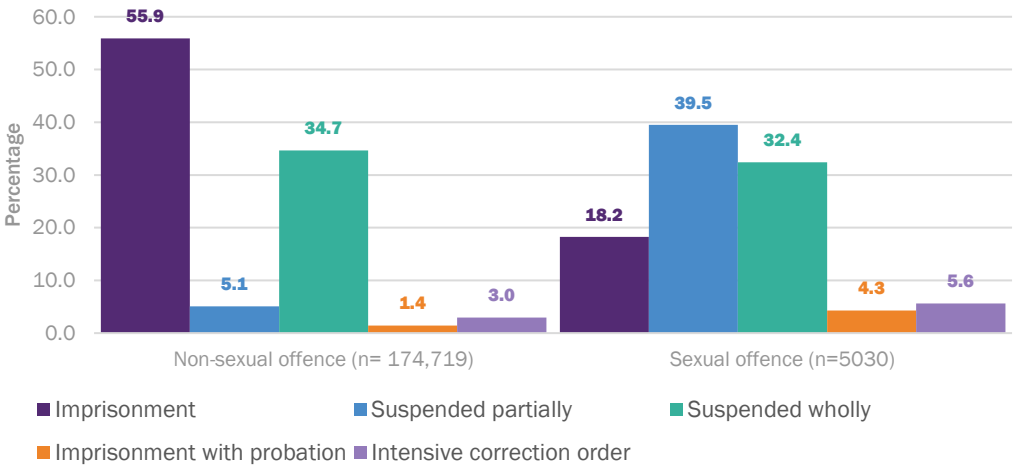
10.7.3 Use of suspended sentences (three years or less) for sexual offences and non-sexual offences

Figure 10-9 shows that for custodial penalties of three years or less, a term of imprisonment was significantly more common for non-sexual offences at 55.9 per cent, compared to 18.2 per cent for sexual offences.

Sexual offences were more likely to receive a partially suspended sentence (39.5%), than non-sexual offences (5.1%). These findings correlate with the Parole System Review Report that courts are using suspended sentences for sexual offences because court ordered parole is not available.[1061]

However, no significant difference is seen in the proportion of wholly suspended sentences given for non-sexual and sexual offences.

Figure 10-9: Custodial penalty type sentenced to three years or less for sexual offence (MSO) and non-sexual offences (MSO), 2005–06 to 2017–18

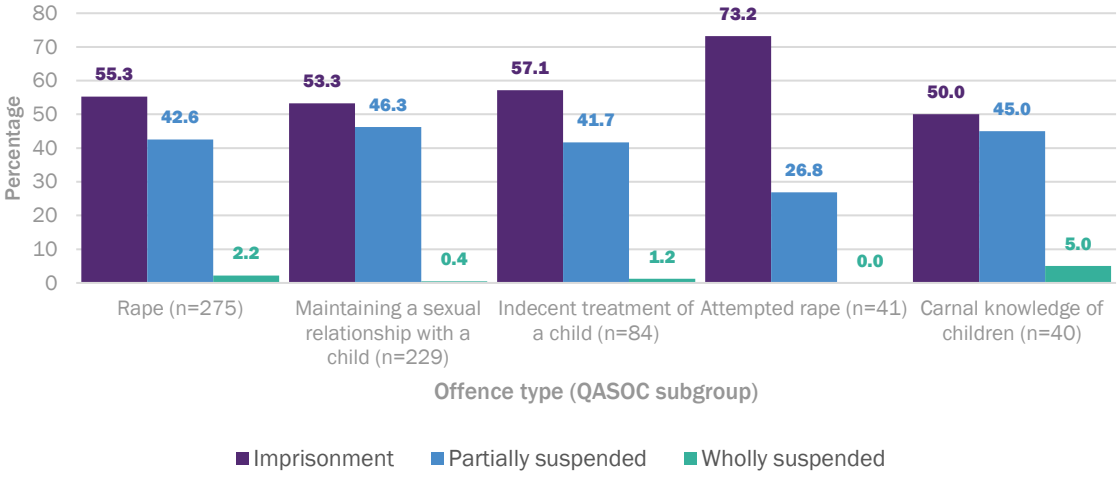


Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

10.7.4 Sexual offenders (MSO) who received a custodial penalty of more than three years up to five years

As shown by Figure 10-10, imprisonment was the most common custodial penalty for the top five sexual offences sentenced to between three years and five years (MSO), comprising between 50.0 and 73.2 per cent of custodial penalties. Partially suspended sentences were imposed for 26.8 to 46.3 per cent of custodial penalties, illustrating that it is a common outcome.

Figure 10-10: Top five sexual offence (MSO) that received a custodial sentence greater than three years and up to five years, 2005–06 to 2017–18



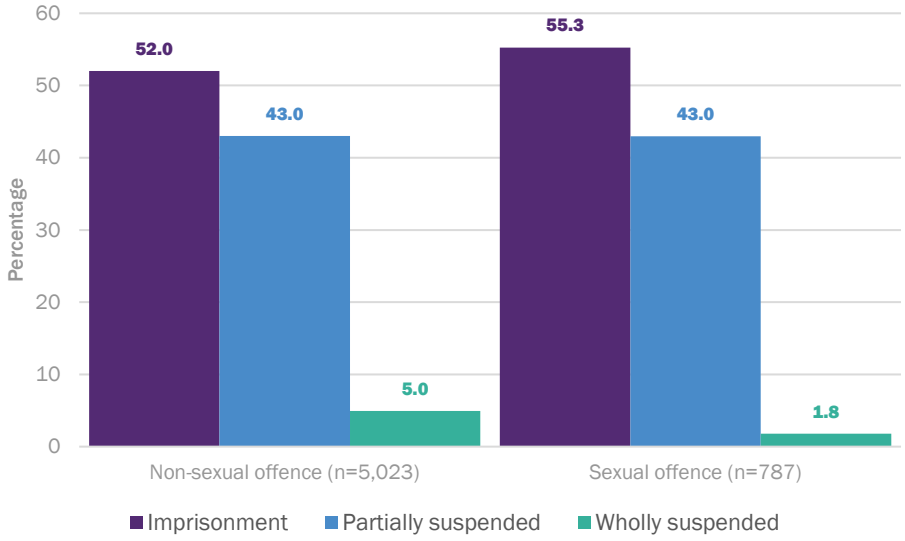
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

1061 Queensland Parole System Review, above n 9, 96–97 [469]–[473] and 101–102 [500]–[503].

10.7.5 Use of suspended sentences (over three years and up to five years) for sexual offences and non-sexual offences

Of the 787 sexual offence cases that fall within the category of sentences of imprisonment between three and five years, 55.3 per cent (n=435) were sentenced to imprisonment, 43.0 per cent (n=338) were partially suspended, and 1.8 per cent (n=14) were wholly suspended. Similar proportions were seen for non-sexual offences with the same penalty criteria as shown in Figure 10-11.

Figure 10-11: Custodial penalty type sentence greater than three years and up to five years for sexual offences (MSO) and non-sexual offences (MSO), 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018

10.8 Sentencing trends and the Parole System Review Report

The sentencing trends presented in this chapter highlight that suspended sentences (whether wholly or partially suspended) are a common outcome for sexual offences (MSO). Suspended sentences are more likely to be imposed for sentences less than three years but are still a common outcome for sentences over three years and up to five years. Where there are multiple offences, less than half of suspended sentences are accompanied by probation.

The data illustrates the unintended consequence of excluding sex offenders from court ordered parole, which has resulted in many sex offenders being subject to sentences that do not involve supervision. The Parole System Review Report observed that:

> It may be that a short period of imprisonment for a sex offence for the purposes of retribution and deterrence would be considered appropriate by a Court if it could be confident as to the length of time that the offender would serve in custody. However, because the court ordered parole regime does not apply to sex offences, the Court cannot be confident as to the length of that period in custody and is, as a consequence, deprived of an option that might best serve the community. In other words, it may be that the effect of not allowing the court ordered parole regime to apply to sex offences is to make it less likely that an offender who commits a sex offence is sentenced to a period of imprisonment with subsequent effective supervision and rehabilitation on parole.[1062]

The Parole System Review Report considered the exclusion of sex offenders from parole and noted that:

> Perhaps it was because it was believed that only a parole board could adequately determine the suitability of a sex offender for parole. But there is nothing different about sex offenders in this respect. And sex offenders and sex offences are not all the same. The community would benefit from the prisoner being subjected to a period of supervision in some cases but this means to reduce risk is denied by ill-thought-through legislation.[1063]

1062 Ibid 102–103 [507]–[508].

1063 Ibid 6 [41].

The Parole System Review Report further highlighted this anomaly: the absence of a power to order a parole release date for sex offenders, even where the sentence is under three years, is inconsistent with the option to wholly suspend their imprisonment. Where imprisonment with release before the full term is served is warranted, the likely outcome is a suspended sentence even though 'court-ordered parole, if available, would instead have been ordered'.[1064]

The basis for the Parole System Review Report recommending that court ordered parole be extended for sexual offences included:

- proper supervision of sexual offenders after release from prison has been found to decrease their risk of offending;[1065]
- probation orders are not nearly as effective in terms of supervision as parole orders;[1066]
- additional conditions can be immediately imposed on a parole order;[1067] and
- offenders who cannot be managed safely in the community can have a parole order suspended and be returned to custody.[1068]

It is desirable that sexual offenders are supervised in the community. A 2010 evaluation of QCS sexual offender treatment programs examined recidivism outcomes as 'a function of discharge status, by comparing those offenders who were discharged from prison:

- without supervision;
- with standard supervision (e.g. parole);and
- under the more stringent supervision and monitoring provisions of the *Dangerous Prisoners (Sexual Offenders) Act* (Qld)'.[1069]

Researchers found that overall, offenders receiving no supervision had significantly higher rates of recidivism (34.7%) compared to those under standard supervision (21.9%). In relation to sexual recidivism, offenders who received no post-discharge supervision were 'somewhat more likely to reoffend sexually'.[1070] This effect was independent of whether or not the offender had participated in sexual offending treatment in custody. The evaluation recommended that standard post-release supervision should be more accessible for both treated and untreated sexual offenders, as the combination of treatment and post-release supervision was the most effective in reducing reoffending.[1071]

The Parole System Review Report referred to two subsequent evaluations undertaken by QCS in 2013 and 2015 on its sexual offending programs and both reported reduced sexual recidivism rates.[1072] These reports indicate that an offender who completed a sexual offending program reoffended at a lower rate than those who did not complete a program.

10.9 If court ordered parole were extended to sexual offences

To consider the number of offenders that would be affected if court ordered parole were extended to sexual offences receiving a sentence of three years or less, the Council analysed data over a two year period (2015–16 to 2016–17).

Over this two year period, 22,365 offenders were sentenced to imprisonment or a partially suspended sentence for their MSO.[1073] Of these offenders, 20,462 were sentenced to imprisonment and could receive

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1064 Ibid 6 [39].

1065 Ibid 102 [504].

1066 Ibid 102 [505].

1067 Ibid 102 [506].

1068 Ibid.

1069 Stephen Smallbone and Meredith McHugh, *Outcomes of Queensland Corrective Services Sexual Offender Treatment Programs* (2010), 46.

1070 Ibid 47.

1071 Ibid Recommendation 5, xii.

1072 Queensland Parole System Review, above n 9, 136 [687]–[688].

1073 Only cases where the Most Serious Offence (MSO) resulted in a term of immediate imprisonment to be served post-sentence were analysed (22,366 cases). Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases).

a parole release date. For the remaining 1,903 offenders, court ordered parole was not an available sentencing option because:

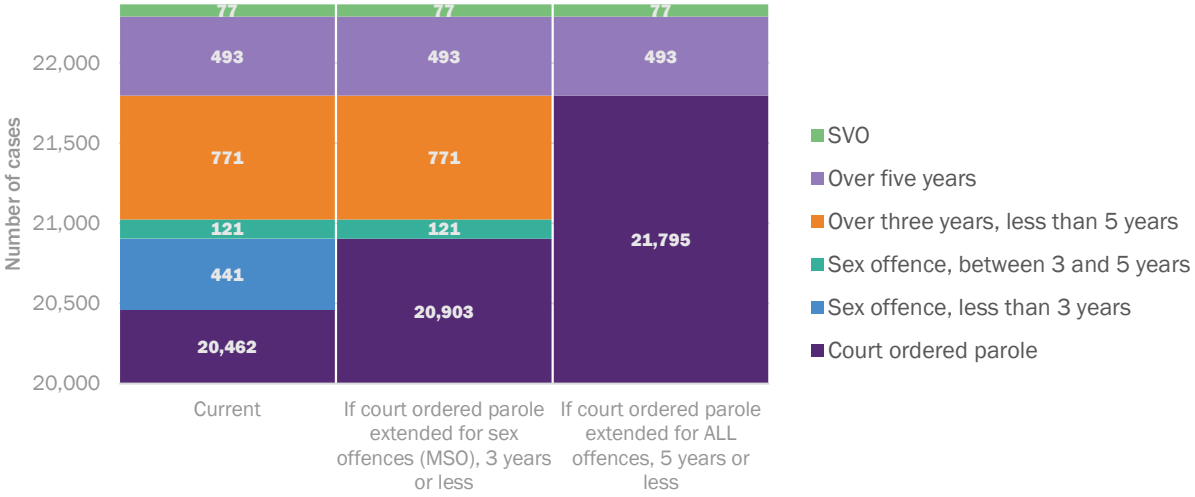
- In 696 cases, the sentence imposed was for a sexual offence MSO (comprising of 441 offenders receiving a sentence of three years or less, and 121 offenders receiving a sentence of over three and up to five years);
- In 771 cases, offenders were sentenced to over three years' imprisonment but less than five for an offence (as the MSO) other than a sexual offence;
- In 493 cases, offenders were sentenced to over five years imprisonment (this includes both sexual or non-sexual offence as the MSO)
- In 77 cases, an SVO declaration was made, meaning the person was not eligible for court ordered parole.

Figure 10-12 illustrates the comparison between hypothetical scenarios if court ordered parole were extended. It reflects the number of offenders for whom court ordered parole may be an available sentencing option at the time of sentence. Figure 10-12 does not propose to show the actual number of offenders on court ordered parole as a court would still have the discretion to suspend a sentence or order prison/probation.

Figure 10-12 shows that if court ordered parole were made available to courts in sentencing an offender to a period of three years or less for a sexual offence, 441 offenders could potentially receive court ordered parole. This would be a 2.2 per cent increase in offenders for which court ordered parole is available.

If court ordered parole was extended to any offence of five years or less, an additional 892 offenders would be affected. Of those, 121 were offenders with a sexual offence as their MSO. In total, there would be a 6.5 per cent increase in offenders who could receive court ordered parole, with 2.6 per cent of these offenders being sex offenders.

Figure 10-12: Offenders who could receive court ordered parole if extended to sexual offences, 2015-16 to 2016-17



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018
Note: This analysis includes cases finalised between 2015-16 and 2016-17 that involve adult offenders.
Only cases where the Most Serious Offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases).
Offenders that fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders. For the benefit of readability, the table bars are not to scale.

10.10 Challenges with managing sexual offenders in custody and in the community

10.10.1 Lack of access to treatment programs

QCS currently delivers a range of sexual offending programs 'that aim to reduce sexual reoffending and ensure all eligible sexual offenders in prison are offered a place in their recommended sexual offending programs'.[1074] In 2017–18, there were 410 completions of sexual offending programs.[1075] The sexual offending programs delivered in custody (set out in greater detail in Appendix 8) include:

a) A nine-month high intensity sexual offender treatment program;
b) A three to five month moderate intensity sexual offender treatment program;
c) A five month adapted inclusion sexual offender treatment program for prisoners with a cognitive impairment;
d) A culturally adapted Aboriginal and Torres Strait Islander sexual offender treatment program;
e) A preparatory program; and
f) A maintenance program.

Sexual offenders under community supervision can be referred to preparatory programs, medium intensity programs, and sexual offender maintenance programs.[1076] All sexual offending programs delivered in custody are delivered by QCS staff. Some of these programs are also delivered in the community.[1077]

QCS operates a mixed model whereby the delivery of programs remains the responsibility of QCS, with external providers contracted to provide individual intervention. The delivery of individual sexual offender intervention in community settings is undertaken through appropriately skilled health practitioners on a Standing Offer Arrangement (primarily psychological intervention). This intervention can be used to address responsivity or behavioural barriers to participating in a QCS delivered group program, or where these barriers cannot be removed, such as where there are safety concerns, geographical constraints or behavioural issues. Individual intervention can be accessed as an alternative treatment pathway for moderato to high risk offenders.

An issue identified in the Parole System Review Report was that 'prisoners on sentences under 12 months and those assessed as low risk do not engage in rehabilitation programs in Queensland prisons'.[1078] This relates to intensive offending behaviour programs targeted to higher risk offenders (noting lower risk offenders can still access a range of programs that address substance misuse, psychological wellbeing, parenting and other needs). It can also be difficult for an offender to access treatment or programs when in prison for a term over 12 months, as well as complete a program by a parole eligibility date. QCS operates a centralised waiting list process to identify sexual offenders eligible for treatment, make offers to participate and where necessary, transfer prisoners between locations to access intervention. The lack of access to programs can be due to several reasons including:

- the offender is ineligible for a program;
- the offender declines the offer of placement on a program;
- the offender is not in a prison where suitable sexual offending programs are available;
- there are long waiting lists for some programs;
- offenders who continue to deny guilt or responsibility for their offences are not allowed to participate; and

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1074 Queensland Corrective Service, *Annual Report 2017-18* (2018), 33.

1075 Ibid.

1076 Queensland Parole System Review, above n 9, 136 [685].

1077 In *Attorney-General for the State of Queensland v FJA* [2018] QSC 291 (6 December 2018) 15-16 [99], the court discussed an affidavit from the Principle Advisor, Offender Intervention Unit that the Medium Intensity Sexual Offending Program (MISOP) "is offered in both custodial environment and community settings in both rolling and closed formats. The MISOP is delivered in a continuous rolling format at both Wolston Correctional Centre and Townsville Correctional Centre. The MISOP is also delivered in a continuous rolling format in the community in the Brisbane and South and South Coast regions."

1078 Queensland Parole System Review above n 9, 90 [430].

- the offender is on remand or has an appeal against their conviction pending.[1079]

10.10.2 Prisoner risk assessments

To inform treatment and rehabilitation of prisoners, QCS undertakes a number of assessments when a person is imprisoned, including an Immediate Risk Needs Assessment and a Risk of Reoffending (RoR) assessment. Prisoners serving terms longer than 12 months receive a Rehabilitation Needs Assessment, which is used to inform the development of the prisoner's Progression Plan. There are also a similar range of assessments completed when a prisoner is entering probation or parole such as the Immediate Risks Assessment and the Benchmark Assessment.[1080]

The Parole System Review Report made a number of recommendations in relation to risk and need assessments used by QCS, which are currently being implemented. QCS has partnered with consultants at KPMG and Swinburne University to review and replace existing risk and need assessments with validated assessment tools suitable for prisoners in custody and offenders under supervision in the community.[1081]

10.10.3 Lack of supervision under some orders

The Parole System Review Report observed that sexual offenders 'are released without the supervision that they might have otherwise receive. Obviously this can have serious consequences'.[1082] The data obtained for this analysis supports that suspended sentences are a common outcome. The data also showed that even where there are multiple offences, a suspended sentence is not always combined with probation.[1083]

The Parole System Review Report expressed concern about the effectiveness of probation in providing adequate supervision for sexual offenders or being able to respond to issues of escalating risk due to the structure of these orders:

> Probation orders are not nearly as effective in terms of supervision as parole orders. To prevent an offender on a probation order from having contact with a person or a child, living at a certain residence or attending certain areas or places, the probation order must be returned to Court for amendment. If the probation officers witness an escalation in risk behaviours of the offender, they are unable to act to prevent reoffending. When an offender breaches a probation order, the matter is returned to Court, which may take months.
>
> Under a parole order, the parole officer may immediately impose additional conditions restricting where the offender can live or who they can have contact with or impose exclusions zones. These conditions can be imposed swiftly and for up to 28 days before the Parole Board must consider whether to impose them more permanently. Moreover, if the parole officer believes the risk that the offender presents cannot be safely managed in the community, they can suspend the order and return the offender to custody.[1084]

The Parole System Review Report noted that it is important to ensure 'that only offenders who are appropriate for parole orders receive terms of imprisonment with a parole release or parole eligibility date'.[1085] In this context, consideration should be given to whether a court should have a discretion to order a parole release date or a parole eligibility date for sexual offences who receive five years or less to coincide with the length of suspended sentences.

