Queensland Sentencing Advisory Council

Issues Paper

The '80 per cent rule':

The serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld)

November 2021

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

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- 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

Queensland Sentencing Advisory Council
GPO Box 2360, Brisbane Qld 4001
Tel: (07) 3738 9499
Email: info@sentencingcouncil.qld.gov.au

Queensland Sentencing Advisory Council

Chair	John Robertson
Deputy Chair	Professor Elena Marchetti
Council members	Jo Bryant Debbie Kilroy OAM Boneta-Marie Mabo* Philip McCarthy QC Katarina Prskalo Dan Rogers Cheryl Scanlon APM Warren Strange Helen Watkins
Director	Anne Edwards

* Chair, Aboriginal and Torres Strait Islander Advisory Panel

Contributors

Authors	Lauren Banning Eva Klambauer Victoria Moore Dimity Thoms
Data analysts	Laura Hidderley Samuel Jeffs
Project board	Dan Rogers (Project Sponsor) Anne Edwards (Senior Supplier) Philip McCarthy QC (Senior User) Warren Strange (Senior User) Helen Watkins (Senior User)

Abbreviations

A Crim R	Australian Criminal Reports
A-G	Attorney-General
AJ	Acting Justice
Council	Queensland Sentencing Advisory Council
CSA	*Corrective Services Act 2006* (Qld)
CJ	Chief Justice
CLR	Commonwealth Law Reports
DPP	Director of Public Prosecutions
DPSOA	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)
DMA	*Drugs Misuse Act 1986* (Qld)
DFV	domestic and family violence
DV	domestic violence
FACAA	Fighters Against Child Abuse Australia
GS:PP	Getting Started: Preparatory Program
HISOP	High Intensity Sexual Offending Program
HRA	*Human Rights Act 2019* (Qld)
IOMS	Integrated Offender Management System
JA	Justice of Appeal
J/JJ	Justice/Justices
LOS	level of service
MISOP	Medium Intensity Sexual Offending Program
MNPP	minimum non-parole period
MSO	most serious office
NPP	non-parole period
PSA	*Penalties and Sentences Act 1992* (Qld)
PSR	pre-sentence report
QCA	Queensland Court of Appeal
QCS	Queensland Corrective Services
QDC	District Court of Queensland
Qd R / QR	Queensland Reports
QGSO	Queensland Government Statistician's Office
QLS	Queensland Law Society
QPSR	Queensland Parole System Review
QSC	Supreme Court of Queensland
RNA	Risk Needs Assessment
RoR	Risk of Reoffending

RoR-PV	Risk of Reoffending – Prison Version
RoR-PPV	Risk of Reoffending – Probation and Parole Version
s/ss	section/sections
sch	schedule
SOMP	Sexual Offending Maintenance Program
SOPIM	Sexual Offending Program for Indigenous Males
SVO	serious violent offence under the SVO scheme
SVO scheme	serious violent offence scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld)

Call for submissions

Submissions are being called for as part of the Council's review of the operation and effectiveness of the serious violent offences scheme under the *Penalties and Sentences Act 1992* (Qld).

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

Submission deadline: Friday, 17 December 2021, 5.00pm

Preparing submissions

The issues and questions presented consider key areas for investigation 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.

Please 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 Issues 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 11 April 2022 and released publicly via the Council's website: www.sentencingcouncil.qld.gov.au.

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, such as private contact details (e.g. personal mobile numbers and email addresses) redacted to protect the privacy of those making the submission.

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Any personal information provided by individuals identified in this public consultation process will be collected only for the purpose of the review. Personal information of a private nature will not be used in 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 Act 2009* may apply to submissions provided as part of this consultation process. If subject to a Right to Information (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 the operation and efficacy of the serious violent offences scheme, 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 may not be uploaded to the Council's website, will not be referred to in the Final Report and may be excluded from the consultation process.

From 5 July 2021, information provided to the Council about suspected sexual offences committed against a child under 16 years, or a child under 18 years with an impairment of the mind, must be disclosed to police, unless there is a reasonable reason for the Council not to (for example, if the information has already been disclosed to police). For more information, see https://www.qld.gov.au/law/crime-and-police/types-of-crime/sexual-offences-against-children/failure-to-report.

Making a submission

Email

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

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

Post

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

Queensland Sentencing Advisory Council
GPO Box 2360
Brisbane Qld 4001

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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:

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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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Questions and options

5 Review principles

1. Do the principles adopted by the Council for the purposes of reviewing the operation and efficacy of the serious violent offences scheme ('SVO scheme') provide an appropriate framework for reform? 31

7 Issues identified

7.1 Objectives and nature of the SVO scheme

2. Are the purposes of the SVO scheme clear? Is any additional legislative guidance required? 40
3. Is the current scheme meeting its intended objectives? 40
4. Is the SVO scheme, as it is currently being applied, targeting the right types of offences and offenders? 40
5. How, if at all, should a person's criminal history and other personal circumstances factor into whether an SVO declaration is made? 40
6. How well are prison and post-prison rehabilitation or reintegration measures working for people who have been declared convicted of an SVO? How can they be improved? 40

7.3 Limited guidance in making discretionary SVO declarations

7. Is the current guidance and the information provided to courts on the making of a discretionary declaration sufficient? If not, what additional guidance or information is required? 43
8. Should there be a statutory requirement for a court to provide reasons for declining to make a declaration when asked by the prosecution to do so? 43

7.4 Impact on court sentencing practices

9. How is the SVO scheme affecting court sentencing practices? For example: 47

   (a) What is the impact of the SVO scheme on the length of head sentences?

   (b) Where the automatic application of the scheme is avoided due to the sentence falling below 10 years, how does this affect the setting of parole eligibility dates?
10. Does the current application of the scheme and anomalies in its structure and operation create inconsistencies or other problems? How might these be overcome? 50
11. Are there any other issues with the operation of the scheme as it impacts court sentencing practices not identified that should be considered as part of the review? 50

7.5 Automatic operation of the scheme and parole eligibility

12. Are mandatory sentencing schemes appropriate in certain cases – such as for serious violent offences? 52
13. Should the distinction under the SVO scheme between sentences at or above 10 years and below 10 years be retained? 52
14. If retained, should the discretion for the SVO scheme to be applied to a listed offence for sentences of imprisonment of 5 to 10 years be retained, or should this apply to a sentence of any length where a listed offence is dealt with on indictment? 52
15. Is the 80 per cent/20 per cent split between the minimum period in custody and maximum period on parole appropriate for offenders declared convicted of an SVO or should this be changed? If changed, what approach do you support: 52

    (a) A fixed standard percentage non-parole period scheme (e.g. parole eligibility at two-thirds, 70%, 75% or other defined percentage of the head sentence); or

    (b) A minimum standard percentage non-parole period scheme (e.g. a minimum of two-thirds, 70%, 75% or other defined percentage of the head sentence); or

    (c) A fixed set range (e.g. between 50–80% of the head sentence)?

16. If the SVO scheme is retained in some form, should a court have the ability to depart by setting either: 52

(a) a lower non-parole period; and/or

(b) a higher non-parole period?

17. If a court has the ability to depart from the scheme's mandatory application, is any legislative guidance required to a court in the setting of a: 52

(a) a lower non-parole period; and/or

(b) a higher non-parole period; and

what form should this take (e.g. where there are 'exceptional circumstances' or 'special circumstances' or where this is 'in the interests of justice')?

18. What factors should be considered in the setting of either a higher or a lower non-parole period, and should these be legislated? 52

7.6 Offences included in the scheme

19. If the SVO scheme is retained, should a schedule of offences to which the SVO scheme applies form the basis for its application? 57

20. If a separate schedule is retained, should the schedule be separate to that which applies for the purposes of section 156A(1)(a) of the *Penalties and Sentences Act 1992* (Qld) ('PSA')? 57

21. Is the current list of offences to which the scheme can, or must, be applied (depending on the sentence length) as listed in Schedule 1 of the PSA appropriate? 57

(a) Are there any offences not included in Schedule 1 that should be?

(b) Should any offences be removed?

22. Should the ability to make a declaration for an offence not listed in the schedule be retained and if so, are the criteria under s 161B(4) appropriate? 57

23. If retained, should the scheme be renamed to better reflect the types of offences captured by it? 57

7.7 Victim satisfaction with the scheme and sentencing

24. Does the SVO scheme impact on victims' satisfaction with the sentencing process and if so, in what ways? 58

25. How important is the parole eligibility date to victims' overall satisfaction with the sentencing process? 58

26. What considerations are important to victims in enhancing their satisfaction with the sentencing process for offences that could attract an SVO declaration? 58

7.8 Human rights issues

27. Is the current SVO scheme compatible with rights protected under the *Human Rights Act 2019* and other human rights instruments (e.g. UN *Convention on the Rights of Persons with Disabilities*)? If it is not compatible, are any existing limitations reasonable and demonstrably justifiable (*Human Rights Act 2019*, s 13)? 59

28. What reforms could be made to the scheme to improve its compatibility with and/or to meet the test of being 'reasonably and demonstrably justifiable'? 59

7.10 Any other issue not addressed

29. Is there any other issue in relation to the SVO scheme or sentencing responses for serious violent offences that have not been addressed in the questions, that you would like to raise with the Council? 60

8 Options – SVO scheme

8.2 Reform options

30. What would the benefits and risks be if the SVO scheme was: 61

(a) retained in its current form – with no changes to its operation or scope;

(b) automatically applied to sentences for listed offences of 5 years or more, but less than 10 years;

(c) presumptive (as to sentences of 10 years or more for listed offences) rather than mandatory;

(d) presumptive (as to sentences of 5 years or more, but less than 10 years) rather than discretionary;

(e) entirely discretionary (applying to listed offences dealt with on indictment, in a discretionary way, regardless of sentence length); or

(f) abolished completely, without replacing it?

31. Are there any specific benefits or risks of the above listed reform options that would apply to: 61

(a) Aboriginal and Torres Strait Islander peoples; and

(b) people who are vulnerable or marginalised?

32. If the SVO scheme is retained (in its current or modified form), which of the options do you prefer and why? 62

Note: Options are set out in Table 8.

9 Alternative approaches

33. If the SVO scheme was repealed or replaced, what approach would best ensure sentencing outcomes reflect the seriousness of offences to which the SVO scheme currently applies. For example: 66

(a) give courts full discretion to set a parole eligibility date applying current legal principles about the setting of a parole eligibility date;

(b) introduce a requirement that if a court sets a parole eligibility date for a listed offence, it must not be set below the statutory 50 per cent that applies where no parole eligibility date is set — or only be set below 50 per cent if the court considers it unjust not to do so or there are exceptional circumstances;

(c) introduce a requirement that parole eligibility for listed offences not be set below a standard percentage of the head sentence set above the current 50 per cent statutory level (for example, at least two-thirds or 70%) but with an ability for a court to depart if unjust to do so or there are exceptional circumstances;

(d) introduce a standard sentence model (similar to Victoria) (expressed as a number of years, rather than as a standard percentage) for specific offences as another guidepost as to the appropriate sentence, with presumptive minimum non-parole periods;

(e) other?

34. If standard parole provisions were to apply in place of the SVO scheme to all Schedule 1 offences, are any legislative changes required to help guide the court in setting an appropriate non-parole period for serious violent (non-sexual) offences, serious violent sexual offences and serious drug offences (beyond the guidance contained in s 9 of the PSA)? 66

1 Introduction

1.1 Background

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

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

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

In undertaking the review, the Council must also:

- examine the approach to similar sentencing provisions involving minimum non-parole periods for serious criminal offences in other Australian and international jurisdictions;
- have regard to any relevant research, reports or publications regarding the SVO scheme;
- consult with the community and other key (legal and non-legal) stakeholders, including but not limited to the judiciary, legal profession, victims of crime groups, child protection and domestic, family and sexual violence advocacy groups, or any relevant government department and agencies;
- if possible, broadly identify any potential financial and practical implications associated with any recommendations;
- advise whether the legislative provisions that the Council reviews, and any recommendations, are compatible with rights protected under the *Human Rights Act 2019*; and
- advise on the impact of any recommendation on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

The Council is required to report to the Attorney-General and Minster for Justice by 11 April 2022. The Terms of Reference are set out in full at Appendix 1.