10.10.4 Queensland Court of Appeal decisions regarding sentencing sexual offenders

There have been a number of Court of Appeal cases involving sexual offenders appealing their sentence on the basis that the sentence structure and treatment options render the sentence manifestly excessive.[1086]

1079 If an offender is appealing a sentence they can still access programs.

1080 Queensland Parole System Review, above n 9, 114 [568].

1081 Queensland Corrective Service, *Annual Report 2017-18* (2018), 31.

1082 Queensland Parole System Review, above n 9, 6 [40].

1083 See above Figure 10-6: Proportion of cases that received a probation order within the same court event as a suspended sentence equal to or less than five years for a sexual offence (MSO) and non-sexual offence (MSO), 2005-06 to 2017-18.

1084 Queensland Parole System Review, above n 9, 102 [505-506].

1085 Ibid 101 [498].

1086 *R v Wells* [2018] QCA 236 (26 September 2018); *R v Goodall* [2013] QCA 72 (5 April 2013); *R v Waszkiewicz* [2012] QCA 22 (24 February 2012); *R v Lloyd* [2011] QCA 12 (11 February 2011); *R v Tracey* [2010] QCA 97 (30 April 2010); *R v Daly* [2004] QCA 385 (15 October 2004).

When the court determines a parole eligibility date in sentencing an offender it can often be reflective of relevant mitigating factors such as an early guilty plea and cooperation. The main argument on appeal is that there is an incompatibility between the delivery of required sexual offender programs necessary for parole compared to the parole eligibility date set by the sentencing court.

In a 2008 decision, the Court of Appeal made the following observation in relation to sentencing and the availability of sexual offence programs:

> The courts cannot frame sentence terms taking into account the availability of offender programmes unless there is some evidence going to these matters and in this case there is none. The presumption must be that the authorities will give effect to the court's orders. It is the executive government that bears the responsibility to ensure that there are sufficient resources to permit the timely undertaking of programmes which determine eligibility for parole. An alternative might be to condition eligibility for parole upon the undertaking of an offender course outside the gaol setting.[1087]

In a recent case of *R v Wells*[1088] the Court of Appeal considered whether a sentence was manifestly excessive because programs were unavailable:

> According to a recent email from a Corrective Services employee, the applicant has not been recommended for any prison programs. The applicant's argument is not supported by any evidence. The applicant has not established that if he had promptly applied for parole, his failure to complete any prison program that was not made available to him rendered it impractical for him to obtain release on parole by the parole eligibility date and that this would thwart the intended effect of the sentence. The case is, therefore, unlike *R v Daly* [2004] QCA 385 at [8] or *R v Lloyd* [2011] QCA 12 at [20], in which a demonstrated practical inability of a prisoner to obtain release on parole meant that effect could not be given to what was intended by the sentencing judge.[1089]

In *R v Lloyd*[1090] the Court observed that while community safety is important, consideration must also be given to situations where an offender is unlikely to receive parole before serving a substantial or indeed, all of the sentence imposed, 'such a result would not give requisite credit to his pleas of guilty to an ex-officio indictment. It would be unjust and is not what was intended by the primary judge'.[1091] The Court varied the sentence by deleting each of 10 concurrent orders of imprisonment with a parole eligibility date and substituting immediately suspended sentences for an operational period of three years, and substituting probation for the imprisonment imposed on an 11th count.

Similarly, in *R v Goodall*[1092] the Court of Appeal varied the sentence of two years imprisonment with a parole eligibility date at one-third to a sentence suspended after six months and an operational period of three years. The Court also imposed a probation order for 12 months on a separate count. The Court noted that:

> it was significant that we were not able to be assured on the hearing of the application that the applicant would be in a position to receive any psychological or psychiatric treatment while in prison during the balance of his term in actual custody … it is desirable that he should receive some supervision to assist him refrain from similar conduct … the probation order will also provide further protection for the community and assist the applicant to address his offending behaviour.[1093]

An alternative approach taken by the Court of Appeal has been to reduce a head sentence but retain the parole eligibility date to ensure the offender would not be required to serve 'all or a substantial part of the five year terms of imprisonment in actual custody'.[1094]

In contrast, in *R v Wano; Ex parte Attorney-General (Qld)*[1095] a partially suspended sentence was substituted with a sentence of imprisonment and a parole eligibility date. The Court of Appeal observed:

1087 *R v Cunningham* [2008] QCA 289 (26 September 2008) 6 [19] (Jones J).

1088 *R v Wells* [2018] QCA 236 (26 September 2018).

1089 Ibid 5 (Fraser JA, Sofronoff P and Philippides agreeing).

1090 *R v Lloyd* [2011] QCA 12 (11 February 2011).

1091 Ibid 5 [20] (Chesterman JA, de Jersey CJ and White JA agreeing).

1092 *R v Goodall* [2013] QCA 72 (5 April 2013).

1093 *R v Goodall* [2013] QCA 72 (5 April 2013) 5 [18]-[19] (Douglas J).

1094 *R v Tracey* [2010] QCA 97 (30 April 2010) 6 [25] (Muir JA).

1095 *R v Wano; Ex parte Attorney-General (Qld)* [2018] QCA 117 (12 June 2018).

> A curious feature of the sentence proceeding is that no-one identified any basis at all as to why a partly suspended sentence was preferable to one which would involve at least some ongoing supervision on the respondent's release, as for example occurs when a prisoner is released on parole. The respondent was a long remanded teenager, without tangible rehabilitative progress or family support, whose continued burglary offending had disturbingly escalated to accompanying sex offending. The need for him to be under supervision when released back into the community was compelling.[1096]

Court of Appeal decisions illustrate the competing considerations a court has when sentencing a sexual offender under the current regime to a sentence of five years or less. The decisions show there can be instances where the intention of the sentencing court is not given practical effect and in cases such as *Lloyd, Goodall and Tracey*, the structure of the sentence has been varied to accommodate this. In other cases such as *Wano*, the desirability of ongoing supervision can outweigh consequences of being detained beyond the sentence date for a parole determination.

10.11 Key issues

10.11.1 General themes from stakeholder consultation

In Chapter 4 on the fundamental principles guiding the review, the Council set out its position that court ordered parole should be retained and that sexual offenders serving sentences in the community should have appropriate supervision. There has been no indication from stakeholders to date of any need to remove court ordered parole, and strong agreement that sexual offenders often have a need for supervision and treatment.

Extending court ordered parole to sexual offences

The Parole System Review Report recommended that court ordered parole be extended to sexual offences, thereby ensuring these offenders are under supervision in the community (see sections 4.1 and 4.7). As the data illustrates, suspended sentences are the most commonly imposed sentencing outcome for sexual offenders who receive a custodial penalty of three years or less.[1097] The discretion of the court to impose supervision with a suspended sentence is limited by the requirement that there must be multiple offences, and that probation must begin on the day of sentence.

Stakeholder views

During early consultation, generally legal stakeholders agreed that court ordered parole should be extended to sexual offences, thereby permitting greater supervision of the offender in the community. However, there were concerns that offenders would not be motivated to undergo treatment as they have certainty of release. Some legal stakeholders would only support the extension of court ordered parole to sexual offenders if the point of release remained sufficiently proximate to the time of sentence. It was suggested that this would provide a sentencing judge with a realistic opportunity to assess the appropriateness of immediate or almost immediate parole and that in the case of release over three years, the Board would be best placed to assess risk and changes in circumstance.

Victim support and advocacy stakeholders were not supportive of extending court ordered parole. While these stakeholders would like greater supervision and treatment for this cohort of offenders, and acknowledged that the purpose of parole was to enable community integration and minimise likelihood of reoffending, they argued that the serious nature of sexual offences means sexual offenders should be assessed by the Board before being released on a parole order, rather than released automatically.

Increasing three year cap to five years

As discussed in Chapter 9 on court ordered parole, the Council is inviting stakeholder views about whether to increase the cap on court ordered parole from three years to five years. Should such an amendment be implemented, the Council is also seeking views on whether a five year cap should apply to sexual offences as well (assuming that court ordered parole has been extended to these offences).

1096 Ibid 8 [44] (Henry J).

1097 Figure 10-4: Sentence length as a proportion of penalty type for sexual offenders (MSO) who received a custodial penalty, 2005-06 – 2017-18.

As noted earlier in this chapter, the reason sexual offences were excluded from court ordered parole originally was because 'these types of prisoners pose a serious risk to the community' and their parole eligibility should be determined by the Board, rather than set by the court.[1098] However, as the data has highlighted, suspended sentences are imposed between 26.8 per cent and 50.0 per cent of sentences between three and five years.[1099] The exclusion has resulted in offenders being placed on suspended sentences and often being released into the community without any form of supervision, even for sentences over three years.

The critical issue for the Council is whether the court is best placed to determine a parole release date that is between three and five years.

Stakeholder views

As noted in Chapter 9, stakeholders held differing views on whether the cap of three years on court ordered parole should be increased to five years, bringing these orders into alignment with the suspended sentence regime. Only one stakeholder specifically submitted that an extension to five years should apply to sexual offenders as well. Stakeholders who did not support extending court ordered parole beyond three years were concerned that the release date would not be sufficiently proximate to the time of sentence. In those circumstances the Board was better placed than the court to assess risk and changes of circumstances in the longer term than the court at the time of sentence.

Jurisdictional powers regarding court ordered parole

As discussed in Chapter 9, there are two jurisdictional issues the Council is considering in relation to court ordered parole. The first relates to Recommendation 3 of the Parole System Review Report that a court should have discretion to set a parole release date, or a parole eligibility date for sentences greater than three years where the offender has served time on remand and the Court believes a further period of custody before parole is required that is no more than 12 months from the date of sentence.

The Parole System Review Report did not discuss whether this amendment should extend to sexual offences. However, given the thrust of this recommendation was that many people on remand are ultimately sentenced to imprisonment, its applicability to sexual offences is highly relevant. As noted above, offenders on remand are not eligible for programs and the Court of Appeal has found some sentences to be manifestly excessive where they are structured in a way that is incompatible with the delivery of required sexual offender programs and give benefit to relevant mitigating factors. This recommendation may be a suitable way to address this issue, by allowing the court to fashion a sentence that still provides a fixed release date, and ensures there is sufficient time for programs to be completed.

The second jurisdictional issue is whether amendments to court ordered parole should apply in both the higher courts and Magistrates Courts (to the extent that the Magistrates Courts' three-year jurisdictional limit allows).

Stakeholder views

Several stakeholders supported allowing judicial 'dual discretion' to set either a parole eligibility date or a parole release date for all sentences of imprisonment for sexual offences. There was also general consensus that Magistrates Courts should have the same legislative powers regarding parole eligibility and release dates for sexual offenders, as the District and Supreme Courts. One stakeholder observed there was a risk that if a difference was maintained between the higher and lower courts that it may encourage people to 'forum shop' and potentially discourage the early disposition of matters.

Restricting partially suspended sentences for sexual offences

Some of the key issues discussed in Chapter 8 on suspended sentences are relevant to the issues discussed in this chapter including: the key differences between court ordered parole and a suspended sentence; factors relevant to whether a sentence must be activated on breach; and powers of courts to deal with breaches of suspended sentence orders.

1098 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 942 (Judy Spence, Minister for Policy and Corrective Services).

1099 Figure 10-10: Top five sexual offence (MSO) that received a custodial sentence greater than three years and up to five years, 2005–06 to 2017–18.

In NSW, when court based parole and suspended sentences operated together (both have been abolished, although court based parole was replaced with statutory parole orders), courts in NSW only had the power to suspend a term of imprisonment imposed in full, not in part. If court ordered parole were extended to sexual offences, there is a question about whether a similar restriction is necessary. As noted in section 8.14.3, the availability of both may result in anomalies or inconsistencies in the operation of the law.

Access to treatment and programs

It is beyond the scope of this reference for the Council to consider prisoner treatment and programs, or to make recommendations in relation to these issues. However, some stakeholders expressed concerns that offenders on short sentences (under three years) were unlikely to receive treatment due to a shortage of program places. Among some stakeholders this raised the tension between the requirement for the court to recognise an offender's genuine guilty plea and therefore, a reduced head sentence, and the likelihood of the offender being required to serve his full sentence due to a lack of accessibility to treatment or programs. Some stakeholders said that it was better to put some sexual offenders on a suspended sentence, thereby ensuring that their guilty plea is being taken into account.

Access to services and support

Similar to treatment and programs, access to services and support is also beyond the scope of the Council's reference, other than to note that changes to penalty options for sexual offences may have impacts on this issue.

Stakeholder views

Raised for all offenders on court ordered parole orders, not only sexual offenders, there were concerns about accessibility to services on release. Several stakeholders observed that many people going through the criminal justice system are in the midst of complex issues such as homelessness, domestic violence, mental health issues, and when given parole can struggle to succeed. Stakeholders highlighted the challenges in assisting people in detention to plan for housing options, and without suitable accommodation for a person to go to, their parole may be suspended.

10.12 Options and preliminary Council views

As discussed in Chapter 9, the Council has identified three options for reform to court ordered parole:

- Option 1: Retain court ordered parole in its current form, with no changes to eligibility criteria or the circumstances in which a parole release data can be set.
- Option 2: Reform court ordered parole by increasing the current three year cap (retaining other criteria, but applying the same principles to sexual offences) by giving courts discretion to set either a parole release or eligibility date in one of the following three circumstances (which are intended to be alternatives):
  (a) for sentences over three-year cap, if appropriate release date is no more than 12 months from date of sentence (Parole System Review Report Recommendation 3); or
  (b) for sentences of over three years, and up to five years; or
  (c) for all sentences up to five years (aligning with suspended sentence regime).
- Option 3: Removing the cap for the setting of a parole release date altogether, giving courts full discretion to set either a parole release or a parole eligibility date, and extending this discretion to all offences, other than serious violent offences, offences for which a life sentence is imposed, or other offences or circumstances which are expressly excluded (such as through the operation of mandatory sentencing provisions).

The Council does not have a preferred option on the basis of concerns discussed in Chapter 9.

There are additional considerations that apply to sentencing for sexual offences, as identified in this Chapter. These considerations include:

- difficulties in assessing issues of prospective risk months or years in advance of an offender's potential release from custody;
- access to appropriate treatment programs and ensuring there are proper incentives for offenders to complete these programs — whether provided in custody or in the community;

- the ability to quickly amend conditions of an order, or to cancel or suspend an order, in situations of escalating risk, which is particularly important in the case of sexual offences where the individual and community impacts of reoffending are particularly high.

In the Council's view, safety considerations in the sentencing and post-sentence management of sexual offenders is paramount. The sentencing framework should be structured, as far as possible, in a way that encourages the use of orders that ensure those convicted of sexual offences are subject to appropriate supervision and are appropriately managed – including in a way that can respond to changes in dynamic risk.

The Council's concerns are, as the Parole System Review Report before it, that the exclusion of sexual offences from the court ordered parole scheme has resulted in unintentional and undesirable impacts — in particular, the greater use of partially suspended sentences that, where ordered on their own, do not provide for offenders to be supervised in the community. Analysis of sentencing data has confirmed these concerns are well founded.

However, as discussed in Chapter 9, the Council's concern is that the existing evidence about the efficacy of court ordered parole is not robust enough to support an extension of court ordered parole beyond those offences to which it currently applies, or to apply it to longer sentences.

If the alternative option discussed in Chapter 9 (giving courts a dual discretion to set a parole release or parole eligibility date for sentences under three years) is supported, an argument might be made that this should be extended to sexual offences. Should this reform be implemented, the Council would expect to see a sharp decline in the use of partially suspended sentences for these offences following the introduction of this change.

Encouraging courts to make greater use of imprisonment through the ability to set either a parole release or eligibility date, in the Council's view, is preferable to the current approach which provides courts with the stark choice of imposing a term of imprisonment with a parole eligibility date on the one hand, or ordering that the term of imprisonment be partially or wholly suspended on the other, meaning the offender may not be under any form of supervision in the community.[1100] Even where a suspended sentence is combined with a community based order, such as probation, ensuring offenders sentenced to imprisonment are subject to a parole order, in the Council's view, is preferable, as while the Board has the ability to amend, suspend or cancel orders relatively quickly, probation and other forms of CBSOs can only be amended or revoked on application to a court. This will also be the case should a CCO be introduced in Queensland, and changes made to enable it to be combined with a suspended sentence.

[1100] Although ICOs are technically available to offenders convicted of a sexual offence, they make up only a very small proportion of offenders subject to these orders (see further, Chapter 6). This may be partly due to the limited duration of these orders (12 months).

Chapter 11 Implementation – Issues and challenges

This chapter considers a number of issues related to the successful implementation of any future sentencing reforms in Queensland. It explores the legal framework that supports the use of pre-sentence assessments and court advice, resourcing issues and challenges, and timeframes for reform.

While the Council will explore a number of these matters in more detail in its final report, they are considered briefly in this chapter on the basis that they provide an important context for consideration of any future reforms.

11.1 Pre-sentence reports and court advisory service

11.1.1 The Current situation in Queensland

Pre-sentence reports (PSRs) have been described as documents prepared for a court, normally at the court's request, with a view to providing information about an offender and to assist the court in determining the most appropriate manner in which to deal with an offender.[1101] They may be either mandatory or discretionary, but are generally sought to supplement information otherwise before the court.[1102] They are additional to any reports that may be obtained by the defence in support of a plea in mitigation.[1103]

The purpose of PSRs in Queensland is to assist courts in sentencing, including to assess the suitability of an offender or child to be placed on a community based order.

Section 344 of the CSA and section 151 of the *Youth Justice Act 1992* (Qld) (YJA) provide that a court may request a PSR to inform sentencing. Section 15 of the PSA, which governs the sentencing of adult offenders, provides that a court may receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a PSR.

In the case of reports requested by a court for the sentencing of adult offenders, QCS is required to give the report to the court within 28 days and provide copies that the court must then provide to the prosecution and the person's lawyers.[1104] A PSR is taken to be evidence of the matters contained in it, and cannot be objected to on the basis that the evidence contained in it is hearsay.[1105]

There are two kinds of PSRs: written and oral. Both forms of PSR make recommendations about appropriate penalties.

Written PSRs are formally requested by judicial officers in the Magistrates and District Courts and are prepared by community corrections officers. A judge may request the PSR include a psychiatric or psychological report and/or focus on a specific issue.

A written report will typically take a few hours to complete, comprising an interview with the prisoner or offender in the community, screening the offender's history with QCS, along with reviewing relevant criminal history and the police court brief (known as a 'QP9') prior to the interview and write up.[1106]

Oral PSRs are commonly used in the Magistrates Courts, primarily to determine an offender's suitability for a program or penalty. There is currently a limited dedicated court advisory service operating out of the Brisbane Magistrates Court.