This Issues Paper has been prepared to gather and present information about sentencing under the SVO scheme to assist stakeholders and community members in providing their views to the Council on the operation and efficacy of the scheme.

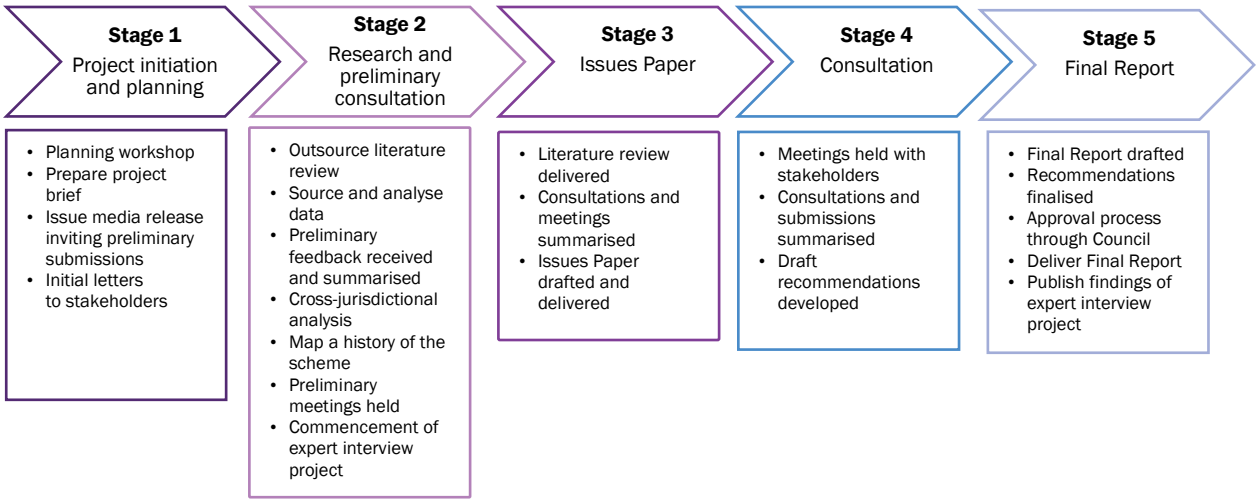
1.2 The Council's approach

As with all its Terms of Reference projects, the Council has adopted a staged approach to the review.

During the initial stages of the review, the Council released an information sheet on the SVO scheme published on its website, invited preliminary feedback on issues to be explored, met with key stakeholders and agencies, and established a research framework to guide the review. The Council commissioned the University of Melbourne to undertake a literature review, analysed relevant data provided by Court Services Queensland and Queensland Corrective Services ('QCS'), and undertook background research on the history of the scheme as well as similar schemes in other jurisdictions.

The outcomes of the initial research and analysis are reported in four background papers — which are available on the Council's website. Key findings from these papers are reported in this Issues Paper.

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



The Council also initiated a separate expert interview project during the initial stages of the review to better understand the operation of the SVO scheme and how it impacts on court sentencing practices, pre-sentence processes, including plea negotiations and the management of offenders convicted of an SVO. More information about this project is below. The findings of this research will be reported by the Council in its Final Report.

The publication of this Issues Paper – representing Stage 3 of the project – marks the mid-point of the reference, as shown in Figure 1 above. Following publication, a six-week period has been provided for stakeholders to respond to the information provided and the issues discussed in this document, with submissions due to the Council by 17 December 2021. All matters raised by stakeholders in submissions and meetings will be documented and summarised to assist the Council to reach a set of appropriate recommendations, which will be developed alongside the drafting of the Final Report in Stage 5.

1.3 Scope of the project

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

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

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

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

The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') is excluded from this review as it is a civil post-sentence scheme. Although some offences listed in Schedule 1 of the PSA may result in an order being made

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

under the DPSOA (meaning the person is subject to detention or supervision at the end of their sentence), the PSA expressly prohibits a court from having regard to the potential for an offender to become subject to an order as a result of a dangerous prisoner application when imposing a sentence.[6] Some analysis has been included in Background Paper 4 to examine the intersection between the SVO scheme and the DPSOA, but this analysis is limited. As the DPSOA scheme was raised during preliminary consultation, it is briefly discussed in section 7.9 of this paper.

The Terms of Reference ask the Council to examine whether the SVO scheme is impacting victims' satisfaction with the sentencing process and if so, in what way. It will not be possible for the Council to undertake empirical research to address this question due to limited time to complete the reference and associated ethical considerations. The Council instead will be addressing this aspect of the Terms of Reference through its consideration of submissions from victims and survivors of crime and their supporters and will also be consulting with victims and survivors and support services. This will enable the Council to better understand their perspectives as those most impacted by these types of crimes and their views on how to best respond to serious violent and sexual offending.

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

1.4 Data sources and methodology

The Council conducted analysis of administrative data collected by Court Services Queensland and QCS on the mandatory and discretionary application of the scheme, characteristics of offenders, and sentencing and parole application outcomes for SVO offenders. Information recorded in the Courts Database about whether a person was sentenced for a declared SVO improved considerably from July 2011 onwards. Consequently, the majority of data reported in this paper covers the period from 2011–12 to 2019–20.

The courts data is presented in relation to the most serious offence (MSO) for which a defendant was sentenced on a particular day. The determination of which sentence is the 'most serious' was ascertained using predetermined data flags developed by the Queensland Government Statistician's Office ('QGSO'). Cases in which the sentence imposed for an MSO was a life sentence were excluded from this analysis – as discussed above, life sentences are covered by separate statutory provisions which operate independently of the SVO scheme. Unless stated otherwise, all data in this paper is referring to the MSO. For information on the limitations and exclusions relating to the data analysed, see Background Paper 4.[7]

As noted in section 1.2, the Council initiated a qualitative interview project with subject-matter experts to gather information on the application of the scheme, its impact on sentencing practices and victim satisfaction, and potential reform suggestions. Between July and October 2021, 72 interviews were held with members of the judiciary, legal representatives (private and Legal Aid), public prosecutors, members of the Parole Board Queensland, victim and survivor support and advocacy organisations and other experts. Some of the issues identified through interviews are referred to in this Issues Paper; however, a full analysis of expert views on the scheme will be provided in the Final Report.

1.5 Terminology in this paper

The Council acknowledges that the language used to describe offences under Schedule 1 is important. For data analysis purposes and to simplify the presentation of the data, the different types of offences listed in Schedule 1, were grouped into the four categories - non-sexual violence offences, sexual violence offences, drug offences and other offences.[8]

The Council acknowledges that not all offences in Schedule 1 can be assigned to a single offence category. The Council refers to interpersonal offences as sexual violence and non-sexual violence to distinguish between these types of offences for data purposes only. The Council regards sexual offences as inherently violent and is aware of a broader and systemic problem regarding the classification of these offences.[9]

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6 PSA (n 2) s 9(9)(b).

7 Queensland Sentencing Advisory Council, *Analysis of Sentencing and Parole Outcomes: The Who, What and How Long of Serious Violent Offences* (Background Paper 4, October 2021).

8 Ibid. See Appendix 1 for a full list of sch 1 offences and the Council's categorisation for analysis.

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

The '80 per cent rule': The serious violent offences scheme

The Council acknowledges that many individuals who have experienced a crime, including specific crime types such as family violence and sexual assault, prefer the term 'victim survivor' or 'survivor' rather than the term 'victim' while some people do not identify with any of these terms. 'Victim' also has a defined legal meaning.[10] For this reason, the Council has used 'victims and survivors of crime' to recognise individual preferences as to the way they should be referred to. This term is used to refer generally to people who have suffered harm because a crime has been committed against them or because they are a family member or dependant of a person who has died or suffered harm because a crime is committed against that person.

10 For example, see *Victims of Crime Assistance Act 2009* (Qld) s 5.

2 Background Papers

This Issues Paper seeks responses to the questions relating to the serious violent offences ('SVO') scheme and sentencing. This is the primary document for which the Council seeks stakeholder input.

The Council has also developed four background papers to provide more information about the SVO scheme. The background papers aim to provide interested stakeholders with additional information on specific aspects of the SVO scheme. These papers, which are available on the Council's website, provide context for the questions posed in this Issues Paper.

Background Paper 1 - History of the serious violent offences scheme

This paper looks at the introduction of the SVO scheme in 1997, and how the scheme has changed over time. This paper sets out the reasons for introducing the scheme, the parliamentary debates at the time and the relationship between the scheme and the *Penalties and Sentences Act 1992* (Qld) ('PSA'). It also examines any changes to the scheme since 1997 and the findings of recent reviews and inquiries related to the scheme.

Background Paper 2 - Minimum non-parole period schemes for serious violence offences in Australia and select international jurisdictions

This paper considers parole arrangements in other Australian states and territories, as well as those that apply to Commonwealth offences, with a specific focus on mandatory and presumptive minimum non-parole period schemes. It also reviews legislative models in three other common law jurisdictions: Canada, England and Wales, and New Zealand.

Background Paper 3 - Analysis of key Queensland Court of Appeal decisions and select sentencing remarks

This paper explores key Court of Appeal decisions regarding the SVO scheme under Part 9A of the PSA. It also reports on the Council's preliminary findings about how the scheme is understood and applied by the Supreme and District Courts of Queensland based on an analysis of sentencing remarks over a two-year period (1 January 2019 to 28 February 2021).

Background Paper 4 - Analysis of sentencing and parole outcomes: The who, what and how long of serious violent offences

This paper provides an overview of the Council's data analysis of the application of the SVO scheme, characteristics of offenders, and sentencing and parole outcomes. It also reports on the types of offences that commonly attract an SVO declaration, mandatory and discretionary declarations made under the scheme, and parole eligibility for Schedule 1 offences in circumstances in which an SVO declaration has not been made.

3 The SVO scheme and parole

3.1 About the serious violent offences scheme

The serious violent offences ('SVO') scheme requires a person declared convicted of certain listed offences (or of counselling, procuring, attempting or conspiring to commit such an offence) to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible to apply for parole.[1] The SVO scheme, as it applies to sentences of 10 years or more, is a form of mandatory sentencing, but the making of a declaration is not mandatory if the sentence is less than 10 years.

This is different to the ordinary rules applying to the setting of a parole release or parole eligibility date that give courts discretion to decide the date an offender must be released on parole (if the person is eligible for court ordered parole) or is able to apply for release on parole (see below in section 3.2).

For offenders with a parole eligibility date, release on parole is not automatic. The decision whether to release the offender from custody to parole is made by the independent Parole Board Queensland ('Parole Board') – see section 3.3.3.

3.1.1 Why the SVO scheme was introduced

The SVO scheme is part of the *Penalties and Sentences Act 1992* (Qld) ('PSA'). The scheme came into operation on 1 July 1997, through two additions to the PSA: Part 9A (the scheme itself) and Schedule 1 (the list of offences it can apply to). When the scheme was introduced, the then Attorney-General explained that the approach was based on:

> a reasonable community expectation that the sentence imposed will reflect the true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it.[2]

Once an offender is declared convicted of an SVO, the 80 per cent rule engages – whether the offender has pleaded guilty or not, and regardless of any mitigating features of the case. For more information about the history of the scheme, please refer to Background Paper 1.

3.1.2 When the SVO scheme applies

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

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

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

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

1 *Corrective Services Act 2006* (Qld) s 182 ('CSA').
2 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice).

Complications with the application of the scheme are explored in section 7 of this paper and include how the SVO scheme is impacting on sentencing practices and may create unnecessary complexity and cause inconsistent sentencing decisions.