1101 Arie Freiberg, above n 117, 173 [2.190].

1102 Ibid.

1103 Ibid.

1104 *Corrective Services Act 2006* (Qld) ss 344(3)–(4).

1105 Ibid s 344(10).

1106 Personal communication, Queensland Corrective Services.

Most Australian jurisdictions legislate what is, or can be, included in a PSR,[1107] however Queensland legislation does not outline this level of detail, providing only that a PSR 'may, for example, state the person's criminal or traffic history'.[1108]

However, the *Standard Guidelines for Corrections in Australia* provide that reports, should be 'concise, objective, factual, and timely'[1109] and 'should, where appropriate … canvass the appropriateness of non-custodial sentencing options'.[1110] In addition to ensuring information is confirmed wherever possible, the guidelines provide that 'any expression of opinion should be clearly identified as such'.[1111] In addition, the guidelines provide that:

> Assessment of offenders should draw upon and identify:
>
> - the widest practicable range of information sources regarding offenders and their offences;
> - relevant issues in their social and cultural background, including health, education and family and community supports where relevant; and
> - knowledge of available correctional services, programmes, and other avenues of information and support.
>
> Where there is insufficient information regarding an offender to permit a responsible assessment and recommendation to be made to a court … advice and reasons to this effect should be provided.[1112]

The guidelines include a suggestion that: 'Interpreters or elders from Indigenous communities and other ethnic groups should be utilised, where possible and appropriate, to assist in communicating with offenders of their own cultural background'.[1113]

While obtaining a PSR is discretionary in the case of adult offenders, even where the court is considering imposing a term of imprisonment, in the case of a young person sentenced under the YJA, a judge or magistrate must obtain a PSR before sentencing a child to a detention order[1114] or an intensive supervision order.[1115] There are detailed provisions under the YJA relating to the preparation, use and disclosure of PSRs as they relate to youth justice matters.[1116]

Under the provisions of the *Evidence Act 1977* (Qld), a sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.[1117] If not admitted or challenged, the sentencing judge or magistrate may only act on it if satisfied on the balance of probabilities that the allegation is true.[1118] The degree of satisfaction required varies depending on the consequences, adverse to the person being sentenced, of finding the allegation to be true.[1119] An 'allegation of fact' for the purposes of this section includes information provided under section 15 of the PSA.[1120]

1107 *Sentencing Act 1991* (Vic) s 8B; *Sentencing Act* 1997 (Tas) s 83; *Sentencing Act* 1995 (NT) s 106(1); *Youth Justice Act* 2005 (NT) s 70. The only Australian jurisdiction where this legislative provision refers to the offender's 'cultural background' is the ACT: *Crimes (Sentencing) Act 2005* (ACT) s 40A, although the other legislative provisions on content refer more broadly to 'social history' and 'background'.

1108 *Corrective Services Act 2006* (Qld) s 344(2).

1109 Corrective Services Ministers' Conference and Conference of Correctional Administrators, Standard Guidelines for Corrections in Australia (Revised 2012) 'Standard Guidelines for Community Corrections' 8 [1.2].

1110 Ibid 9 [1.8].

1111 Ibid 8 [1.2].

1112 Ibid 8 [1.3] and [1.5].

1113 Ibid 8 [1.6].

1114 *Youth Justice Act 1992* (Qld) s 207.

1115 Ibid s 203.

1116 Ibid ss 151A, 152, 153 and 153A.

1117 *Evidence Act 1977* (Qld) s 132C(2).

1118 Ibid s 132C(3).

1119 Ibid 132C(4).

1120 Ibid s 132C(5).

11.1.2 Queensland Productivity Commission proposals

In its draft report on imprisonment in recidivism released in February 2019, the QPC recommended:

> To ensure sentencing options support community safety and rehabilitation, the Queensland Government should introduce pre-sentence assessment of offenders who may be facing prisons terms.[1121]

While noting the risk of court delays, the Commission suggests:

> A process where relevant information is assembled and the broad parameters of the most therapeutic treatment approach is considered at sentencing would help ensure that the sentence is consistent with the most appropriate post-sentence treatment of the offender.[1122]

The Commission further suggests that health and psychological tests usually carried out on an offender's reception into a prison could be conducted at the pre-sentence stage 'so that the judicial officer has all the relevant information to help ensure the sentence fits the offence and the offender's circumstances'.

'If necessary to reduce undesirable delays', the Commission suggests, 'this pre-sentence assessment of offenders could prioritise offenders facing prison sentences'.[1123] Even if limited in this way, based on 2017–18 data, this would require assessments (limiting this to sentences which in the case of this data, resulted in a sentence of actual imprisonment being imposed) in over 12,000 cases per annum — 3,793 matters in the higher courts, and 8,862 in the Magistrates Courts.[1124] Making some allowance for those likely to be released straight to parole and who have not served any time in custody (about 40% of those on court ordered parole, or approximately 3,400[1125]) — assuming that priority will be given to those likely to be sentenced to serve time post-sentence in custody — it would still leave a large number of offenders to be assessed for their suitability for alternative forms of orders.

The Commission referred to the Victorian PSR model of reports prepared by Corrections Victoria staff, as a potential model for Queensland.[1126] Victorian PSR, which the Commission, citing the Sofronoff Report, suggests 'usually can be prepared on the same day they are ordered.'[1127]

The Victorian *Sentencing Act 1991* provides that a PSR can include information about a range of matters, including:

- the offender's age, social history and background, medical and psychiatric history and any alcohol, drug and any other substance history disclosed by the offender;
- the offender's educational background and employment history, and financial circumstances;
- the circumstances of any other offences of which the offender has been found guilty and which are known to the court;
- the extent to which the offender is complying with any sentence currently in force in respect of him or her;
- the ability of the offender to pay a bond;
- any special needs of the offender;
- any other services that address the risk of recidivism from which the offender may benefit;
- any courses, programs, treatment, therapy or other assistance that could be available to the offender and from which he or she may benefit;
- the relevance and appropriateness of any proposed condition;
- the capacity of the offender to perform unpaid community work for any proposed unpaid community work condition;
- the recommended duration of any intensive compliance period fixed under a CCO;

1121 Queensland Productivity Commission, above n 11, 161. Draft Recommendation 4.

1122 Ibid 157.

1123 Ibid 157.

1124 Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18* Cat No 4513.0 (2019) Table 26 (Summary outcomes by principal offence, Magistrates' Courts – Queensland, 2016-17 to 2017–18).

1125 Queensland Corrective Services, unpublished data on direct from court commencements (provided to Council on 29 March 2019).

1126 Ibid 156.

1127 Ibid 157.

- if an electronic monitoring condition is proposed in relation to a CCO: (i) the suitability of the offender to be electronically monitored; (ii) the availability of appropriate resources or facilities, including but not limited to devices or equipment, for the offender to be electronically monitored; and (iii) the appropriateness of the offender being electronically monitored in all the circumstances;
- the appropriateness of confirming an existing order that applies to the offender; and
- any other information that the author believes is relevant and appropriate.[1128]

The preparation of these reports is mandatory in some cases, including where the court is considering making a CCO, unless the court is considering making an unpaid community work condition of no more than 300 hours as the sole condition of the order.[1129]

The Victorian Department of Justice and Regulation reported as at 30 June 2018, there were nearly 14,000 offenders being managed by Corrective Services on a CCO,[1130] although the number of admissions to these orders in a given year would be below this level taking into account the maximum term of the order is five years. In 2017–18, there were 9,021 matters in the Magistrates Court of Victoria and 220 in the higher courts that resulted in a 'community supervision/work order' being imposed (constituting the majority of CCOs imposed).[1131] A monitoring report produced in 2014 by VSAC found that about 70 per cent of CCOs included an unpaid community work condition, although in three-quarters of cases, the order had some other additional condition[1132] (meaning the preparation of a PSR in these cases would have been required under the Victorian *Sentencing Act*).

The evidence relating to the impact and effectiveness of PSRs is somewhat mixed. One study has investigated the views of report writers and compared these with judicial officers, finding that perceptions of the utility of these reports differ between groups.[1133] One of the key issues raised by the study was the issue of report quality:

> in terms of its usefulness to judicial sentencing, report quality is not an objective, fixed entity that can be universally calibrated, regardless of case context and courtroom personnel. The dominant judicial control of the assessment of evaluative criteria such as 'relevance', 'neutrality' and 'realism' means that judicial perceptions of 'quality' are a constantly shifting target.[1134]

A study of PSRs in Ireland,[1135] where there is no obligation on the court to request a PSR, but where there is an assumption that a PSR will be ordered where a period of imprisonment is being considered, found that judicial officers acknowledged the professionalism of Probation Officers and their recommendations about sentence offered in these reports. However, the study found considerable variation in the extent to which they are requested, indicating the need for clarity about the circumstances within which a PSR should be ordered and for what purpose.

A paper on user perceptions of the quality and effectiveness of PSRs in Utah[1136] concluded that nearly half of those surveyed (227 judges, prosecuting attorneys, public defers, and probation/parole officers) had not read the report in its entirety, instead using them to identify only those sections they decided were important for their purposes. This study also documented a large number of report users who were concerned about

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1128 *Sentencing Act 1991* (Vic) s 8B.

1129 Ibid ss 8A(2)–(3).

1130 Victoria, Department of Justice and Regulation, above n 521, 35.

1131 Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18*, Cat No 4513.0 (2019) Tables 21 and 22. For a description of the counting rules adopted for reporting purposes based on the conditions of a CCO, see Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18*, Cat No 4513.0 (2019) 'Explanatory Notes', para 88.

1132 Sentencing Advisory Council (Victoria), above n 459, 16.

1133 Cyrus Tata et al, 'Assisting and Advising the Sentencing Decision Process: The Pursuit of 'Quality' in Pre-Sentence Reports' (2008), 48 *British Journal of Criminology* 835.

1134 Ibid 849–850.

1135 Nicola Carr and Niamh Maguire, 'Pre-sentence Reports and Individualised Justice: Consistency, Temporality and Contingency' (2017), 14 *Irish Probation Journal* 52.

1136 Michael Norman and Robert Wadman, 'Utah Presentence Investigation Reports: User Group Perceptions of Quality and Effectiveness' (2000), 64(1) *Federal Probation* 7, 8.

the accuracy of the reports, which was in some part attributed to the high volume of PSRs required and the short time available to report writers.

A recent UK study[1137] has noted the rapid increase in the use of 'fast delivery' PSRs (written or oral), which have largely replaced the traditional, and more thorough approach to PSR compilation, which typically requires adjournment to give the time required to prepare these. Probation staff interviewed as part of the study spoke about a more target-driven approach to their work, which sees fast delivery oral reports (which can be prepared within 20 minutes) now comprise 42 per cent of PSRs in the Magistrates Court. Inevitably, the study comments on the compromise to quality and suitability of sentence recommendations this has led to, which the authors argue may be a significant contributing factor to the reduction in community sentences being ordered by the courts.

A more rigorous approach was utilised by a group in the Netherlands, who adopted propensity score matching to investigate the sentencing outcomes for two groups of offenders – one group where a structured, risk-based PSR had been ordered, and another where there had been no PSR.[1138] The study used 10 matching criteria including offence, defendant, case-processing and risk characteristics. The study determined that while there were clear outcomes for low-risk offenders, where the presence of a PSR led to less punitive sentencing outcomes and more diverting outcomes than cases where there was no PSR. However, for high-risk offenders this did not bear out. Instead, the presence of a PSR did not make this level of difference for high-risk offenders, where the two groups were more evenly matched in relation to their sentencing outcomes (and therefore indicating the PSR made no difference). The authors go on to conclude that a welfare-based approach to sentencing in the Netherlands is present in judicial decision-making, and urges that 'future research could also benefit from studying the effects of pre-sentence reports in other national contexts'.[1139]

Unfortunately, the Council was not able to identify any research that could shed light on this issue from an Australian context.

11.1.3 Stakeholder views

During the current review, a number of legal stakeholders have expressed their support for the broader availability of PSRs or, in the alternative, a model that allows pre-sentence advice to be provided in court by probation and parole officers. The Childrens Court approach for PSRs was referenced as a potential model for adoption in the adult jurisdiction.

A concern of some with the current limited availability of this advice is that sentencing judges and magistrates may be making decisions without adequate information being provided, relying solely on reports provided by the defence, which may lead to orders being made that are not appropriate and therefore more likely to be breached.

The problem raised with the Council of making PSRs mandatory, or creating a presumption in favour of their adoption, was how much time would be required to allow for their preparation. Ensuring reports are of a consistently high quality to inform the court was also viewed as particularly important as otherwise there is a risk they will provide judicial officers with little or no assistance in sentencing. To undertake this process well and ensure these reports are accurate, it was submitted, would require proper resourcing to allow time for rapport to be established and and for appropriate checks to be undertaken to ensure the information provided by an offender is accurate (for example, checks of a proposed residential address).

A key concern is that as the situation currently stands, with very limited availability of PSRs, there is a two-tiered system of reports, as people on low incomes or benefits cannot afford urine tests, mental health assessments and medical reports. This has been noted by the Court of Appeal in *R v Clark*.[1140]

1137 Du Mont and Redgrave,above n 500.

1138 Sigrid van Wingerden, Johan van Wilsem and Martin Moerings, 'Pre-sentence Reports and Punishment: A Quasi-experiment Assessing the Effects of Risk-Based Pre-sentence Reports on Sentencing' (2014) 11 *European Journal of Criminology* 723.

1139 Ibid 741.

1140 *R v Clark* [2016] QCA 173 (24 June 2016) 3–4 [6] (McMurdo P). See also comments made at 16–17 [70]–[72] (Morrison JA, North J agreeing).

In this context, some stakeholders pointed to the potential advantages of pre-sentence orders and programs as these programs enable judicial officers to have more information about the person's circumstances at the time of sentence. Two current examples in Queensland are the Court Link and Queensland Magistrates Early Referral into Treatment (QMERIT) programs.

Court Link is 'a single, generic integrated court assessment, referral and support program' which can be accessed by any person appearing before a Magistrates Court charged with a criminal offence.[1141] The program is aimed at responding to issues contributing to offending including drug and alcohol dependency, mental health issues, impaired decision making capacity or being homeless or at risk of homelessness.[1142] The level of service is based on a person's assessed risks and need.[1143] Clients with lower levels of risk or need who are not already linked in with treatment of support services, are referred to community support services.[1144] A bail-based case management service is provided to clients with moderate to high risk and needs with ongoing judicial monitoring.[1145] Participation in the case management stream is for approximately 12 weeks and is voluntary. [1146] In addition to progress reports documenting the defendant's participation in Court Link, the court is provided with a final report at the conclusion of their engagement providing information to the court about the person's response to Court Link, and any recommendations for the sentencing court to take into account in sentencing.[1147] Court Link currently operates in Brisbane, Cairns, Ipswich and Southport. As this program only commenced in late November 2017, it is yet to be evaluated.

QMERIT operates out of the Maroochydore and Redcliffe Magistrates Courts as a pre-plea program. Eligible adult offenders who consent to participate are required to complete a 12 to 16 week rehabilitation and treatment program, as a condition of bail.[1148] Successful engagement with the program can be taken into account at sentencing.[1149] The program allows for court reviews at appropriate intervals to monitor progress, at which the QMERIT Health Team appears before the court and provides written progress reports.[1150] A final court report is provided at the conclusion of the program reporting on progress, with a relapse prevention plan and after care plan, but must not make any sentencing recommendation.[1151] However, the Magistrate may seek a further report from the QMERIT Health Team, if necessary, commenting on drug treatment sentencing options.[1152]

While both Court Link and QMERIT offer an opportunity for more detailed information to be presented to the court to inform sentencing, the numbers of defendants engaged in these programs is comparatively small when considered in the context of the overall number of adult offenders sentenced in the Magistrates Courts each year. In 2017–18, 59 defendants participated in the Court Link program in Brisbane during the initial seven months of its operation, while 200 defendants participated in the QMERIT program. Over this same one year period, 107,004 sentencing matters were dealt with by the Magistrates Courts, of which 13, 851 resulted in a custodial sentence, and 8,862 in actual custody.[1153]

11.1.4 Options and preliminary Council views

The Council has considered three options for reform regarding the availability and use of PSRs.

- Option 1: make no change to the current legislative framework for PSRs.

1141 Magistrates Courts of Queensland, *Annual Report 2017-18* (2018) 28.

1142 Ibid 28; 'Court Link', Queensland Courts *(Web Page)* < https://www.courts.qld.gov.au/services/court-programs/court-link>.

1143 Ibid.

1144 Ibid.

1145 Ibid 28–29.

1146 Ibid 28; 'Court Link', Queensland Courts *(Web Page)* < https://www.courts.qld.gov.au/services/court-programs/court-link>.

1147 Magistrates Courts of Queensland, *Practice Direction No 8 of 2017: Court Link*, 29 November 2017.

1148 Ibid 29.

1149 Magistrates Courts of Queensland, *Practice Direction No 1 of 2016 (Amended): Queensland Magistrates Early Referral into Treatment (QMERIT) Program*, issued 27 January 2016, amended 19 March 2018 [7].

1150 Ibid [25]–[26].

1151 Ibid [31].

1152 Ibid [32].

1153 Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18, Cat No 4513.0*(2019) Table 26 (Summary outcomes by principal offence, Magistrates' Courts – Queensland, 2016-17 to 2017–18).

- Option 2: create a presumption in favour of PSRs being provided for the making of specific order types (for example, if a new CCO model is introduced), with some exclusions.
- Option 3: require a PSR or suitability assessment report to be prepared only for the attaching of specific conditions or condition types (for example, electronic monitoring/home detention conditions).

The Council has not considered the option of making PSRs mandatory in all cases, or for particular order types. The Council discounted this option as viable on the basis that in a jurisdiction such as Queensland, with limited resources and a geographically dispersed state, such a requirement would effectively make some forms of CBSOs unavailable in some court locations purely on the basis of a report not being able to be prepared.

Option 1: No change to the requirement for a PSR (Council preferred option)

Option 1: No change to the requirement for a PSR (Council preferred option)
Retain the current approach to PSRs, which allows a PSR to be ordered, but does not require it. Under this approach, there would be no requirement for a court to order a PSR before making a community based sentence order or deciding to attach specific conditions to that order. Under section 15 of the *Penalties and Sentences Act 1992* (Qld), in imposing a sentence on an offender, a court may receive any information it considers appropriate to enable it to impose the sentence, including a PSR prepared under section 344 of the *Corrective Services Act 2006* (Qld). Section 344 of the *Corrective Services Act* requires the chief executive (corrective services), when required to do so by a court, to prepare a PSR for the court about a stated person convicted of an offence, which must be given to the court within 28 days in writing in triplicate. The court must give a copy to the prosecution and the convicted person's lawyers. The report is evidence of matters contained in it.

Under Option 1, there would be no change to the current PSR provisions under the *Penalties and Sentences Act 1992* (Qld) or *Corrective Services Act 2006* (Qld). The ordering of a PSR would remain discretionary.

This is the Council's preferred option on the basis that even a presumption in favour of ordering of a PSR may act as a barrier to courts making CBSOs for offenders who might otherwise benefit from the making of such orders.

There is some risk with the introduction of new types of CBSOs, such as a CCO, that in the absence of good pre-sentence advice, courts will not be able to sufficiently tailor and target conditions to address the underlying causes of offending. However, the Council considers it should be possible to cast many of the conditions a court may be able to impose in broad enough terms to enable the individualisation of interventions, treatment and program requirements to occur post-sentence once the offender has been assessed by QCS.