3.1.3 How courts make discretionary SVO declarations

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

- must be convicted on indictment for:
  - an offence or offences in Schedule 1; and/or
  - of counselling or procuring the commission of, or attempting or conspiring to commit, an offence or offences against a provision in Schedule 1; and
- must be sentenced to 5 years or more, but less than 10 years.[3]

The exception to this is in the case of an offence involving the use or attempted use of violence against a child under 12 (or that caused the death of a child under 12). Section 161B(5) provides the sentencing court *must* treat the age of the child as an aggravating factor. The limited statutory guidance is further discussed in section 7.3 of this paper.

In the 2000 decision of *R v Collins*[4] the Court of Appeal affirmed that:

> The clear intention of the legislature in enacting the 1997 Act was that judges should exercise the s. 161B(3) discretion in appropriate circumstances. Section 3 demonstrates that protection of the community was an important consideration for the legislature, as was punishment and rehabilitation. Sections 9(3), 9(4)(a) and 9(4)(b) reinforce the view that the legislature was primarily concerned to protect the community from offenders who pose an ongoing risk to the community. The Attorney-General's second reading speech of the 1997 Act is also consistent with this approach.[5]

In relation to making discretionary SVO declarations the Court of Appeal has determined:

- there is no need for special factors to justify the exercise of the discretion to make an SVO declaration – provided that the making of the declaration is warranted by the circumstances of the case and supported by proper reasons;[6]
- the making of a discretionary SVO declaration is to be undertaken as part of the 'integrated process of arriving at a just sentence', in which consideration is required of all available sentencing options and all the circumstances;[7]
- in fashioning a sentence that is just in all the circumstances where an SVO declaration is made, the offender should be sentenced towards the lower end of the applicable range and/or the head sentence that would otherwise have been appropriate should be reduced;[8]
- the consequences of making a declaration must be taken into account by the court when assessing whether the overall outcome is a just sentence;[9] and
- judges must consider factors relevant to community protection and adequate punishment when deciding whether to make a declaration, and therefore requiring an offender to serve a longer period in actual custody before parole eligibility.[10]

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

This analysis found some of the reasons judicial officers made or declined to make a discretionary declaration are those contained in Table 1 below (this is a non-exhaustive list and in no particular order).

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3 *Penalties and Sentences Act 1992* (Qld) s 161B(3) ('PSA').
4 [2000] 1 Qd R 45.
5 *R v Collins* [2000] 1 Qd R 45, 51 [29] (McMurdo P).
6 *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219.
7 *R v Free; Ex parte Attorney-General* (Qld) (2020) 4 QR 80; [2020] QCA 58, 93-94 [36] ('*Free*').
8 *R v Bojovic* [2000] 2 Qd R 183; (1999) 113 A Crim R 1; [1999] QCA 206; *R v Ali* [2018] QCA 212.
9 *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219.
10 *Free* (n 7) 98 [49].

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

Reasons for making a discretionary SVO declaration	Reasons for not making a discretionary SVO declaration
Protracted, violent attack	One-off, limited nature of violence used
Vulnerable victim	Not 'outside the norm'[11]
Use of a weapon	Offender's youth
Attack was premeditated and/or planned	Attack was opportunistic and unplanned
Nature and extent of the injuries inflicted	Would be disproportionate to offender's overall offending/to avoid a 'crushing' sentence
Serious and relevant criminal history	Limited or no criminal history
Absence of genuine evidence of rehabilitation prospects	Mental health issues
Offending occurred while on parole and/or a suspended sentence.	Admissions and cooperation with the investigation
Protection of the public and/or adequate punishment	Need for supervision and to promote rehabilitation in the interests of community safety

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

3.2 How courts set a parole eligibility date

The Terms of Reference require the Council to consider the 'purpose of parole in allowing an offender to serve an appropriate portion of their period of imprisonment in the community in order to successfully and safely reintegrate a prisoner into the community and minimise the likelihood of an offender reoffending'.

Queensland has a 'mixed system where orders for release on parole are either made by the court at the time of sentence or by the Parole Board sometime during the sentence period'.[12] This means that when a court decides to sentence an offender to imprisonment with parole, one of two methods will be used.[13]

1. **Court ordered parole** – where a court sentences an offender to a term of imprisonment of 3 years or less (excluding sexual offences and declared SVOs) the court must set a parole release date at sentencing.[14] The offender must be released on that date. The court may fix any day of the offender's sentence as their parole release date, including the day of sentence or the last day of the sentence.[15] A person cannot be sentenced to court ordered parole and declared convicted of an SVO.
2. **Board ordered parole** - where a court chooses to set the date the person becomes eligible to apply for parole. The Parole Board decides whether the person should be released when that person makes an application. The actual date of their release is at the discretion of the Parole Board and can vary greatly depending on the circumstances of the case and of the offender. In some cases, offenders serve their full head sentence.

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

11 See *R v DeSalvo* [2002] QCA 63 4 [15] (Williams JA); and *R v McDougall and Collas* [2007] 2 Qd R 87 where until recently the Court of Appeal had stated that courts should identify offending 'beyond the norm' to make a discretionary declaration. Cf *Free* (n 7) where the Court of Appeal has more recently clarified it was erroneous to focus 'on a perceived need to find factors which take the case outside the norm for the type of offence; rather than considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required': at 98 [49].

12 Queensland Corrective Services, *Queensland Parole System Review: Final Report* (Report, 2016) 71 [315] ('*Queensland Parole System Review: Final Report*').

13 The relevant provisions regarding parole are in the PSA Part 9, Division 3.

14 PSA (n 3) s 160B.

15 Ibid s 160G.

3.2.1 About parole

Parole is 'a form of conditional release of offenders sentenced to a term of imprisonment which allows an offender to serve the whole or part of their sentence in the community, subject to conditions'.[16] Parole aims to improve public safety by reintegrating the person into the community and minimising the likelihood of reoffending.

The sole purpose of parole is:

> to reintegrate a prisoner into the community before the end of a prison sentence to *decrease the chance that the prisoner will ever reoffend*. Its only rationale is to keep the community safe from crime. If it were safer, in terms of likely reoffending, for prisoners to serve the whole sentence in prison, then there would be no parole.[17]

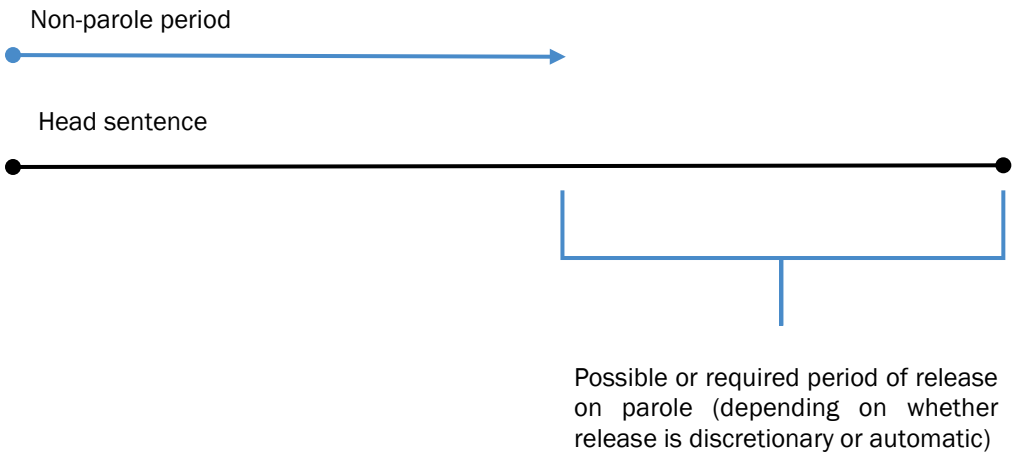
Prisoners who are not granted parole and are released from prison at the end of their sentence will not be subject to supervision,[18] nor the support the parole system can provide.[19]

A person on parole must comply with conditions and can be returned to prison at any time during the remainder of their sentence, in accordance with the Parole Board's statutory powers (which have a primary focus on community safety). If a person fails to comply with the conditions of their parole order, the Parole Board may amend, suspend or cancel parole (see section 3.3.3).[20]

3.2.2 What is the non-parole period?

The non-parole period is the period during which an offender sentenced to imprisonment must remain in custody before being eligible for release or released into the community on parole.[21] The maximum term of imprisonment to be served is called the 'head sentence' (comprising the non-parole period and parole period). The relationship between the head sentence and the non-parole period is illustrated in Figure 2. In Queensland, the non-parole period is the period before a prisoner reaches their parole eligibility or fixed parole release date.

Figure 2: Head sentence and the non-parole period in sentencing



Generally in Queensland, there is no set statutory ratio between the minimum time to be served before an offender is eligible to be released on parole and the head sentence – that is, a minimum parole period is not set in legislation. However, there are some exceptions, such as the SVO scheme (see below).

16 Arie Freiberg et al, 'Parole, Politics and Penal Policy' (2018) 18(1) *QUT Law Review* 191, 191.
17 *Queensland Parole System Review: Final Report* (n 12) 1 [3] (emphasis in original).
18 An exception to this is the *Dangerous Prisoners (Sexual Offending) Act 2003* (Qld) ('DPSOA') which provides a system for preventative detention and supervision of a certain class of offender beyond the expiry of their full time sentences. The 'particular class of prisoner' are those detained in custody serving a period of imprisonment for a 'serious sexual offence': DPSOA s 5. The court will determine whether the prisoner should be ordered to remain in custody (continuing detention order) or be released into the community under extended supervision (supervision order): DPSOA s 13(5).
19 Parole Board Queensland, *Parole Manual* (2019) 11.
20 CSA (n 1) s 205.
21 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No. 103, 2006) 281 [9.2].

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

> Because of the many different kinds of offences, the infinite kinds of circumstances surrounding the commission of offences and the limitless kinds of offenders, both the discretion as to length of imprisonment and as to the fixing of a parole date cannot possibly be circumscribed by judge-made rules so as to preclude consideration of whatever relevant factors might arise in a particular case. It may be common to impose a head sentence by having regard mostly to the circumstances surrounding the commission of the offence and to fix the actual period of custody by reference to an offender's personal circumstances. But there is no rule of law that requires that to be done in every case. In the absence of a statute that prescribes the way in which an offender should be punished, sentencing judges have always regarded all of the elements of a sentence to be flexible. They will continue to do so in order to arrive at a just sentence in all the circumstances.[22]

The 'usual' non-parole period in Queensland

There is no legislated 'usual' non-parole period in Queensland. That is, there is no statutory ratio of minimum time to be served before being eligible for parole. Sections 160C(5) and 160D(3) of the PSA give courts the discretion to set a parole eligibility date for sentences of imprisonment that are longer than 3 years, or of any length if the person is being sentenced for a sexual offence.[23] Where a judge declines to set a parole eligibility date, section 184(2) of the *Corrective Services Act 2006* (Qld) ('CSA') provides that the person will become eligible for parole after serving 50 per cent of their sentence – although there are some legislated exceptions to this. This is commonly applied to offenders who have been convicted after a trial.

In Queensland, it is regarded as a 'rule of thumb'[24] that where an offender pleads guilty and there are other mitigating features, such as a lack of prior criminal history or a commitment by the offender to their rehabilitation, the court will set a parole eligibility date at the one-third mark of the head sentence.[25] The Court of Appeal has found the discretion to set an appropriate parole eligibility date is 'relatively unfettered'[26] and that 'there can be no mathematical approach to setting such a date'.[27] However, the Court has also said that postponing an offender's parole eligibility date beyond the statutory 50 per cent mark must be supported by a 'good reason'.[28]

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22 *R v Randall* [2019] QCA 25, [38]. See also *R v Fischer* [2020] QCA 66, 4–5 (Sofronoff P, Boddice and Williams JJA agreeing).