Retention of the current legislative approach would still provide scope for expansion of the availability of PSRs and a court advisory service, as supported by many legal stakeholders. This was considered a worthwhile investment by many on the basis this would enhance information available to a court to better inform sentencing and result in better targeted orders and conditions. This, in turn, may support greater compliance by offenders with orders that take into account their individual circumstances and the underlying factors associated with their offending.

The provision of this information through a court advisory service staffed by QCS also has potential to standardise the information provided to courts, while ensuring that offenders who do not have access to the resources to seek specialist psychological or other reports are not disadvantaged. The greater available of this information may further assist in building a shared understanding by courts and Corrective Services of what factors impact sentencing decisions, and how orders, once made, are administered, thereby over time potentially supporting improved confidence in the use of CBSOs.

The Council notes the views of the ALRC in its 2006 report on the sentencing of federal offenders that these reports: 'have a particularly important role in the sentencing of special categories of offenders, such as

offenders with a mental illness or intellectual disability, and Aboriginal and Torres Strait Islander offenders.'[1154] In its more recent report on the incarceration of Aboriginal and Torres Strait Islander Peoples, the ALRC has recommended the adoption of cultural reports for Aboriginal and Torres Strait Islander offenders, a form of which already exists in Queensland. These reports are discussed further below in section 11.1.5 of this paper.

A court advisory service provided by Probation and Parole officers, as is available on a very limited basis in the Brisbane Magistrates Court, or staff recruited specifically for this purpose, may provide the most efficient means of providing advice of this nature to sentencing courts, without the need for detailed written reports. Similar to Queensland, a number of jurisdictions allow for the provision of shorter written or verbal reports by court duty officers that focus on the suitability and availability of particular sentencing options in addition to more detailed reports. The Council suggests it may be beneficial to clarify in legislation that a PSR can be delivered orally or in writing, as is the case in some other jurisdictions.[1155]

While the required resourcing for a court advisory service is outside the scope of this review, to provide this service on a statewide basis would require a commitment of additional funding and resources and potentially recruitment of additional staff to undertake this work. It is important any enhancements considered not be at the expense of existing service provision, or result in increased workloads for Probation and Parole officers who, as discussed below, are already carrying high caseloads. Such a service could be trialled at select court locations to assess its impact, before consideration is given to broader rollout. Implementation issues are briefly considered in section 11.3 of this chapter. This option would still allow for enhancements to be made to the current court advisory service which operates on a very limited basis by QCS.

Option 2: Presumption in favour of a PSR being prepared for certain orders (or conditions), but no requirement

Option 2: Presumption in favour of a PSR being prepared for certain orders (or conditions), but no requirement
Require a PSR to be prepared if the court is considering making a CBSO (or ordering a short period of imprisonment in the alternative), but allow the court to make the order in the absence of such an order if, in the circumstances of the case, the court is of the opinion a PSR is unnecessary – for example, because there is sufficient information before the court to support the order being made (see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17D(1A) which is in similar terms). Exceptions could be provided for under the Act (for example, in Victoria, the only condition ordered is a community service condition up to a maximum of 300 hours as the sole condition attached to the order (*Sentencing Act 1991* (Vic), s 8A(3)). Greater specificity could also be provided in legislation about the purposes of a PSR, and the type of information that may be included in the report, provided this information is considered relevant and is readily ascertainable (see, for example, purposes and factors set out under sections 8A and 8B of the *Sentencing Act 1991* (Vic) and guidance on matters to be taken into account in preparing an assessment report for an ICO under *Crimes (Sentencing Procedure) Regulation Act 2017* (NSW) s 15).

Option 2 would require a PSR to be prepared if the court is considering making a CBSO (or ordering a short period of imprisonment in the alternative), but would allow the court to make the order in the absence of such an report. This requirement could be departed from where, in the circumstances of the case, the court is of the opinion a PSR is unnecessary – for example, because there is sufficient information before the court to support the order being made. This is similar to models existing in some other jurisdictions reviewed, such as under the *Crimes (Sentencing Procedure) Act 1999* (NSW) for the ordering of an assessment report for an ICO:

1154 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders Report 103* (2007) 401–402 [14.46].

1155 See *Sentencing Act 1995* (WA) s 22(3); *Sentencing Act 2017* (SA) s 17(3); *Sentencing Act 1997* (Tas) s 82(1)(a); *Crimes (Sentencing) Act 2005* (ACT) s 44. The Tasmanian legislation distinguishes between: (a) an oral statement of a probation officer; and (b) a pre-sentence report.

> **17D Requirement for assessment report**
>
> (1) The sentencing court must not make an intensive correction order in respect of an offender unless it has obtained a relevant assessment report in relation to the offender.
>
> (1A) However, the sentencing court is not required to obtain an assessment report (except if required under subsection (2) or (4)) if it is satisfied that there is sufficient information before it to justify the making of an intensive correction order without obtaining an assessment report.

Similarly, under the *Criminal Justice Act 2003* (UK), there is a requirement that a court obtain a PSR if considering making a community order and when determining the suitability of an offender for particular requirements under that order, but this does not apply: 'if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a pre-sentence report'.[1156]

Option 2 would provide a legislative framework that encourages the greater use of PSRs and provision of court advice in Queensland, while providing courts with the ability to make a CBSO in the absence of a PSR being available.

While the greater availability of pre-sentence advice is desirable, this option, like making PSRs mandatory, still carries a real risk of the presumption in favour of these reports being requested acting as a barrier to courts making use of CBSOs on the basis that a PSR is not available, or concerns about potential delays in having matters finalised.

Court delays caused by the additional time required to undertake assessments and prepare a PSR may have a number of negative impacts across the system, including contributing to court backlogs and workload, and causing uncertainty for offenders who have an interest in having their matter finally resolved.

As highlighted by the Victorian Law Reform Commission in its 2016 report on the role of victims in the criminal trial process, unnecessary delay can also result in significant adverse effects for victims who 'spend considerable time and emotional energy preparing for important court dates' including sentencing.[1157] Delays may not only affect the ability of victims to recover and move on with their lives, but may also have practical consequences, such as needing to take time off work or study, or make childcare arrangements to attend a sentencing hearing.

Option 3: – PSR required for specific condition types, rather than order types

Option 3: PSR required for specific condition types, rather than order types
Under this option, a PSR would not be mandatory, except in the case of specific conditions being ordered. As an example, in NSW, a court can only impose a community service condition on an ICO or CCO, or a home detention condition as part of an ICO if an assessment report has been provided to the court and the report states that the offender is a suitable person to be subject to such a condition (*Crimes (Sentencing Procedure) Act 1999* (NSW) ss 17D(2), 17D(4), 73A(3), 89(4)).

Option 3 could be adopted in combination with either Options 1 or 2 to require an assessment or suitability report to be prepared for some types of conditions only.

It is likely that in the case of such conditions, which limit the movements of offenders and potentially impact on victims of crime, other family members, and co-residents, that some type of pre-sentence assessment should be undertaken to confirm suitable arrangements can be made and that the person is suitable for such conditions. The Council invites views on what types of reports should be mandatory should the scope of legislated conditions be expanded, and for what types of conditions they should be required.

1156 *Criminal Justice Act 2003* (UK) s 156(4).

1157 Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process: Report 34* (2016) 99.

QUESTION 15: PRE-SENTENCE REPORTS

15.1 Should pre-sentence reports or assessment reports be mandatory for some types of orders or conditions?

15.2 If so, for what conditions or orders should such reports be mandatory, and why?

11.1.5 Cultural reports

Section 9(2)(p) of the PSA requires a sentencing court, if the offender is an Aboriginal or Torres Strait Islander person, to have regard to, among other matters, submissions made by a representative of a Community Justice Group (CJG) in the offender's community relevant to sentencing, including:

- the offender's relationship to their community;
- any cultural considerations; or
- any considerations relating to programs and services established for offenders in which the CJG participates.

This provision applies to all courts hearing criminal matters in Queensland. Submissions can be made orally or in writing, and submitted or made on their own, or in addition to a PSR.

DJAG provides funding to 49 CJGs to develop and deliver strategies within their communities to work towards reducing the overrepresentation of Aboriginal and Torres Strait Islander offenders and victims within the criminal justice system, including in support of sentencing hearings.[1158] New triennial funding arrangements commenced on 1 July 2017, with a total allocation of $4M annually.

Nearly all CJG members are volunteers and include Elders, traditional owners, Respected Persons and community members of 'good standing'. CJGs have a range of roles including supporting the Murri Courts, bringing Elders to court, and providing oral and written reports to assist in bail and sentencing matters.

The Murri Court has adopted two special forms of written reports: Entry Reports and Sentence Reports. The procedures identified as best practice in the operation of the Murri Court, including the preparation of these reports, are detailed in a Practice Direction issued by the Chief Magistrate.[1159]

1158 Magistrates Court of Queensland, *Annual Report 2017-18* (2018) 26.

1159 Magistrates Court of Queensland, Practice Direction No. 2 of 2016: Queensland Murri Court, 13 April 2016 (amended 16 May 2017) 26.

MURRI COURT

Murri Court is a Queensland Magistrates Court bail based program which provides an opportunity for members of the Aboriginal and Torres Strait Islander community (including Elders and victims) to participate in a court process which requires defendants to take responsibility for their offending behaviour but which respects and acknowledges Aboriginal and Torres Strait Islander culture.

Defendants are required to take responsibility for their offending and are provided with support from Elders and support services to address the underlying causes of offending and encourage positive behaviour change. In addition participants can be referred to treatment and support services, as well as taking part in cultural activities, including yarning circles and Men's and Women's groups. Stakeholders participating in Murri Court are encouraged to speak in "plain English" rather than legal jargon, and the Magistrate speaks directly to the defendant and takes advice from Elders and Respected Persons.

Murri Court continues to operate in 14 locations across the State, including Maroochydore, Brisbane, Caboolture, Cairns, Cherbourg, Cleveland, Mackay, Mount Isa, Richlands, Rockhampton, St George, Toowoomba, Townsville, and Wynnum.

In 2017-18, 615 defendants (588 adults and 27 children) appeared before Murri Courts and worked with Elders and support services to address the underlying contributors to their offending and connecting with culture.

Source: Excerpt from Magistrates Courts of Queensland, *Annual Report 2017–2018* (2018) 27

The reports used in the Murri Court and mainstream courts prepared by CJGs are in addition to sentencing submissions made on behalf of legal practitioners. For example, sentencing submissions made by the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS) on behalf of clients can include information about their clients' antecedents and, as part of this, relevant cultural and background information, such as their clients' current connection to culture and to their community.

In 2017–18, CJGs reported attending Queensland Magistrates Courts 1,557 times and provided 4,188 bail and sentencing court submissions through their support of 5,238 defendants as well as support to victims of crime throughout Queensland.[1160]

The value of cultural advice being provided to inform sentencing was an issue expressly raised by members of the Council's Aboriginal and Torres Strait Islander Advisory Panel during preliminary consultation to ensure orders are appropriately tailored and take into account the offender's personal circumstances. More information about the Panel can be found at section 4.5 of this paper.

In a 2017 Court of Appeal decision of *R v SCU*, Sofronoff P found that the 'opinion of a [CJG] is a matter of great weight', noting that it has 'a statutory basis'. Section 150(1)(g) of the YJA makes 'it mandatory for a court to have regard to such submissions' when sentencing a child.[1161] In this context:

> the provisions of s 150 are not merely "certain cultural aspects". Their centrality to the task of sentencing does not depend upon the offender's being merely Indigenous. They are directly relevant to the applicant's situation as a child offender and constitute some of the very reasons why detention ought not be ordered.[1162]

The ALRC, in its 2017 *Pathways to Justice* report on its inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples, summarised the reasons for the introduction of the Queensland provision as follows:

> The key factors that led to the current form of s 9(2)(p) was the over representation of Aboriginal and Torres Strait Islander peoples in custody, and the need for greater community based culturally appropriate

1160 Magistrates Court of Queensland above n 1158, 26.

1161 *R v SCU* [2017] QCA 198 (8 September 2017) 11–12 [56] (Sofronoff P).

1162 Ibid [121] (McMurdo JA).

> options. It was intended that submissions from community justice groups would give the sentencing court insight into the 'reasons for the offending behaviour and relevant cultural and historical issues'. Community justice groups could make the court aware of local sentencing options, particularly those in which the group participated. Submissions to this effect were to be of particular benefit to circuit courts in remote areas, with the responsible Minister noting in the second reading speech that it would be 'expected that the advice of the community justice groups will lead to more appropriate sentencing options for offenders' allowing for the 'community to take a greater role in addressing offending behaviour in a culturally appropriate way'.[1163]

The Caxton Legal Centre, in a submission to the ALRC, found need for legislative reform on the basis that:

- 'There is no explicit requirement … for a sentencing Court in Queensland to take into account the ongoing systemic and background factors that uniquely affect Aboriginal and Torres Strait Islander offenders' and, with reference to the High Court's position in *Bugmy v The Queen*, 'whilst cultural considerations, including systemic deprivation, can and will be taken into account on sentence in Queensland, they must have some evidentiary basis'.
- 'The evidentiary burden on Aboriginal and Torres Strait Islander offenders to raise such matters' can be a barrier to this occurring.
- 'There is no requirement submissions be sought from Community Justice Groups and, if obtained, no legislative requirement on judges to accept recommendations'.[1164]

It concluded:

> In our view, sentencing principles should explicitly take into account individual and systemic factors arising out of an offenders Aboriginal or Torres Strait Islander background because 'individualised justice requires recognition of the relevant facts'.[1165]

The ALRC, after reviewing the relevant authorities and views expressed in submissions in support, recommended:

> **Recommendation 6–1** Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[1166]

The ALRC has suggested that: 'Where adopted, the provision should be uniform across the states and territories'.[1167]

The Commonwealth Government and Queensland Government are yet to issue a response to the ALRC's report.

The Council invites views about the extent such a provision might encourage the greater use of CBSOs in Queensland.

In addition to this recommendation, the ALRC made two additional recommendations which would ensure courts are provided with the necessary information to give practical effect to this new provision:

> **Recommendation 6–2** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.
>
> **Recommendation 6–3** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

1163 Australian Law Reform Commission, above n 26, [6.22].

1164 Caxton Legal Centre Inc, Submission No 47 to Australian Law Reform Commission, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (4 September 2017) 9.

1165 Ibid citing Thalia Anthony, Lorna Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39 *Melbourne University Law Review* 74.

1166 Australian Law Reform Commission, above n 1163, 204.

1167 Ibid 214 [6.114].

A Murri Court process evaluation is currently underway, which the Council is informed will consider the suitability of current reports used in the Murri Court and whether some other form of reports are required.

The Council suggests there may be opportunities to build on the successful CJG model in Queensland through this evaluation, and any future evaluations of the CJG program, to ensure cultural reports meet the needs of judicial officers and provide sufficient detail to ensure the sentencing process responds to the circumstances of Aboriginal and Torres Strait Islander offenders.

11.2 Resourcing challenges

As discussed earlier in this report, the Council's Terms of Reference focus on improving the legislative framework that supports sentencing in Queensland – with specific reference to reforms that can improve the availability and flexibility of existing intermediate sentencing orders.

The Council has not been asked to consider the funding implications of its recommendations, but as with any reform process, it is unlikely any reform adopted will be cost neutral.

The Council heard from legal stakeholders during the initial stages of the review about the importance of ensuring adequate funding across the system to encourage the greater use of CBSOs and implement evidence-based interventions to reduce the risks of people reoffending and coming back into contact with the criminal justice system.

In its Draft Report, the QPC has highlighted the following challenges for Queensland, highlighting the financial costs of continuing to imprison offenders at the current rate of growth:

> Imprisonment is expensive: It costs around $107,000 to accommodate a prisoner for a year.
>
> Imprisonment also has indirect costs on prisoners, their families and communities. These costs are difficult to estimate, but could be around $40,000 per prisoner per year.
>
> At the current rate of growth, Queensland will require an additional 4,600 to 5,800 additional prison cells by 2025—this will require around $5.2 to 6.5 billion in infrastructure costs alone.
>
> Imprisonment benefits the community where it incapacitates and deters offenders, particularly where it prevents high-harm offences. However, preliminary analysis suggests that: for a material portion of Queensland's prison population, the costs of imprisonment outweigh the benefits to the community for a further portion, lower cost alternatives would provide greater benefits to the community.[1168]

Among other reforms recommended, the QPC has recommended an increase in non-prison sentencing options, including home detention, monetary penalties and community based orders, and removing unnecessary restrictions on these options[1169] — which is a focus of the Council's review.

Relevant to the issue of resourcing, the QPC has recommended: 'To encourage the appropriate use of non-custodial sentencing, the Queensland Government should establish a mechanism to allocate resources to community corrections to support changing court sentencing practices.'[1170]

Referring to the Australian Productivity Commission's published data on spending on correctional services, the Commission has noted:

> While 70 per cent of the offenders managed by Queensland Corrective Services (QCS) are under some form of community supervision, community corrections receives only 10 per cent of total expenditure, with the remainder being spent on prisons. Expenditure on community supervision in Queensland is the lowest in Australia.[1171]

In 2017–18, Queensland spent $14.19 per offender on community supervision per day (translating to approximately $5, 180 per year), compared to the national average spend of $25.26 (approximately $9,220

1168 Queensland Productivity Commission, above n 11, 3.

1169 Ibid.

1170 Ibid 30 Draft Recommendation 4.

1171 Ibid 153.

per year).[1172] Expenditure in Queensland is substantially below that of a number of other states including NSW ($27.28), Victoria ($34.20) and Western Australia ($33.61).[1173]

QCS staff carry some of the highest caseloads in Australia. In 2017–18, there were 29.1 offenders to every one Probation and Parole officer, compared to a national average of 18.7.[1174] The lowest offender to staff ratios are in Victoria (12.2 offenders per community services officer).[1175] The apparently low cost of community corrections in Queensland is, in part, a product of this factor.

The investment in community correction, does not take into account the funding of support services and interventions in the community to address underlying issues that may be associated with offending, such as drug and alcohol misuse, mental health issues and homelessness, or the challenges of ensuring that these services are available in regional and remote locations. The impact of a lack of access to support services on sentencing practices was noted by the ALRC as part of its recent inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples.[1176] It was also the subject of comment by the Law Council in its 2018 final report produced as part of the Justice Project — a national review of access to justice in Australia for people experiencing disadvantage — which recommended:

> **Recommendation 5.5** State and territory governments should invest in accessible, disability-responsive and culturally appropriate support services that underpin non-custodial supervisory sentences in rural, regional and remote areas to ensure that there is greater parity with urban areas.[1177]

The Council will be exploring this issue in more detail in its final report through the use of three illustrative place-based case studies.

The Council also invites legal services and service providers to share case studies with the Council about what services and interventions are proving effective in their community in supporting offenders on community based orders, and where services or interventions might be absent or deficient contributing to higher rates of breach and reoffending.

11.3 Implementation

The implementation challenges of any significant reforms to sentencing should not be underestimated. As a 2001 review of sentencing in the UK commented:

> Experience in England and Wales, and in comparable jurisdictions, shows that sentencing reform projects can, but do not always, gain their intended results. The risks of unintended or suboptimal outcomes are high, and several factors are critical for success. Important conditions for a successful and intended outcome include:
>
> - sufficient understanding of, and commitment to the main elements of the reform programme, including its goals and how it is expected to work, amongst all those directly involved, and a wider public (the "hearts and minds" aspect of implementation);
> - comprehensive assessment of needs for investment in infrastructure and services, including completing necessary policy development; constructing essential systems;
> - obtaining necessary human and financial resources; and enacting legislation;
> - adequate planning for the change process through a comprehensive plan that recognises the needs of all concerned and commands a sufficient level of confidence across all agencies.[1178]

These comments are as apposite today as they were when first made 18 years ago.