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

24 Ibid [43] (Sofronoff P, Morrison JA and Burns J agreeing).

25 *R v Crouch & Carlisle* [2016] QCA 81, [29] (McMurdo P, Gotterson JA and Burns J agreeing). The President also said that judges should continue to 'exercise the sentencing discretion judicially' and that 'whether a sentence warrants mitigation reflected in a parole eligibility, a parole release date or a suspension set after one third of the sentence, or at some other time, will always turn on the particular circumstances of the individual case': at [29]. See also *R v Tran; Ex Parte Attorney-General (Qld)* [2018] QCA 22, where it was stated that 'usually, pleas of guilty generally only attract parole eligibility dates at around the one-third mark of a head sentence in circumstances where the plea of guilty is early and accompanied by genuine remorse. There are also often other factors relevant to the exercise of such discretion, including the youth of the offender and successful steps towards rehabilitation': at [42]. Absent a mandatory sentence, it is common for an offender who enters an early guilty plea, accompanied by genuine remorse, to have a parole eligibility date or release date, or suspension of their sentence, set after serving one-third of the head sentence in custody: See *R v Crouch* [2016] QCA 81, [29] (McMurdo P, Gotterson JA and Burns J agreeing); *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22, [42]–[44] (Boddice J, Philippides and McMurdo JA agreeing); *R v Rooney* [2016] QCA 48, [16]–[17] (Fraser JA, Gotterson JA and McMeekin J agreeing) and *R v McDougall and Collas* [2007] 2 Qd R 87, [20]. More recent judgments stress that 'as a matter of principle, the just and appropriate sentence including the proportion which the period to be served in prison bears to the whole term, is to be fixed with reference to all of the circumstances of the particular case, rather than by the application of some rule of thumb in a way that would unduly confine a sentencing judge's discretion': *R v Dinh* [2019] QCA 231, 5 (Fraser JA, McMurdo JA and Henry J agreeing). Further, 'the discretion to fix a parole eligibility date is unfettered and the significance of a guilty plea for the exercise of that discretion will vary from case to case. Consequently, there can be no mathematical approach to fixing such a date': *R v Randall* [2019] QCA 25, [43].

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

27 *R v Hitchcock* [2019] QCA 60, [18] (Sofronoff P, Fraser and Philippides JJA agreeing) referring with approval to comments made by Fraser JA in *Amato* (n 26) at [20] citing *R v Ruha* (2010) 198 A Crim R 430 at [47] as authority.

28 *R v Randall* [2019] QCA 25 at [37].

What difference does the SVO scheme make to parole?

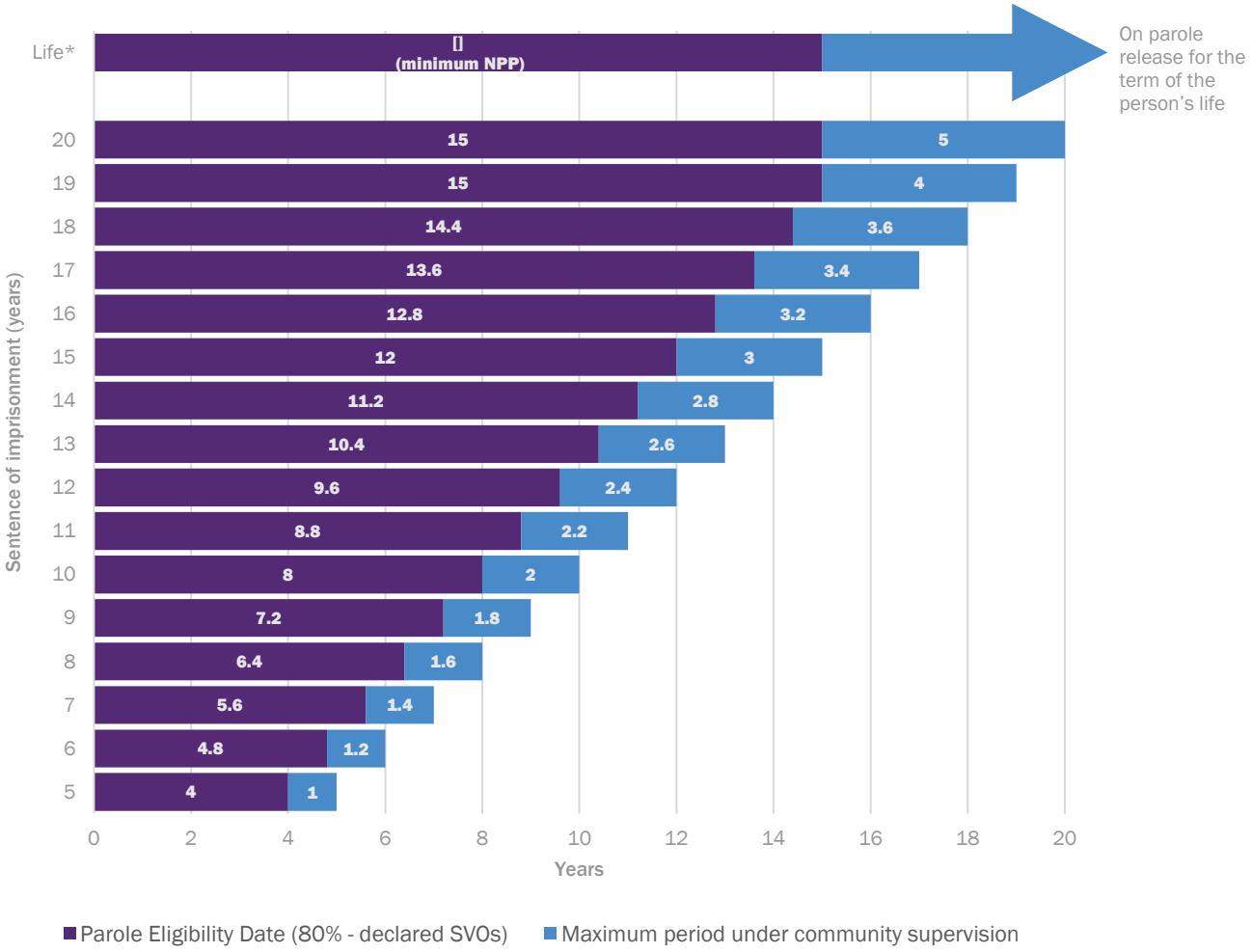
The '80 per cent rule' in the SVO scheme is a marked departure from standard parole laws. The SVO scheme requires an offender to serve 80 per cent of their term of imprisonment in custody or 15 years in prison (whichever is less) before being eligible for parole. This applies regardless of whether the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

Figure 3: A 9-year head sentence of imprisonment with different ratios of non-parole periods

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

The ratio between the head sentence and non-parole period for sentences subject to the SVO scheme is shown in Figure 4. Ranging from 5 to 20 years, the purple bar is the mandatory component to be served in custody and the blue is the maximum period the prisoner may be on parole. Depending on at what point the person applies for parole and the decision of the Parole Board, a person may serve more than 80 per cent of their sentence before being released on parole — and in some cases, may serve their full sentence in custody.