1172 Australian Government, Productivity Commission, above n 14, 'Chapter 8 Corrective Services', Table 8A.17.

1173 Ibid.

1174 Ibid Table 8A.7.

1175 Ibid.

1176 Australian Law Reform Commission, above n 26, 229–230.

1177 Law Council of Australia, *The Justice Project Final Report — Part 2* (2018), 'Critical Support Services', 65.

1178 Halliday, French and Goodwin, above n 402, 65 [10.1]. This report is also commonly referred to as the 'Halliday report'.

While the Council has been asked to consider the legislative framework that supports sentencing only — in particular, as it supports the use of CBSOs and sentencing flexibility — to adopt an analogy used by the UK sentencing review 'the foundations should not be laid, through legislation, until the building plans are complete'.[1179]

The risks of acting prematurely to reform a criminal justice system which is already under some pressure could be substantial.

While the risks are many, the opportunity to reform sentencing options available to courts, and to provide a more flexible range of sentencing orders that can be individualised to both meet the purposes of sentencing, and the individual circumstances of the offence and offender has significant potential to improve sentencing outcomes. Such reforms may result in better tailored orders that enable the underlying causes of offending to be targeted, higher rates of compliance, reduced reoffending and, ultimately, a safer community.

The Council does not underestimate the work that will be required to give effect to any reforms that are ultimately supported by Government. To cite a recent example, the NSW reforms to its sentencing framework, which came into effect on 24 September 2018, followed some five years after the NSW Law Reform Commission delivered its final report following its review of sentencing.[1180] The legislation, though passed in October 2017,[1181] did not come into operation until 12 months later.[1182]

Reforms to the Tasmanian sentencing options, which commenced in December 2018,[1183] had a shorter genesis, having followed the delivery of TSAC's final report on the phasing out of suspended sentences in March 2016.[1184] This followed a two-year review to examine Tasmania's current use of suspended sentences and how to phase out the use of these orders in that state which commenced in July 2014. In contrast to Queensland, Tasmania is a much smaller state, with a smaller population and fewer challenges in managing a geographically dispersed offender population.

During the next stage of the review, the Council will consider what reforms might be considered for immediate introduction, and what reforms should be delayed until the necessary preparatory work can be done to prepare for commencement. Some reforms, such as the expansion of a court advisory service, may be implemented comparatively quickly. Although this reform has significant resourcing and funding implications, and would require additional staff to be recruited and trained, it is not reliant on legislative reform or a new sentencing structure to be in place.

It is likely, in some cases, the Council will recommend that certain reforms, although supported, should be delayed until such time as initial changes are made to improve the range of existing CBSOs and their impact on sentencing practices evaluated.

Ongoing monitoring and the testing of impacts through review of data and ongoing engagement with the courts, legal practitioners, correctional services staff, service providers, victims' organisations and other key stakeholders is critical to ensure any reforms have their intended impact. If the CCO model is supported for introduction in Queensland, Government will have the benefit of learning from the experience in Victoria, NSW and Tasmania before commencing its reform process.

11.4 Conclusion

This chapter has considered potential options for the use of PSRs in Queensland, resourcing issues and implementation challenges.

In the final chapter of this paper, we will consider other issues identified by stakeholders as part of this review, and invite views on anything else that should be addressed as part of this review.

1179 Ibid 66 [10.6].

1180 NSW Law Reform Commission, above n 62 .

1181 *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) passed on 18 October 2017, and assented to on 24 October 2017.

1182 Date of commencement, 24 September 2018: *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) s 2 and 2018 (534) LW 21 September 2018.

1183 *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas), passed on 29 November 2017 assented to on 20 December 2017, and proclaimed into force on 14 December 2018.

1184 Sentencing Advisory Council (Tasmania), above n 67.

Chapter 12 Other Issues

The Council identified further issues which do not fall within other chapters but have been raised by stakeholders over the course of consultation.

These issues are discussed in this final chapter of the options paper.

12.1 Administrative mechanisms – section 651 applications, ex officio indictments, section 189 schedules

During initial consultation, key stakeholders were asked:

> Is the section 651 of the *Criminal Code* (Qld)[1185] process working well? Could aspects of section 561 of the *Criminal Code* (Qld)[1186] and section 189 of the PSA[1187] be incorporated? What improvements, if any, could be made?

Section 651 provides that, if an indictment has been presented against a person before a court, the court may hear and decide summarily any charge of a summary offence. Section 651(2) qualifies this and provides the court must not do so unless certain criteria are met, including that the Crown and the accused consent to the court doing so.

The Office of the Director of Public Prosecutions' *Director's Guidelines*[1188] state that prosecutors should not consent unless the summary matter has some connection to an indictable matter set down for sentence. Circumstances in which consent may be given include:-

> An evidentiary relationship: where the circumstances of the summary offence would be relevant and admissible at a trial for the indictable offence.
>
> The facts form part of the one incident.
>
> The offences overlap or are based on the same facts.
>
> The summary offences were committed in resistance to the investigation, or apprehension, of the offender for the indictable offence.
>
> There is a substantive period of remand custody that could not otherwise be taken into account under section [159A] of the PSA.

Consent to a transfer of summary matters should not be given:

> Where all offences could be dealt with in the Magistrates Court.
>
> For a breach of the *Bail Act*. Such offences should be dealt with at the first appearance in the Magistrates Court.

While acknowledging drawbacks, not all stakeholders encouraged amendment. However, many stakeholders were of the view that in general the process was:

- inefficient;
- unnecessarily complex;
- laborious and inflexible;
- led to delay, and
- attempts to use the process were not always successful.

1185 Court may decide summary offences if a person is charged on indictment.

1186 Ex officio indictments.

1187 Outstanding offences may be taken into account in imposing sentence.

1188 Office of the Director of Public Prosecutions, *Director's Guidelines* (as at 30 June 2018) (2018) 53-56 ('(vii) Transfer of Summary Matters').

Many stakeholders commented that the section 651 process may not provide for all offences which can be heard and decided summarily (such as commonwealth offences, a breach of a community based order[1189] or if the offence is an indictable offence under section 552B of the *Criminal Code* (Qld).[1190]

Comment was made that requiring the offender's signature on the relevant template document can lead to delays if the offender is in custody.

There was some criticism of the requirement that the Crown's consent be required for section 651 applications and the requirement that offences be connected to the primary indicted offences.[1191]

Stakeholders also considered that the 14 day time limit in the Practice Direction was restrictive and often resulted in sentences being adjourned for compliance with this requirement.[1192]

In respect of section 189 of the PSA, comment was made that the practice was extensive in the 1990's but attracted criticism as the offences in section 189 schedules were taken into account but were not offences in respect of which a conviction was obtained. This could carry negative consequences regarding victims not feeling validated and being unable to later claim compensation or insurance.

It was noted that registry committals could achieve the same benefits as the previously used ex officio indictments.

The approach in select jurisdictions (Victoria and NSW)

The *Criminal Procedure Act 2009* (Vic) provides the procedure for a Supreme or County Court (analogous to a District Court in Queensland) to deal with a related - and/or unrelated - summary offence. The key difference between the Queensland and Victorian regimes is that in Victoria, the consent of the DPP to transfer a summary offence is not required.

When an indictable offence is committed for trial, the Magistrates' Court must order that the proceedings for any related summary offence are transferred to the same court (without the need for a plea) unless the DPP and accused agree that the matter should remain in the Magistrates' Court. Once the indictable charge has proceeded to trial, a guilty plea is entered or it is discontinued, the court will then hear and determine the related summary charge without a jury. The court has the power to discharge the offender or impose any sentence that could be imposed by the Magistrates' Court.

In the case of an unrelated summary offence, if an offender has an indictment before a Supreme or County Court, intends to plead guilty and consents to the charge being heard by the higher court, the proceedings in the Magistrates' Court are transferred to the relevant higher court. There is no further guidance in the Victorian DPP guidelines.

In NSW, the *Criminal Procedure Act 1986* (NSW) provides for a related offence to be dealt with in a Supreme or District Court. When an indictable offence is committed for trial or sentence, the prosecution presents a certificate specifying each 'related offence' which is then transferred to the higher court (without a plea). Once the indictable offence has been determined, the court may deal with a summary offence unless it would not be in the interests of justice. In NSW there is no provision for an unrelated summary offence to be transferred to a higher court when an offender has other matters indicted. The DPP guidelines do not provide any further guidance.

1189 It is noted that the s 130(b) of the *Penalties and Sentences Act 1992* (Qld) expressly recognises that contraventions of the requirements of community based orders may be dealt with under s 189 of that Act – although that process also requires prosecution consent (s 189(1)(a)). However contraventions of graffiti removal orders are excepted: sections 130 (note) and 189(12).

1190 *Criminal Code* (Qld), 552B: Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial.

1191 *Criminal Code* (Qld), s 651(2)(c). See also Office of the Director of Public Prosecutions (Queensland), *Director's Guidelines* (as at 30 June 2016), 53 [47](vii).

1192 District Court of Queensland, *Practice Direction No 3 of 2002* and Supreme Court of Queensland, *Practice Direction No 5 of 2002*.

QUESTION 16: OPERATION OF SECTIONS 651 AND 561 *CRIMINAL CODE* (QLD) & SECTION 189 *PENALTIES AND SENTENCES ACT 1992* (QLD)

16.1 Do you agree with the points raised about sections 651 and 561 of the *Criminal Code* (Qld) and section 189 of the *Penalties and Sentences Act 1992* (Qld)?

16.2 What improvements could be made to any of these provisions and their associated systems?

12.2 Convicted and not further punished

The sentencing order that an offender be 'convicted and not further punished' is a staple of Queensland sentencing options, constantly relied on to achieve fair and expedient resolutions of criminal charges. It is particularly useful for sentencing multiple charges where one of a group of offences will attract the head sentence, or where pre-sentence custody or other issues mean that another form of order would be unjust.

This form of sentencing disposition is not expressly recognised in Queensland legislation. It may appear similar to section 19(1)(a) of the PSA (absolute discharge) but that order can only be made if a conviction is not recorded in every instance (s 16).

By contrast, Victoria has an unconditional discharge order in section 73 of the *Sentencing Act 1991* (Vic), being discharge of a person who the court 'has convicted of an offence'.

QUESTION 17: SENTENCING DISPOSITION – CONVICTED, NOT FURTHER PUNISHED

17.1 Should the sentencing disposition of convicting and not further punishing an offender for an offence be legislated?

17.2 What aspects of the order would need to be included in a definition?

12.3 High volume imprisonment in Magistrates Courts: breaches of domestic violence orders and breaches of bail

The Council produced data which shows that in the Magistrates courts in the most recent financial year (2017-18):

- 27.6 per cent of imprisonment sentences were imposed for justice and government offences;
- close to two-thirds (62.7%) of these offences were for breach of a violence order; and
- 30.0 per cent were for breach of bail offences, with other offences (such as breach of community based orders) making up the remainder.

Over the course of the Council's data period, the lowest proportion of imprisonment sentences imposed were for justice and government offences was in 2011-12, when:

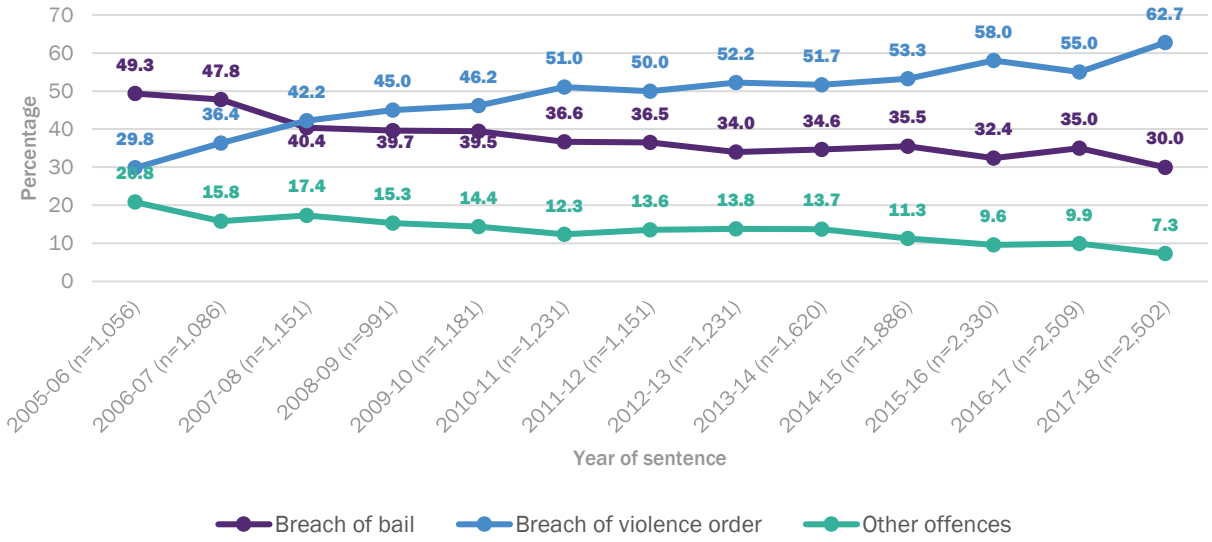
- 20.2 per cent of imprisonment sentences imposed were for justice and government offences;
- 50.0 per cent of these offences were for breach of a violence order; and
- 36.5 per cent were for breach of bail offences.

The highest proportion of imprisonment sentences imposed for justice and government offences occurred in 2005-06, at the commencement of the Council's data period:

- 30.9 per cent of imprisonment sentences imposed were for justice and government offences;
- 29.8 per cent of these offences were for breach of a violence order; and
- 49.3 per cent were for breach of bail offences.

Overall, within justice and government offences that received an imprisonment sentence, the proportion of breach of violence order increased, while breach of bail decreased.

Figure 12-1: 'Justice and government' category offences that attracted an imprisonment sentence, Magistrates Courts, 2005–06 to 2017–18



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018. Stakeholders raised concern about these statistics

Potential remedies suggested included an increased use of alternative options such as bail-based programs mandating domestic violence related programs and treatment.

This is an important and complex issue which raises issues beyond the scope of the Council's current Terms of Reference. There is a complex interrelationship between recent amendments to bail and criminal laws regarding domestic violence, and the increasing awareness of the seriousness and risk that such offending poses.

The Council believes this deserves a separate review given the complexity of the issues concerned.

The potential scope and duration of such an endeavour is shown by the October 2017 VSAC report *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders*.[1193] It followed a March 2016 Royal Commission into Family Violence recommendation that the Sentencing Advisory Council examine the desirability of and methods for accommodating 'swift and certain justice' approaches to family violence offenders in Victoria's sentencing regime. The Attorney-General issued Terms of Reference in September 2016, which led to the report.

12.4 Breaches of community based orders

Three issues emerged in consultation regarding dealing with breaches of community based orders (CBOs - community service order, graffiti removal order, ICO or probation order).[1194] The issues raised (expanded below) were:

- A higher court power to deal with a lower court CBO.
- A lower court power to deal with a higher court CBO.
- Magistrates Courts' discretion to action a breach of Magistrates Court CBO on its own initiative.

While the discussion below relates to the existing PSA provisions and current CBOs, the issues may be of relevance to any future CCO as well.

1193 Sentencing Advisory Council (Victoria), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Report* (2017) ix.

1194 *Penalties and Sentences Act 1992* (Qld) s 4.

12.4.1 Amendment and revocation powers

The amendment and revocation provisions[1195] apply their powers to the court that made the CBO.[1196] There is recognition of a court, other than that which imposed the order, amending or revoking for non-compliance or inability to comply. It must then notify the court that made the order.[1197] However, the provision dealing with resentencing on revocation contains no recognition of a court other than that which originally made the order.[1198]

12.4.2 Breaches

The relevant PSA provisions are in Part 7, Division 2 (sections 123-132). Section 123 creates an offence of contravening a CBO requirement, which carries a fine as the maximum penalty.

Proceedings for this offence 'may be brought in any Magistrates Court' (s 124) – subject to sections 128 or 129 (see below). The proceedings may be taken, and the offender dealt with, under this division for the contravention even though the order has been terminated or revoked.[1199]

Proceedings for an offence against a community based order, if not initiated by a court, must be started by complaint made by a person authorised by the chief executive (corrective services) to do so, either generally or in a particular case.[1200]

A Magistrates Court has no such power to initiate. If the magistrate convicts the offender of the offence brought to court against section 123, further powers are available in s 125 – in addition to, or instead of, dealing with the offender under section 123. Section 125(2) allows the magistrate to admonish and discharge or make one or more of a choice of orders which do not affect the continuation of the CBO (s 123(3)). Section 125(4) contains further discretion to:

- sentence afresh, if the CBO was made by a Magistrates Court (this terminates the order);[1201] or
- if the CBO was made by the Supreme or District Courts, commit the offender into custody or grant bail to facilitate their appearance before that court (if two or more CBOs were made by courts of different jurisdictions, this order may be made to effect appearance before the higher of those courts).[1202]

Sections 128 and 129 highlight that, while a magistrate might make certain orders regarding a breach of a higher court CBO, it cannot resentence and thereby terminate such an order. They deal with a justice issuing a summons or warrant requiring appearance in court for a contravention of section 123. One factor the justice must consider is whether the corrective services officer bringing the complaint 'intends to recommend to the court before which the offender appears, or is brought, if the offender is convicted, that the offender be [resentenced, so that the order is terminated]'.[1203]

Section 126 sets out the powers of the Supreme and District Courts to deal with section 123 offences. It does not contemplate a higher court dealing with a Magistrates Court CBO. It appears to have the effect

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1195 These are in Part 1, Division 1 of the PSA (sections 120-122), and see also sections 99, 108, 110L and 119 regarding termination).

1196 *Penalties and Sentences Act 1992* (Qld) ss 120(1), 120A, 121.

1197 Ibid ss 120(2) and 120A(3). A court to which an application is made under the division, which did not make the order, has a similar notice requirement (s 122(5)).

1198 Ibid s 121. It is not clear what the 'first court' means in this division, in the sense that a court of lower jurisdiction might action an order made by a higher court. 'First' and 'original' courts are not defined in the definitions in s 4, and 'court' is defined in three distinct contexts — but not for this division.

1199 *Penalties and Sentences Act 1992* (Qld) s 132.

1200 *Penalties and Sentences Act 1992* (Qld) s 142.

1201 For termination see *Penalties and Sentences Act 1992* (Qld) ss 99(b), 108(b), 110I(b) and 119(b) regarding probation, community service, graffiti removal, intensive correction orders, respectively.

1202 *Penalties and Sentences Act 1992* (Qld) s 125(5).

1203 Ibid ss 128(4) and 129(4).

that it only applies to the District Court if that court made the order, while the Supreme Court can deal with a CBO made by the District Court as well.[1204]

However, section 126(7) does clearly apply to CBOs made by the Supreme Court where the offender 'is convicted before a District Court of another offence committed during the period' of the CBO (but not a s 123 offence).[1205] In such as case, the District Court 'may' commit the offender into custody or grant bail to facilitate their appearance before the Supreme Court.

The court's powers under the subsections prior to section 126(7) are similar to the Magistrates Courts' powers in section 125.[1206]

The court can also sentence afresh if the offender is before the court:

- where the District Court has committed up a Supreme Court breach;[1207]
- under a summons or warrant issued under sections 128 or 129;[1208] or
- having just convicted that offender of another offence committed during the CBO and the offender is also the subject of CBOs made by courts of lower jurisdiction.[1209]

12.4.3 The Supreme and Districts Courts should have power to deal with a CBO imposed by Magistrates Courts. This would involve an extension of section 126(1)(a) of the PSA to CBOs made in a Magistrates Court.

Magistrates Courts do not have power under section 125 to commit a breach of CBO made by that court to a higher court. There is a narrow power in sections 125(5) and 126(5)(c) for a court to deal with incidental lower court CBOs when dealing with their own. Otherwise, section 126(1) of the PSA does not allow higher courts to deal with Magistrates Court CBOs and only permits the exercise of jurisdiction regarding section 123 as against higher court CBOs.[1210] A question of reasonable excuse on a contravention is determined by the judge.[1211]

Furthermore, sections 128(3) and 129(3) are drafted so as to give discretion to require appearance before (a) the court that made the order ['if it was not a Magistrates Court': s 128] or (b) a Magistrates Court. They do not permit a summons or warrant for a contravention of a Magistrates Court CBO being dealt with in a higher court.

1204 Ibid s 126(1): This section applies if—(a) the community based order to which the offender is subject was made by the Supreme Court or a District Court; and (b) the offender is before the court or, if the order was made by a District Court, before the Supreme Court; and (c) the court is satisfied that the offender committed an offence against section 123(1) in relation to the community based order.

1205 Ibid s 126(7) reflects the Magistrates Courts' discretion in s 125(4)(b) – the District Court 'may' commit the offender into custody or grant bail to facilitate the offender' s appearance before the Supreme Court

1206 Including dealing with the offender under s 123, admonishing and discharging (s 126(2)(a)), as well as sentencing afresh (which means terminating the order (s 126(4)); although it lacks the power in section 125 to increase the number of hours for community service or graffiti removal service, or the duration of such an order.

1207 *Penalties and Sentences Act 1992* (Qld) s 126(5)(a), (7). This supports the interpretation that s 126(1) does not permit the District Court to terminate a Supreme Court CBO.

1208 Ibid s 126(5)(b).

1209 Ibid s 126(5)(c).

1210 Section 126 effectively grants jurisdiction to the District or Supreme Court to deal with a s 123 offence, which is a summary offence. Note the comments of Pincus JA in *R v Tootoo* (2000) 115 A Crim R 90 2 [3]: 'The District Court's criminal jurisdiction is of course statutory and its extent is set out principally in Div 1 of Pt 4 of the *District Court Act 1967*. Subject to any provision changing that position, the District Court has no jurisdiction to "inquire of, hear, and determine" any offences other than indictable offences. The summary offences in question here were created by statute; in each instance it was provided that prosecution should be under the *Justices Act 1886* [for CBOs, see s 138 of the *Penalties and Sentences Act 1992* (Qld) s which applies the *Justices Act 1886* to a complaint, summons, warrant or penalty under Part 7]... The purpose of the learned primary judge in taking into account the outstanding summary offences was to enable his Honour to fix a single penalty appropriate for them as well as for the offence charged under the indictment before him. But his Honour had no jurisdiction in respect of the summary offences, other than that given by the Criminal Code and the *Penalties and Sentences Act...*'.

1211 *Penalties and Sentences Act 1992* (Qld) s 131.

There could be occasions where, for reasons of totality or pre-sentence custody declaration, it would be in the interests of justice to take such a course.

For breaches of suspended sentences, the PSA dictates that if the court that convicts an offender of a breaching offence is of higher jurisdiction than that which made the order, the higher court must deal with the breach unless it would be in the interests of justice for the lower court which made the order to instead deal with the breach.[1212] South Australia has a provision of similar effect regarding reoffending on a home detention order.[1213] An example of where such a power could be of use is as follows:

- An offender is sentenced for two offences in a Magistrates Court to a suspended sentence and a probation order.
- During those orders, the offender commits robbery and is remanded in custody.

If the power contemplated above existed, the District Court could deal with the robbery and contravention of probation order (by offending on the order) and activate the existing suspended sentence with the sentence for the robbery. Otherwise, the District court could only deal with the robbery and the suspended sentence. A breach action instituted regarding the probation order would be dealt with in a Magistrates Court. The District Court could not declare the time spent in custody for any breach at sentence (but could take it into account).

If this power were to be introduced, it would mean that such breach proceedings would require the provision of material regarding the facts of the offence giving rise to the CBO that has been contravened, as well as material from Probation and Parole regarding the offender's compliance while on the order. The parties would need to be proactive in ensuring this material was available for the higher court sentence of the offence committed during the period of the order.

If this reform were made, the way in which it would apply to regional areas serviced only by District and Supreme Court circuits would have to be considered. If the the higher court sentence of the offence committed during the period of the order were the catalyst for the breach proceedings, with both matters to be dealt with together, this may not be as acute a problem.

QUESTION 18: ABILITY OF HIGHER COURTS TO DEAL WITH BREACH OF A MAGISTRATES COURT CBO

Should the *Penalties and Sentences Act 1992* (Qld) expressly permit the District Court and Supreme Court to deal with breach of a community based order imposed by a Magistrates Court?

12.4.4 A lower court which has before it a breach of an order made by a higher court, should have discretion to deal the breach itself in addition to discretion to commit to the higher court.

There may be delay in dealing with a breach of CBO committed to a higher court.[1214] However, committing the matter is discretionary, which should militate against committing minor or trivial matters. There is no such discretion in the same scenario regarding a suspended sentence.[1215]

The breach provisions in the PSA appear designed to ensure that a court cannot resentence on breach of, and therefore revoke, a CBO made by a higher court. This is a key distinction to the discussion of the same point in the context of suspended sentences in Chapter 8. A court which activates a suspended sentence is 'dealing with' the offender under that sentence as opposed to sentencing afresh.[1216] By contrast, resentencing on a CBO as a consequence of a breach of section 123 involves 'deal[ing] with the offender for

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1212 Ibid s 146(2A).

1213 *Sentencing Act 2017* (SA) s 73(11): 'If a person subject to a home detention order is found guilty of an offence by a court of a superior jurisdiction to that of the court that made the order, being an offence committed during the period of the home detention order, any proceedings for breach of condition arising out of the offence are to be taken in the court of superior jurisdiction'.

1214 Under sections 125(4)(b), (5) and 126(7) of the *Penalties and Sentences Act 1992* (Qld).

1215 Section 146(3) and (4) of the *Penalties and Sentences Act 1992* (Qld) regarding Magistrates Court; sections 146(5) and (6) regarding the District Court.

1216 *R v Skinner; Ex parte Attorney General (Qld)* [2001] 1 Qd R 322, 325 [14] (de Jersey CJ, Davies and Pincus JJA).

the offence' for which the CBO was imposed, as if the offender had just been convicted of it,[1217] which terminates the CBO. The current position under the PSA also guards against scenarios where a lower court faces dealing with the breach of a CBO imposed by a higher court for an offence which the lower Magistrates Court[1218] or District Court[1219] has no power to sentence on.

This was the subject of discussion in section 8.14.6 regarding suspended sentences, where potential models proposed were defence election, referral to the DPP seeking consent to have the matter dealt with in this way or (the Council's preferred option) by the court (on its own motion), with an adaption of section 651 *Criminal Code* (Qld) type considerations.[1220] The UK legislation mentions community orders and suspended sentence orders made by the Crown Court that include a direction that any failure to comply with the requirements of the order is to be dealt with by a Magistrates Court.[1221] This appears to allow a higher court to determine at the time of sentencing whether or not the matter is one which could be appropriately dealt with by a Magistrates Court on a breach.

QUESTION 19: POWER OF LOWER COURTS TO DEAL WITH HIGHER COURT CBO BREACH

19.1 Should Magistrates Courts and the District Court have a discretionary power to deal with breach of a CBO imposed by a higher court?

19.2 If yes, should there be guidance as to the use of the discretion and what form should this take?

12.4.5 Magistrates Courts' power to deal with a breach of their own CBOs on their own initiative, as opposed all proceedings being initiated by summons under section 123 of the PSA

This would give Magistrates Courts a discretionary power to deal immediately with a breach of section 123 by reoffending during the order, if that court has just convicted the person of the new (non s 123) offence,[1222] without the need to institute breach proceedings. It would resemble section 146 of the PSA regarding suspended sentences, and section 126 regarding higher court CBO breach powers. This could minimise delay and better facilitate accommodating totality issues on sentence.

However, it might risk causing the very delay that it would be designed to address:

- QCS would probably still be required to engage in the process, as the sole repository of information regarding the offender's performance on the order, which would be relevant to every breach proceeding (and is expressly required to be considered in the case of resentencing: s 125(6), PSA).
- The facts upon which the original offence was sentenced giving rise to the CBO would also be relevant, and may not be capable of immediate production.

QUESTION 20: MAGISTRATES COURTS' POWER TO DEAL WITH BREACH OF A CBO IMPOSED BY A MAGISTRATES COURT ON OWN INITIATIVE

Should section 124 of the *Penalties and Sentences Act 1992* (Qld) be amended to allow a Magistrates Court to deal with a breach, by reoffending, of a CBO imposed by a Magistrates Court, without proceedings first having to be instituted under section 123?

1217 *Penalties and Sentences Act 1992* (Qld) ss 125(4)(a), 126(4).

1218 See *Criminal Code* (Qld) Chapter 58A regarding the Magistrates Courts' ability to deal with indictable offences.

1219 See *District Court of Queensland Act 1967* (Qld) Part 4 Division 1 regarding the District Court's criminal jurisdiction.

1220 The court must consider it appropriate, the accused must have legal representation, the Crown and accused must consent and sufficient information about the original offence and circumstances in which it was imposed must be before the court.

1221 *Criminal Justice Act 2003* (UK) Schedule 8, ss 5(4), 6(2), 6A(2), 7(1)(b), 8(1), 14(1)(a), 16(4)(b) regarding community orders, and sections 4(4), 5(2), 5A(2), 6(1)(b), 7(1) and 13(3)(b) regarding suspended sentences.

1222 Reoffending on the order being a breach of the first mandatory requirement of each community based order in ss 93(1)(a), 103(1)(a), 110C(1)(a), 114(1)(a), regarding probation, community service, graffiti removal, intensive correction orders, respectively.

12.5 Data quality

In conducting its review, the Council has identified issues in working with administrative data and a lack of research into the effectiveness of orders that use appropriate statistical techniques, such as propensity score matching. The quality of the evidence to support reform is therefore, in some cases, either lacking or ambiguous. This can compromise the degree of confidence that can be placed in certain potential reform options.

Administrative data is collected by a number of agencies across the criminal justice system. There are many instances where these administrative datasets do not reflect the legal framework of the wider system. Two such scenarios are where:

- Agencies operate using different ICT systems and any information recorded by one agency is not linked to information in other systems, making it difficult to get the full picture.
- Administrative data is not validated in the context of the legal framework, leading to inaccuracies in the underlying datasets.

For example, the Council noted in Chapter 9 that there is not clear evidence on the relative effectiveness of court ordered versus board ordered parole. Further, it is also aware that the reported court ordered parole and board ordered parole completion rates represent a point in time and may not (and in a number of recent examples brought to the Council's attention by the Board, **do not**) capture further offending that occurred within the order period but was yet to be finalised by the Court prior to the order expiring. QCS has advised that the counting rules used in Queensland to calculate completion rates are derived from National Counting Rules.

The Council notes that Queensland has a unique parole system which allows offenders to serve an entire period of imprisonment on parole. The mandatory legislative consequences of reoffending on parole can result in such an offender being drawn further into the system (see section 9.6). These factors increase the significance of the Council and other stakeholders having a proper understanding of rates of compliance with parole.

In undertaking this review, the Council has further identified that the administrative data used to classify suspended sentences as either wholly or partially suspended may be recorded in a way that is unclear or liable to be misinterpreted. Analysis revealed that a number of wholly suspended sentences were recorded as having declared pre-sentence custody, which is not allowable under section 159A(2)(c) of the PSA. A manual review of a sample of 92 sentencing remarks was undertaken to determine the nature of each order; 52 cases were confirmed as wholly suspended sentences (57%), 32 were partially suspended sentences that had been incorrectly recorded as wholly suspended sentences (35%), and the status of the remaining eight could not be determined from the sentencing remarks. Statistical research on declared pre-sentence custody is rarely conducted by other agencies; as such, this data does not undergo the rigorous validation processes that are applied to more frequently used data items.

The Council was also not able to determine in the case of breach of a suspended sentence by reoffending, whether formal breach action was initiated and if so, what action the court took on finding the breach proven (for example, whether the sentence was activated in full or in part, or the operational period of the order extended). This means it is very difficult to determine how effective suspended sentences are in Queensland in diverting offenders from prison.

The 2008 *Review of the Civil and Criminal Justice System in Queensland* noted a lack of reliable, comprehensive data in the criminal justice system.[1223] The review noted that:

> Reliable, up to date, accurate and accessible data is the life blood of an effective criminal justice system. It allows decision makers at all levels to make evidence based decisions; it challenges entrenched beliefs and perceptions, and it provides a foundation to secure funding. Such a system is dependent on effective information technology support.[1224]

1223 Hon Martin Moynihan AO QC, above n 4, 20, expanded on at 106.

1224 Ibid 105.

It was noted that 'the criminal justice system is made up of a number of interactive agencies … what one agency does or does not do impacts on other agencies, a benefit to one agency may come at a cost to others'.[1225] Benefits of an effective information system were listed, and included:

> Identifying variations and trends and formulating effective, flexible and immediate responses;
>
> Accurately assessing the effectiveness of strategies in order to make evidence based evaluation with consequent adjustments;
>
> Identifying related cases or those with common characteristics to enable specific strategies to be developed to address unique needs;
>
> Identifying and dealing with impacts of changes on other agencies and on the system as a whole;
>
> Ensuring focussed, effective allocation of resources; and
>
> Making cost benefit and process analysis, and budget bids.[1226]

The Council is aware there is work underway across government to address current data issues. The Council considers this is important work to be prioritised, particularly in light of its relevance in informing future policy and system reform.

1225 Ibid.

1226 Ibid.

Appendix 1

Terms of Reference

I, Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills, having regard to:

- the 2016 *Queensland Parole System Review Final Report* (Parole System Review Report) by Mr Walter Sofronoff QC, in particular the observations made in the report regarding the lack of flexibility of community based sentencing options available to a court and the likely adverse impact this has upon the prison population and the need to improve Queensland's sentencing laws;
- Recommendation 2 of the Parole System Review Report that court ordered parole should be retained;
- Recommendation 4 in the Parole System Review Report that a suitable entity, such as the Sentencing Advisory Council, should undertake a review into sentencing options and in particular, community based orders to advise the Government of any necessary changes to sentencing options;
- the Queensland Government's Response to Recommendations 3 and 4 of the Parole System Review Report which stated that the Government will have the Queensland Sentencing Advisory Council undertake a review that considered those recommendations.
- Recommendation 2 in the 2016 Queensland Audit Office report, *Criminal justice system- prison sentences, Report 4: 2016-17* that the Department of Justice and Attorney-General in collaboration with the Queensland Police Service assess the need to review sentencing legislation to reduce the complexity of sentence calculations;
- the importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992*;
- the importance of sentencing orders of the court being properly administered so that they satisfy the intended purposes of the sentencing order and facilitate a fair and just sentencing regime that protects the community's safety;
- the purpose of parole is allowing an offender to serve part of their period of imprisonment in the community in order to successfully reintegrate a prisoner into the community and minimise the likelihood an offender reoffending;
- the need to further encourage and maintain public confidence in the criminal justice system and ensure that sentencing practices meet the community's expectations; and
- the impact of any recommendation the Council may make on the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system;

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(1) of the *Penalties and Sentences Act 1992*, a review of community based sentencing orders, imprisonment and parole options.

In undertaking this reference, the Queensland Sentencing Advisory Council will:

- review sentencing and parole legislation, including but not limited to the *Penalties and Sentences Act 1992* and the *Corrective Services Act 2006*, to identify any anomalies in sentencing or parole laws that create inconsistency or constrain the available sentencing options available to a court and advise how these anomalies could be removed or minimised;
- consider Recommendation 3 of the Parole System Review Report and advise as to whether a court should have discretion to set a parole release date or parole eligibility date for sentences of greater than three years where the offender has served a period of time on remand and the court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence;

- consider and advise on Recommendation 5 of the Parole System Review Report that court ordered parole should apply to a sentence imposed for a sexual offence;
- assess restrictions on the ability of a court to impose a term of imprisonment with a community based order and advise on whether those restrictions should be removed or modified in order to better enable offenders to be appropriately monitored and managed upon release in to the community to support the reintegration and rehabilitation of an offender and prevent recidivism;
- consider flexible community based sentencing orders that provide for supervision in the community that are used in other jurisdictions (for example, the CCOs contained in *Sentencing Act 1991* (Vic)) and advise on appropriate options for Queensland;
- assess whether there are any inherent complexities in the legislative framework including recognition of pre-sentence custody, that contribute to, or cause complexity in calculating an offender's overall period of incarceration, and advise on how those inherent complexities can be addressed with a view to simplifying the calculation process and preventing discharge and detention error;
- consult with key stakeholders, including but not limited to the legal profession, the judiciary, victim of crime groups, prisoner advocacy and support groups, relevant government department and agencies; and
- advise on any other matter relevant to this reference.

The Queensland Sentencing Advisory Council is to provide a report on its examination to the Attorney-General and Minister for Justice and Minister for Training and Skills by 30 April 2019.*

Dated the 25th day of October 2017

YVETTE D'ATH

Attorney-General and Minister for Justice and Minister for Training and Skills

* Extension granted to 31 July 2019 – Letter from Attorney-General and Minister for Justice, Yvette D'Ath to John Robertson, Chair, Queensland Sentencing Advisory Council, 15 July 2019.

Appendix 2

Agencies consulted – Stages 2 & 3

Date	Agency
8 January 2018	Queensland Law Society
23 January 2018	Aboriginal and Torres Strait Islander Legal Service (Qld) Inc
1 February 2018	Crime and Corruption Commission
2 February 2018	Protect All Children Today Inc
15 February 2018	Bar Association of Queensland
23 February 2018	Queensland Corrective Services
23 February 2018	Legal Aid Queensland
26 February 2018	Bravehearts
28 February 2018	Parole Board Queensland
1 March 2018	Aboriginal and Torres Strait Islander Legal Service (Qld) Inc
6 March 2018	Queensland Magistrates Courts Criminal Law Committee
9 March 2018	Legal Services Commission of South Australia
13 March 2018	New Zealand Crown Law
13 March 2018	Sentencing Advisory Council of South Australia
21 March 2018	Criminal Law Policy and Operations, Victorian Government
24 March 2018	Queensland Law Society
4 July 2018	Queensland Corrective Services
6 July 2018	Sisters Inside
6 July 2018	Aboriginal and Torres Strait Islander Legal Service (Qld) Inc
6 July 2018	Office of the Commonwealth Director of Public Prosecutions
12 July 2018	Court Services Queensland
16 July 2018	Bar Association of Queensland
25 July 2018	Legal Aid Queensland
10 August 2018	Office of the Director of Public Prosecutions (Qld)
13 August 2018	Sisters Inside
28 August 2018	Aboriginal and Torres Strait Islander Legal Service (Qld) Inc
31 August 2018	Bar Association of Queensland
11 September 2018	Queensland Law Society
24 September 2018	Supreme Court of Queensland
24 September 2018	District Court of Queensland
26 September 2018	Queensland Corrective Services
31 October 2018	Queensland Magistrates Courts Criminal Law Committee
2 November 2018	Parole Board Queensland
8 November 2018	Queensland Corrective Services
30 November 2018	Aboriginal and Torres Strait Islander Legal Service (Qld) Inc
3 December 2018	Bar Association of Queensland
12 December 2018	Sisters Inside
17 December 2018	Queensland Police Service
18 December 2018	Legal Aid Queensland
19 December 2018	Office of the Director of Public Prosecutions (Qld)
20 December 2018	Queensland Law Society
9 January 2019	Queensland Government Statistician's Office
17 January 2019	Sisters Inside
21 January 2019	Bar Association of Queensland
31 January 2019	Queensland Police Service
7 February 2019	Aboriginal and Torres Strait Islander Advisory Panel, Queensland Sentencing Advisory Council
25 February 2019	Specialist Courts, Referral and Support Services, Courts Innovation Program, Department of Justice and Attorney-General
27 February 2019	Stakeholder roundtable #1 – Representatives from Office of the Director of Public Prosecutions (Qld), Legal Aid Queensland, Office of the Commonwealth Director of Public Prosecutions, Aboriginal and Torres Strait Islander Legal Service (Qld) Inc, Office of the Chief Magistrate (Qld), Queensland Corrective Services, Parole Board Queensland, Sisters Inside, Queensland Police Service, Queensland Law Society, Bar Association of Queensland, Prisoners' Legal Service, QSAC Aboriginal and Torres Strait Islander Advisory Panel, Strategic Policy and Legal Services Department of Justice and Attorney-General
25 March 2019	Parole Board Queensland

Date	Agency
26 March 2019	Parole Board Queensland
26 March 2019	Stakeholder roundtable #2 – representatives as for meeting #1 as well as Courts Innovation, Department of Justice and Attorney-General and Mr Brendan Butler AM SC, District Court Judge, Chief Magistrate (retired)
10 April 2019	Supreme Court of Queensland
10 April 2019	Queensland Magistrates Courts Criminal Law Committee
24 April 2019	District Court of Queensland

Appendix 3

What works in sentencing – summary tables

Table 1: Evidence of the effectiveness of different sentencing orders

Order type	Strength of evidence	Studies considered	Conclusion
Imprisonment	A strong level of evidence is available.	Gendreau, Goggin & Cullen (1999) Heijden (2014) Kay (2019) Killias, Villettaz & Zoder (2006) Kurlychek, Brame & Bushway (2006) Meade, Steiner, Makarios & Travis (2013) Mears, Cochran & Bales (2012) Mews, Hiller, McHugh & Coxon (2015) Mitchell, Cochran, Mears & Bales (2017) Nagin, Cullen & Johnson (2009) Revolving Doors Agency (2012) Ritchie (2011, 2012) Sentencing Advisory Council (2013) Spelman (2000) Spohn & Holleran (2002) Sydes, Eggins & Mazerolle (2018) Tollenaar, van der Laan & van der UK Ministry of Justice (2011, 2013) Villiettaz, Gillieron & Killias (2015) Weatherburn (2010)	Mixed. Findings. Effective as a means of achieving the objectives of punishment and denunciation. Largely ineffective as a deterrent and limited in its ability to incapacitate (thereby providing community safety). Periods of imprisonment up to 12 months are least effective, most likely due to insufficient time to engage in programs compounded by disruption to family, employment and other social connections.
Partially suspended sentence	Insufficient methodologically robust evidence.	Bartels (2009b) Aarten, Denkers, Borgers & van der Laan (2012)	Conclusions cannot be reached.
Wholly suspended sentence	Some robust research exists, but there are significant gaps.	Aarten, Denkers, Borgers & van der Laan (2012) Bartels (2009a) Lulham, Weatherburn & Bartels (2009) Poynton & Weatherburn (2012) Sentencing Advisory Council (2013) Weatherburn & Bartels (2008)	A small but significant impact on reducing recidivism has been observed compared with the impact of imprisonment, and the effect seems stronger for repeat offenders. Further work is needed to understand what factors are associated with successful completion, and to understand which offenders are most likely to succeed.
Parole	Reasonable evidence.	Carmichael et al (2005) Clark et al (2016) Edo, Ouden and Skeen (2011) Jones, Donnelly, McHutchison & Heggie (2006) Lai (2013) Ostermann (2012) Schlager & Robbins (2008) Stavrou, Poynton & Weatherburn (2016) Thompson, Forrester & Stewart (2015) Verbrugge et al (2002) Vito, Higgins & Tewksbury (2017) Wan, Poynton, van Doorn & Weatherburn (2014) Weatherburn& Ringland (2014) Wright & Rosky (2011)	Mixed findings, but authors conclude that active supervision that focuses on rehabilitation rather than compliance is more effective. Mixed results on Board versus Court Ordered parole.
Conditional suspended sentence	Insufficient methodologically robust evidence.	Bartels (2009b) Potas, Eyland & Munro (2005)	Conclusions cannot be reached

Order type	Strength of evidence	Studies considered	Conclusion
Intensive Correction Order	Two robust studies.	Ringland & Weatherburn (2013) Wang & Poynton (2017)	Supervision combined with rehabilitation programs can have a significant impact on reoffending rates, with programs targeted at high risk offenders producing larger reductions in reoffending than those targeted at middle and low risk offenders
Home detention	Some robust research available on both 'front-end' and 'back-end' home detention. Significant gaps in research exist.	Avdija & Lee (2014) Bouchard & Wong (2018) Cale & Burton (2018) Development Services Group (2014) Gibbs & King (2003b) Henderson (2006) Marie, Moreton & Goncalves (2011) Stanz & Tewksbury (2000)	Mixed and inconsistent findings. Authors conclude that home confinement can assist offenders reintegrate into the community on release from custody and can deter offending. However, effectiveness in reducing recidivism remains uncertain.
Community Service Order	Reasonable evidence.	Killias, Aebi & Ribeaud (2000) Klement (2015) KPMG (2010) Morris & Sullivan (2015) Snoball (2008) Snowball & Bartels (2013) Wermink et al (2010)	Community service orders are effective at reducing recidivism, but further research is needed to understand the underlying reasons for success, who it is most successful for and under what circumstances
Probation	A substantial body of research exists.	Burke & Keaton (2004) Caudy, Tillyer & Tillyer (2018) Degiorgio & DiDonato (2014) DeVall et al (2017) Hawken & Kleiman (2009) Hepburn & Griffin (2004) Kilmer et al (2013) Lattimore et al (2016) MacKenzie, Browning, Skroban & Smith (1999) Meloy (2005) Michigan, Gray, Fields & Maxwell (2001) Olson, Alderden & Ligurio (2003) Skeem et al (2009) Smith, Heyes, Fox, Harrison, Kiss & Bradbury (2018) Wodahl, Boman & Garland (2015)	Strong evidence of effectiveness at reducing recidivism compared to imprisonment, including for vulnerable offenders such as women, offenders with mental illness and possibly also for sex offenders. Failure on probation appears more likely for those with a criminal history or substance abuse issues
Community Correction Order	No real research has been conducted on the effectiveness of these orders as they have only been introduced in Victoria in 2012 and have not yet been properly evaluated.	Victorian Sentencing Advisory Council (2016)	Conclusions cannot be reached.

Source: Gelb et al (2019)

Table 2: The effectiveness of specific conditions on orders

Condition	Evidence	Studies considered	Conclusion
Electronic monitoring	Sufficiently robust evidence.	Bales, Mann, Blomberg, Gaes, Barrick, Dhungana & McManus (2010) Belur et al (2017) Gies (2012) Henneguelle, Monnery & Kensey (2016) Killias, Gillie'ron, Kissling & Villettaz (2010) Renzema & Mayo-Wilson (2005) Roman, Liberman, Taxy & Downey (2012) Washington State Institute of Public Policy (2017a) Washington State Institute of Public Policy (2017b) Williams & Weatherburn (2019)	Reduces recidivism cost effectively, particularly when used as an alternative to prison, and when used in conjunction with counselling and therapy. Some cohorts, such as sex offenders, demonstrate greater success using electronic monitoring. Concerns have been raised in the academic literature about the potential for a net-widening effect, but there is currently not enough research to conclude this is the case.
Treatment programs (generic)	Substantial evidence.	Gendreau & Andrews (1996) Latessa & Lowencamp (2006) Lipsey, Chapman & Landenberger (2001) Lipsey & Cullen (2007) McGuire (2002) Pertersilia (2007) Vennard, Sugg & Hedderman (1997)	The most effective treatment programs provide meaningful contact between the offender and the provider, must be designed to address the assessed criminogenic needs of the offender, and must be delivered consistently with the design of the program.
Cognitive-behavioural therapy (therapy that aims to change a person's thought patterns to move away from criminogenic thought patters to pro-social behaviour)	Good consensus and rigorous research exists.	Aos, Miller & Drake (2006) Davis et al (2008) Mackenzie (2000) Pearson et al (2002) Vennard, Sugg & Hedderman (1997) Washington State Institute of Public Policy (2017d)	Evidence shows that offenders engaging in this treatment were less likely to reoffend, and are cost effective when considering the cost of treatment versus the financial benefits associated with reduced offending.
Drug treatment	Some robust evidence.	Aos, Miller & Drake (2006) Davis et al (2008) Vennard, Sugg & Hedderman (1997)	Drug treatment found to be particularly effective in reducing offending for men and younger offenders.
Sex offender programs	Some robust evidence.	Hanson, Bourgon, Helmus & Hodgson (2009) Landenberger and Lipsey (2005) Lipsey, Chapman & Landenberger (2001) Losel & Schmucker (2005) Rietzel & Carbonell (2006) Schmucker & Losel (2017)	There are some promising findings to suggest that programs designed specifically for sex offenders are more effective than generalised programs.
Violent offender programs	Some robust evidence.	Joliffe & Farrington (2007)	Promising findings that suggest programs involving greater duration, an anger control component, cognitive skills, role-play, relapse prevention and which include homework tasks are most likely to reduce reoffending.

Condition	Evidence	Studies considered	Conclusion
Domestic violence offender programs	Good level of evidence available.	Babcock, Green & Robie (2004) Feder (2005, 2006) Miller, Drake and Nafziger (2013) Smedslund, Dalsbo, Steiro, Winsvold & Clench-Aas (2007) Vigurs, Schucan-Bird, Quy & Gough (2016)	Inconclusive evidence. Small effect sizes, at best, are demonstrated, although promising findings appear to be associated with programs that involve cognitive behavioural therapy, couples therapy and substance abuse treatment. No conclusive evidence about what constitutes an effective intervention for domestic violence offenders.
Supervision **High-intensity supervision, involving increased numbers of contacts, home visits and drug tests** **Low-intensity supervision, reduced number of contacts** **Environmental corrections, where staff assist an offender to avoid problematic environments and situations, and maximise positive influences**	Good level of evidence available.	Aos & Drake (2013) Barnes et al (2010, 2012) Bonta et al (2008) Drake (2011) Gendreau, Goggin, Cullen & Andrews (2000) Gill, Hyatt & Sherman (2009) Lowencamp et al (2010) Petersilia & Turner (1993b) Ringland & Weatherburn (2013) Schafer (2018) Sydes, Eggins & Mazerolle (2018) Washington State Institute of Public Policy (2017e) Weatherburn & Trimboli (2008) WODC (2014)	Mixed support, although evidence broadly suggests that supervision that focuses on rehabilitative rather than surveillance or monitoring alone is most effective. The evidence on high-intensity supervision is mixed, and there is little evidence of the effectiveness of low-intensity supervision. Limited evidence about the impact of an environmental approach to supervision shows some promise in reducing recidivism.

Source: Gelb et al (2019)

Appendix 4

Summary of mandatory sentencing provisions in Queensland

Act and Section	Offence	Mandatory Penalty
Mandatory Imprisonment		
Criminal Code (Qld): s 305	Murder	Life Imprisonment
Penalties and Sentences Act 1992 (Qld): s 161E	Repeat serious child sex offenders 'Serious child sex offence' is defined in *Penalties and Sentences Act* Schedule 1A Criminal Code: s213 Owner etc. permitting abuse of children on premises s215 Carnal knowledge with or of children under 16 s219 Taking child for immoral purposes s222 Incest s229B Maintaining a sexual relationship with a child s349 Rape s352 Sexual assaults	Life imprisonment
Penalties and Sentences Act 1992 (Qld): s 161R	Serious organised crime offences Prescribed offences are listed in *Penalties and Sentences Act* Schedule 1C	Imprisonment imposed under law for the offence (base component) plus the lesser of 7 years imprisonment or the maximum penalty for the offence (mandatory component), served cumulatively.
Weapons Act 1990 (Qld): s 50(1)(d)(i) *Weapons Categories Regulation 1997* (Qld)	Unlawful possession of a firearm if: 10 or more category D, R, H or R weapons 10 or more weapons Possession of category D, H, R, C or E weapon And: Possess and use for an indictable offence	Mandatory minimum 18 months imprisonment served wholly in a corrective services facility.
Weapons Act 1990 (Qld): s 50(1)(d)(ii)-(iii) *Weapons Categories Regulation 1997* (Qld)	Unlawful possession of a firearm if: 10 or more and at least 5 are category D, R, H or R weapons 10 or more weapons Possession of category D, H, R, C or E weapon And: Possess for the purpose of committing or facilitating the commission of an indictable offence or Possess a short firearm in public	Mandatory minimum 1 years' imprisonment served wholly in a corrective services facility.
Weapons Act 1990 (Qld): s 50(1)(e)(i) *Weapons Categories Regulation 1997* (Qld)	Unlawful possession of a firearm if: Possess category A, B or M weapon for use in an indictable offence	Mandatory minimum 9 months' imprisonment served wholly in a corrective services facility.
Weapons Act 1990 (Qld): s 50(1)(e)(iii) *Weapons Categories Regulation 1997* (Qld)	Unlawful possession of a firearm if: Possess category A, B or M weapon for the purpose of committing or facilitating the commission of an indictable offence	Mandatory minimum 6 months' imprisonment served wholly in a corrective services facility.
Weapons Act 1990 (Qld): s 50B(1)(d) *Weapons Categories Regulation 1997* (Qld)	Unlawful supply of a firearm 5 or more and 1 is a category D, E, H or R weapon and if 1 is a short firearm	Mandatory minimum 3 years' imprisonment served wholly in a corrective services facility.

Act and Section	Offence	Mandatory Penalty
Weapons Act 1990 (Qld): s 50B(1)(e) *Weapons Categories Regulation 1997* (Qld)	Unlawful supply of a firearm Category D, H, or R and is a short firearm	Mandatory minimum 2.5 years' imprisonment served wholly in a corrective services facility.
Weapons Act 1990 (Qld): s 65(1)(c) *Weapons Categories Regulation 1997* (Qld)	Unlawful trafficking in weapons If at least 1 is a category H or R weapon	Mandatory minimum 5 years' imprisonment served wholly in a corrective services facility.
Weapons Act 1990 (Qld): s 65(1)(d) *Weapons Categories Regulation 1997* (Qld)	Unlawful trafficking in weapons If at least 1 is a category A, B, C, D or E, a category M crossbow or explosives	Mandatory minimum 3.5 years' imprisonment served wholly in a corrective services facility.
Dangerous Prisoner (Sexual Offenders) 2003 (Qld): s 43AA(2)	Contravene a relevant order If released prisoner removes or tampers with a monitoring device.	Mandatory minimum 1 years' imprisonment served wholly in a corrective services facility.
Transport Operations (Road Use Management) 1995 (Qld): s 79(1C)	Vehicle offences involving liquor or other drugs If there are two convictions within five years (for offences see s79(1C)(a)-(f))).	The court must impose imprisonment as whole or part of the punishment.
Mandatory Non-Parole Periods		
Criminal Code (Qld): s 305 *Corrective Services Act 2006* (Qld): ss 181(2)(a)-(c)	Murder	Parole eligibility date: 30 years – murder of more than one person or by an offender with a previous murder conviction 25 years – murder of a police officer 20 years – murder other than listed above
Penalties and Sentences Act 1992 (Qld): s 161E *Corrective Services Act 2006* (Qld): s 181A	Repeat serious child sex offenders 'Serious child sex offence' is defined in *Penalties and Sentences Act* Schedule 1A	Parole eligibility date after 20 years imprisonment
Penalties and Sentences Act 1992 (Qld): s 161R *Corrective Services Act 2006* (Qld): s 181(2A)	Serious organised crime offences Prescribed offences are listed in *Penalties and Sentences Act* Schedule 1C	If sentenced to life imprisonment: 37 years – murder of more than one person or by an offender with a previous murder conviction 32 years – murder of a police officer 27 years – murder other than listed above 22 years – otherwise
Criminal Code (Qld): s 314A(5)	Unlawful Striking Causing Death If offender is sentenced to a term of imprisonment (not an ICO or suspended sentence)	The offender must serve 80% of the term of imprisonment or 15 years imprisonment (whichever is less). If sentenced to life imprisonment see *Corrective Services Act*: s181

Act and Section	Offence	Mandatory Penalty
Penalties and Sentences Act 1992 (Qld): ss 161A – 161B *Corrective Services Act 2006* (Qld): s 182	Serious Violent Offender (SVO) 'Serious violent offence' is defined in *Penalties and Sentences Act* Schedule 1 If convicted on indictment of an offence against Schedule 1 or counselling, procuring the commission of, or attempting or conspiring to commit an offence against a provisions in Schedule 1 and sentenced to 10 years or more – SVO declaration is mandatory. If sentenced to less than 10 years but more than 5 years – discretion to make a SVO declaration If convicted on indictment of an offence that involved the use of, counselling or procuring the use of, or conspiring or attempting to use, serious violence against another person, or that resulted in serious harm to another person and is sentenced to a term of imprisonment for the offence – discretion to make a SVO declaration regardless of whether it is a Schedule 1 offence and what length of imprisonment is imposed.	The mandatory non-parole period is 80% of the term of imprisonment or 15 years (whichever is less)
Mandatory Minimum Penalties		
Police Powers and Responsibilities Act 2000 (Qld): s 754	Evasion offence (previously Failing to Stop)	Minimum 50 penalty units or 50 days imprisonment served wholly in a corrective services facility
Mandatory Community Service Orders		
Penalties and Sentences Act 1992 (Qld): ss 108A–108D	Community service orders mandatory for particular offences If a prescribed offence is charged with a circumstance of aggravation that it was committed in a public place while the offender was intoxicated. Prescribed offences Criminal Code: s72: Affray; s320: Grievous bodily harm; s323: Wounding; s335: Common assault; s339: Assaults occasioning bodily harm; s340(1)(b) or (2AA): Serious assaults against a police officer (1(b)) or a public officer (2AA); *Penalties and Sentences Act*: s790: assault or obstruct police officer	Must make a community service order whether or not another order is imposed. If offender is sentenced to imprisonment the CSO will be deferred until release. Unless the court is satisfied that because of a physical, intellectual or psychiatric disability the offender is not capable of complying. Minimum – 40 hours Maximum – 240 hours
Penalties and Sentences Act 1992 (Qld): s 110A	Graffiti Removal Order If convicted of a graffiti offence	Must make a graffiti removal order whether or not another order is imposed. Unless the court is satisfied that because of a physical, intellectual or psychiatric disability the offender is not capable of complying. Maximum – 40 hours
Mandatory Driving Disqualification		
Police Powers and Responsibilities Act 2000 (Qld): s 754(3)	Evasion offence (previously Failing to Stop)	2 year disqualification
Transport Operations (Road Use Management) 1995 (Qld): ss 78, 79, 86	Disqualification of drivers of motor vehicles for certain offences	Various

Act and Section	Offence	Mandatory Penalty
Mandatory Parole Release or Parole Eligibility		
Penalties and Sentences Act 1992 (Qld): s 160B	Sentence of 3 years or less and not a serious violent offence or sexual offence	Parole Release Date
Penalties and Sentences Act 1992 (Qld): s 160C	Sentence of more than 3 years and not a serious violent offence or sexual offence	Parole Eligibility Date
Penalties and Sentences Act 1992 (Qld): s 160D	Sentence for a serious violent offence or sexual offence	Parole Eligibility Date
Mandatory Cumulative Sentences		
Bail Act 1980: s 33(4)	Failure to appear in accordance with undertaking	The term of imprisonment must be served cumulatively.
Penalties and Sentences Act 1992 (Qld): s 156A	Cumulative order of imprisonment must be made in particular circumstances If offender convicted of an offence against Schedule 1 or counselling or procuring the commission of or attempting or conspiring to commit an offence against Schedule 1 and: Offender is serving a term of imprisonment Release on post-prison community release or parole On leave of absence or Unlawfully at large	The sentence imposed must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve.

Appendix 5

Offending behaviour programs for community based orders

Program description	Program target	Program duration	Locations (Probation and Parole offices)	Parole criteria	Internally or externally delivered?
Getting Started Preparatory Program (GSPP)					
A motivational program designed to assist offenders to reduce barriers and responsibility factors known to inhibit further intensive sexual offending programs	Sexual offending motivational program	24 hours (6 weeks)	Cairns Brisbane Central Ipswich South Coast	Sufficient time to complete program with current sexual offence conviction	Program Delivery Officers (PDO)
Medium intensity sexual offending program (MISOP)					
All sexual offending interventions are based on the Cognitive-Behaviour Therapy model of interventions. Sexual offending programs target the cognitive drivers behind sexual offending while providing sexual offenders with the cognitive, emotional and behavioural skills to live an offence-free lifestyle.	Sexual offending	75–175 hours (4-6 months)	Cairns Brisbane Central Ipswich South Coast	Prisoners and offenders assessed as low to moderate risk of sexual reoffending. Sufficient time to complete program with current sexual offence conviction.	PDO
Sexual offending maintenance program (SOMP)					
The Sexual Offending Maintenance Program is designed to build on and strengthen offenders' cognitive, emotional and behavioural skills linked with living an offence-free lifestyle.	Sexual offending	16–24 hours (12 weeks)	Brisbane Central Logan/Ipswich Townsville Cairns	Sufficient time to complete program with current sexual offence conviction. Completed previous sexual offending intervention. Can be referred to multiple SOMPs.	PDO
Turning point preparatory program					
Turning Point is a brief 15 to 20 hour psycho-educational program designed to target offenders' responsibility issues surrounding their readiness to change. Based on cognitive-behaviour change, the program uses the motivational interviewing approach to assist people to prepare for and work towards positive change.	General offending motivational program	15–20 hours	Multiple locations Ipswich	Sufficient time on order. Can be used as preparation for further intensive program participation, or to increase engagement with community supervision.	PDO
Positive Futures					
The Positive Futures Program is a culturally sensitive 'strength based 'program' targeting family violence and anger and violence, alcohol and drug abuse, power and control, jealous, trust and fear, family and community and parenting.	Substance abuse and violence	32–36 hours (6-8 weeks)	Multiple central and remote P&P locations	Sufficient time to complete the program.	PDO, Cultural Liaison Officers or male facilitators from community stakeholder

Program description	Program target	Program duration	Locations (Probation and Parole offices)	Parole criteria	Internally or externally delivered?
Short Substance Intervention (SSI)					
Short Substance Intervention is an educational based program that starts offenders on the pathway to addressing their substance abuse needs. This program does not include a written completion report and does not include a relapse prevention plan. The program is delivered by external provides.	Substance abuse	8–12 hours	Multiples P&P locations	Substance abuse needs	External providers
Low Intensity Substance Intervention (LISI)					
Low Intensity Substance Intervention is based on Cognitive-Behavioural Therapy and relapse prevention approaches, providing offenders the skills to manage their substance abuse and link to further support mechanisms in the community. This program can be delivered by QCS staff or external providers.	Substance abuse	16–24 hours	Multiple P&P locations	Sufficient time to complete the program. Substance abuse needs.	PDO and external providers
Substance Abuse Maintenance Intervention (SAMI)					
A maintenance program for substance abuse offenders who have completed a substance abuse intervention and have an existing relapse prevention/safety plan. Can be run in a rolling or closed group format. Participants can cycle through this intervention on more than one occasion.	Substance abuse	30 hours	Multiple P&P locations	Completion of QCS substance abuse programs	PDO and external providers
Strong not Touch: Adult Resilience Program					
The Strong Not Touch: Adult Resilience program aims to develop an individual's resilience – their ability to 'bounce back' from hardship, to cope with the negative effects of stress, to adapt in the face of challenging circumstances and the courage to embrace new opportunities.	Emotional coping and wellbeing	10 hours	Brisbane Central Logan/Ipswich Cairns Redcliffe	Sufficient time. History of poor coping and self-harm. Firs time offenders.	Psychologists Counsellors PDO
Men's Domestic Violence Education and Intervention Program.					
An intervention based on the Duluth model aimed at working with men to assist them to end their violence and increase the safety of women and their children. The model prioritises a community commitment to hold men accountable for their future use of violence relying on an integrated response to violence.	Domestic violence	48 hours	Multiple P&P locations	As referred from Court	Gold Coast DV Service co-facilitative with QCS

Program description	Program target	Program duration	Locations (Probation and Parole offices)	Parole criteria	Internally or externally delivered?
Mind Wise					
The program is a treatment group addressing substance use. The group will consist of psychoeducational and skills based approaches. The aims of the group will be to provide evidence based treatment and education around substance use and offending.	Substance abuse	6 hours	Beenleigh Burleigh Heads Logan Southport	Anyone with substance abuse issues	Mind Wise Psychology Not funded by QCS
Alcohol fuelled violence Program (AFVP)					
AFVP is designed to target the factors associated with the occurrence of alcohol related violence. The program provides education around the cognitive, behavioural and emotional effects of alcohol use, how individual differences can impact on individual's response to alcohol consumption and the cultural factors that can influence attitudes towards alcohol use.	Substance abuse/ violence	3 hours	Brisbane Central	17–25 year old offenders	Ted Noff Foundation Not funded by QCS

Appendix 6

The consequences of further offending on court ordered parole – summary of the relevant PSA and CSA provisions as discussed in several judgments[1227]

Penalties and Sentences Act 1992 (Qld)

Sections 160B(2) and (3):

- For a sentence of three years or less and not a serious violent or sexual offence, a sentencing court must fix a parole eligibility date if the offender has had a court ordered parole order[1228] cancelled under CSA section 205 or 209 "during the offender's period of imprisonment". Otherwise, a parole release date must be fixed.

'Period of imprisonment' – s 160:

- Period of imprisonment means the period of imprisonment that includes the term of imprisonment mentioned in section 160A.
  Note — Period of imprisonment therefore includes the term of imprisonment a court is imposing at the time of sentence.

'Period of imprisonment' – s 4:

- Period of imprisonment means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether—
  (a) ordered to be served concurrently or cumulatively; or
  (b) imposed at the same time or different times;
  and includes a term of imprisonment.

'Term of imprisonment' – 4:

- Means the duration of imprisonment imposed for a single offence and includes—
  (a) the imprisonment an offender is serving, or is liable to serve—
  (i) for default in payment of a single fine; or
  (ii) for failing to comply with a single order of a court; and
  (b) for an offender on whom a finite sentence has been imposed, any extension under section 174B(6) of the offender's finite term.

Corrective Services Act 2006 (Qld)

Section 209 – a parole order is automatically cancelled if:

- the prisoner is sentenced to another period of imprisonment
- for an offence committed
- in Queensland or elsewhere
- during the period of the order
- even if the period of the order has expired (s 209(2); see s 215).

Section 210 – Automatic cancellation under s 209 leads to the prisoner serving the 'unexpired portion' (see below re s 211(2)) regarding the prisoners 'period of imprisonment' consequent upon the execution of a warrant).

1227 This follows the order as discussed in *R v Smith* [2015] 1 Qd R 323, 325 [13]–326 [20] (Morrison JA, Muir JA and Daubney J agreeing). See also *R v Hall* [2018] QSC 101 (18 May 2018), 3 [13]–[15] (Dalton J); *Soanes v Commissioner of Police* [2013] QDC 26 (22 February 2013), 9 [24]–15 [37] (Long SC DCJ); *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487 (16 December 2010), 4 [13]–5 [19] (Rafter SC DCJ); *R v Bond* [2009] QDC 28 (26 February 2009), 2 [7]–3 [14] (Everson DCJ).

1228 This issue does not arise where the original order involved a parole eligibility date. An offender to be sentenced under s 160B who had a board ordered parole order cancelled will fall under s 160B(2) and the court must fix a parole release date. See also *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487 (16 December 2010), 8 [32] (Rafter SC DCJ).

Section 211 – Effect of cancellation: If cancelled due to a ground giving rise to the Board's power, or because of further sentence regarding s 209 (s 211 reflects the language of s 209 but uses 'term' instead of 'period'):

> (2) The time for which the prisoner was released on parole before one of the following events happens counts as time served under the prisoner's period of imprisonment—
>
> [In respect of the Board's power – prisoner failed to comply or order was cancelled for another s 205(1) reason]
>
> (2)(c) the prisoner committed the offence mentioned in the context of s 209 [even, therefore, if the prisoner remained in the community and otherwise complied with their parole order and despite s 214, see below].
>
> (3) Despite section 206(3)(b), the parole board may, by written order, direct that the prisoner serve only part of the unexpired portion of the prisoner's period of imprisonment [prisoner must reapply for parole].

One Supreme Court judge has noted that sections 210(3) and 211(3) of the CSA show that:

> The legislative intention is that upon cancellation of a parole order the offender is to return to jail. They are to serve a period of time equal to the period between the date of the commission of the offence for which the triggering sentence is imposed, and the full-time release date on the original sentence.[1229]

A 2017 Australian Law Reform Commission (ALRC) report identified two different parole revocation schemes operating in Australia. Queensland's s 211(2) of the CSA fell into the first: Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), counts towards the head sentence. The ALRC criticised the second: Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), does not count towards the head sentence, and must be served again in prison upon the parolee's return. In respect of that second scheme, it recommended the abolition of parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.[1230]

Section 214 - A prisoner released on parole is still serving their sentence.

Section 215 - The period of imprisonment is taken to be served if the order expires without being cancelled under s 205 or 209 [but note the effect of s 209(2)) which effectively nullifies this in certain circumstances].

1229 *R v Hall* [2018] QSC 101 (18 May 2018) Dalton J 3 [15].

1230 Australian Law Reform Commission, above n 26, 234, Recommendation 9-2.

Appendix 7

Sexual offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld)

Offence	MSO sentenced 2005–06 to 2017–18	QASOC subgroup	Classified as a contact offence^
Classification of Computer Games and Images Act 1995			
s 23 Demonstration of an objectionable computer game before a minor	0	Censorship offences	No
s 26 (3) Possession of objectionable computer game	72	Child pornography offences	No
s 27 (3) Making objectionable computer game	0	Child pornography offences	No
s 27 (4) Making objectionable computer game	2	Child pornography offences	No
s 28 Obtaining minor for objectionable computer game	0	Child pornography offences	No
Classification of Films Act 1991			
s 41 (3) Possession of objectionable film	1	Child pornography offences	No
s 42 (3) Making objectionable film	0	Child pornography offences	No
s 42 (4) Copying objectionable film	0	Child pornography offences	No
Classification of Publications Act 1991			
s 12 Sale etc. of prohibited publication	6	Censorship offences	No
s 13 Possession of prohibited publication	0	Censorship offences	No
s 14 Possession of child abuse publication	6	Child pornography offences	No
s 15 Exhibition or display of prohibited publication	0	Censorship offences	No
s 16 Leaving prohibited publication in or on public place	0	Censorship offences	No
s 17 Producing prohibited publication	0	Censorship offences	No
s 18 Procurement of minor for RC publication	0	Censorship offences	No
s 20 Leaving prohibited publication in or on private premises	0	Censorship offences	No
***Crimes Act 1914* (Cwlth)**			
s 50BA Sexual intercourse with a child under 16	3	Indecent treatment of a child	Yes
s 50BB Inducing child under 16 to engage in sexual intercourse	0	Indecent treatment of a child	NC
s 50BC Sexual conduct involving child under 16	1	Indecent treatment of a child	Yes
s 50BD Inducing child under 16 to engage in sexual conduct	0	Indecent treatment of a child	NC
s 50DA Benefiting from offence against this Part	0	Aggravated sexual assault	NC
s 50DB Encouraging from offence against this Part	0	Aggravated sexual assault	NC
***Criminal Code* (Qld)**			
s 210 Indecent treatment of children under 16	2,576	Indecent treatment of a child/Non-assaultive sexual offences against a child/ Indecent treatment (consent proscribed)	Yes
s 211 Bestiality	5	Bestiality	Yes
s 213 Owner etc. permitting abuse of children on premises	5	Non-assaultive sexual offences against a child	No
s 215 Carnal knowledge with or of children under 16	865	Carnal knowledge of children	Yes
s 216 Abuse of persons with an impairment of the mind	142	Indecent treatment of a child/ Indecent treatment (consent proscribed)/ Aggravated sexual assault (remainder)/ Non-assaultive sexual offences, nec1231 (remainder)	Yes
s 217 Procuring young person etc. for carnal knowledge	8	Non-assaultive sexual offences	No

Offence	MSO sentenced 2005–06 to 2017–18	QASOC subgroup	Classified as a contact offence^
s 218 Procuring sexual acts by coercion etc.	10	Non-assaultive sexual offences, nec (remainder)/ Administer harmful substances	No
s 218A Using internet etc. to procure children under 16	270	Non-assaultive sexual offences against a child	No
s 218B Grooming children under 16	47	Non-assaultive sexual offences against a child	No
s 219 Taking child for immoral purposes	5	Abduction	No
s 222 Incest	77	Incest	Yes
s 228 Obscene publications and exhibitions	10	Censorship offences/ Non-assaultive sexual offences against a child	No
s 228A Involving child in making child exploitation material	18	Non-assaultive sexual offences against a child	Yes
s 228B Making child exploitation material	57	Child pornography offences	Yes
s 228C Distributing child exploitation material	111	Child pornography offences	No
s 228D Possessing child exploitation material	1,045	Child pornography offences	No
s 228DA Administering child exploitation material website	0	Child pornography offences	No
s 228DB Encouraging use of child exploitation material website	0	Child pornography offences	No
s 228DC Distributing information about avoiding detection	0	Child pornography offences	No
s 229B Maintaining a sexual relationship with a child	643	Maintaining a sexual relationship with a child	Yes
s 229L Permitting young person etc. to be at place used for prostitution	0	Permitting minors to be at place of prostitution	No
s 349 Rape	1,247	Rape/ Attempted rape	Yes
s 350 Attempt to commit rape	57	Attempted rape/ Non-aggravated sexual assault	Yes
s 351 Assault with intent to commit rape	36	Assault with intent to commit rape	Yes
s 352 Sexual assaults	1,110	Non-aggravated sexual assault/ Aggravated sexual assault (remainder)/ Non-assaultive sexual offences, nec* (remainder)/ Perform an indecent act with intent/ Rape	Yes
Criminal Code* provisions repealed by *Criminal Law Amendment Act 1997			
s 208 Unlawful anal intercourse	117	Aggravated sexual assault/ Carnal knowledge of children/ Aggravated sexual assault (remainder)	Yes
s 221 Conspiracy to defile	0	Aggravated sexual assault	No
***Criminal Code* (Cwlth)**			
s 270.6 Sexual servitude offences	0	Sexual servitude offences	NC
s 270.7 Deceptive recruiting for sexual services	0	Sexual servitude offences	NC
***Customs Act 1901* (Cwlth)**			
s 233BAB Special offence relating to tier 2 goods	0	Import/export regulations	No

Notes:

* Nec – Not Elsewhere Classified.

^ NC – Not classified as no offences were sentenced during data period.

Appendix 8

Queensland sexual offending programs

Group based programs remain the most proven means of addressing sexual offending, as well as addressing a range of mental health needs. The strongest evidence of effectiveness is for cognitive-behavioural approaches, based on the assumption that particular ways of 'thinking that lead to criminal conduct are learned and get reinforced by the outcomes resulting' from those ways of thinking. Participants develop a blueprint for change and the internal mindsets to support desistance from offending.

Queensland Corrective Services currently delivers best-practice, group based cognitive-behavioural programs to address sexual offending. The programs are a mixture of high intensity treatment, preparatory and maintenance programs. All sexual offending programs are delivered by QCS staff.

Program description	Target	Hours	Location	Quick Criteria
GETTING STARTED PREPARATORY PROGRAM				
A motivational program designed to provide offenders and QCS to reduce barriers and responsivity factors know to inhibit further intensive sexual offending programs.	Sexual offending motivational program	24 hours (6 weeks)	Wolston Townsville Lotus Glen Cairns Brisbane Central Ipswich South Coast	Sufficient time to complete program with current sexual offence conviction
MEDIUM INTENSITY SEXUAL OFFENDING PROGRAM (MISOP)				
All sexual offending Interventions are based on the Cognitive Behavioural Therapy Model of interventions. Sexual offending programs target the cognitive drivers behind sexual offending while providing sexual offenders with the cognitive, emotional and behavioural skills to live an offence free lifestyle.	Sexual Offending	75 -175 hours (4 -6 months)	Wolston Townsville Cairns Brisbane Central Ipswich South coast	Prisoners and offenders assessed as low to moderate risk of sexual reoffending Sufficient time to complete program with current sexual offence conviction
HIGH INTENSITY SEXUAL OFFENDING PROGRAM				
Based on the same approach outlined above, this program is a high intensity sexual offending program specifically designed for higher risk offenders.	Sexual Offending	350 hours (9-12 months)	Wolston	Prisoners assessed as High Risk of sexual reoffending Sufficient time to complete program with current sexual offence conviction
INCLUSION SEXUAL OFFENDING PROGRAM				
The Inclusion Sexual Offending Program is an adapted program for offenders with low cognitive and/or low social/emotional abilities. Although based on a CBT model of change, the Inclusion program use techniques known to increase learning, social functioning and inhibition in this cohort.	Sexual Offending Cognitive Impaired	108 hours (5 months)	Wolston	Assessed as requiring support to participate in a sexual offending program Sufficient time to complete program with current sexual offence conviction
SEXUAL OFFENDING PROGRAM FOR INDIGENOUS MALES (SOPIM)				
The Sexual Offending Program for Indigenous Males is designed to meet the specific cultural needs of Aboriginal and Torres Strait Islander offenders. The basic constructs of CBT exists, yet more narrative in nature targeting the cognitive, emotional and behavioural drivers behind sexual offending.	Sexual Offending	75 – 350 hours (3-12 months)	Lotus Glen	Sufficient time to complete program with current sexual offence conviction

Program description	Target	Hours	Location	Quick Criteria
SEXUAL OFFENDING MAINTENANCE PROGRAM (SOMP)				
The Sexual Offending Maintenance Program is designed to build on and strengthen offenders cognitive, emotional and behavioural skills linked with living an offence free lifestyle.	Sexual Offending	16-24 hours (12 weeks)	Wolston Townsville Lotus Glen Brisbane Central Logan/Ipswich Townsville Cairns	Sufficient time to complete program with current sexual offence conviction Completed previous sexual offending intervention Can be referred to multiple SOMPs

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