Figure 4: Ratio between head sentence and non-parole period for sentences subject to SVO scheme



* Excludes murder and repeat serious sex offences

3.2.3 Do other Australian jurisdictions have 'usual' non-parole periods?

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

As is the case in Queensland, for Commonwealth offences, and in the ACT and Victoria, in general there is no set statutory ratio between the non-parole period and the head sentence. However, under Victorian[29] and ACT[30] common law, the ratio is commonly between 50 and 75 per cent of the head sentence, and in the case of Victoria, there are several legislated exceptions which set a minimum non-parole period.[31] Commonwealth offences which fall within the category of being a terrorism or espionage offence are subject to a 'three-quarter rule' where the non-parole period must be set that is at least three quarters of the head sentence.[32]

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

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

31 These are the standard sentences scheme which includes mandatory non-parole periods and the statutory minimum sentences scheme which applies a statutory defined term minimum non-parole period to certain offences. See Queensland Sentencing Advisory Council, *Minimum Non-parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions* (Background Paper 2, 2021) section 2.9 for more details.

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

In other states and territories, sentencing and parole legislation provides guidance about the required minimum, or recommended proportion between the non-parole period and the head sentence. This ranges from 50 per cent in the Northern Territory,[33] Tasmania[34] and Western Australia,[35] to 75 per cent in New South Wales.[36] In Western Australia, for sentences of more than 4 years, a person is eligible for parole after serving all but two years of the term of imprisonment imposed in custody.[37]

3.3 Assessment and management of offenders in custody and on parole

3.3.1 Post sentence release has changed significantly since the scheme was introduced

The CSA introduced the parole scheme (largely) as it currently exists in Queensland.

In 1997 when the SVO scheme was introduced, the parole system was very different. Most notably, Queensland also had the remission system and allowed home detention. Remissions were an administrative arrangement whereby prisoners could be released early for good behaviour. Introduced in 1986, Queensland had a 'standard rate of one-third remission for all prisoners serving sentences of imprisonment of more than two months'.[38] This meant there were 'two streams of release from custody, via parole at one half[39] or remission at two-thirds'.[40]

In practice, the remission scheme resulted in many offenders not applying for parole.[41] Rather than be released conditionally with consequences for breaching, offenders chose to remain in custody longer so they could be released unconditionally on remission. Prisoners were not required to complete programs or interventions in custody to gain remission. The Queensland Court of Appeal found in 1992 that the 'structure and language of [the Corrective Services] Regulation (since repealed) suggested the granting of one-third remission was standard practice for a well-behaved prisoner'.[42] The Court held that on the basis of procedural fairness under the Regulation, if an offender was of 'good conduct and industry' while incarcerated, then they must be granted remission, and concerns 'in respect of…possible future conduct…was inappropriate'.[43]

When the SVO scheme was introduced, the then Attorney-General explained that 'there will be no remissions for serious violent offenders'.[44] The original s 161D of the PSA stated: 'the sentence of an offender convicted of a serious violent offence cannot be remitted under the *Corrective Services Act 1988*'.

The relevance of remission is that (a) it existed at the time the SVO scheme was introduced and was exercised separately from the prior exercise of judicial power and (b) it shortened a head sentence and involved no supervision whatsoever. For a brief overview of the parole system since its introduction in 1937 to the current day, please refer to Background Paper 1.

The Kennedy review (1988) recommended that the Queensland parole system be overhauled. The review concluded that 'remission was a flawed concept and that justice would be better served by its abolition'.[45] Despite this recommendation, remission continued alongside the new legislative framework for parole.[46] In relation to parole, Kennedy argued for 'parole eligibility at one third and automatic community supervision at two-thirds of a sentence'.[47] Despite the recommendations of the Kennedy review, remission continued until 2000 when it was abolished by the *Corrective Services Act 2000* (Qld).

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33 Applies to sentences of 12 months or longer: *Sentencing Act 1995* (NT) ss 53 and 54. The non-parole period increases to 70 per cent for certain sexual and violent offences: *Sentencing Act 1995* (NT) ss 55 and 55A.
34 *Sentencing Act 1997* (Tas) s 17(3).
35 In this case limited to sentences of 4 years or less: *Sentencing Act 1995* (WA) s 93.
36 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, unless there are special circumstances for the balance of the sentence to be more. A court can also decline to set a non-parole period: s 45.
37 *Sentencing Act 1995* (WA) s 93.
38 *Queensland Parole System Review: Final Report* (n 12) 43 [169].
39 Under s 53(2)(a) of the *Offenders Probation and Parole Act 1980* (Qld) offenders serving imprisonment of more than six months, except those serving life sentences or indeterminate sentences, were eligible to apply to the Parole Board for release on parole on completing half of their sentence.
40 *Queensland Parole System Review: Final Report* (n 12) 43 [169].
41 Ibid [173]: The Kennedy review 'found the system of remission provided little incentive for good behaviour and a positive incentive to avoid parole' at 47-8 [196].
42 Laurie Cullinan, 'A Right to Remissions' (1994) 19(2) *Alternative Law Journal* 61, 62.
43 Ibid. See also *The Queen v The Queensland Corrective Services Commission; Ex Parte Fritz* (1992) 59 A Crim R 132 (Fitzgerald P, Davies and Byrne JJ agreeing).
44 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 598 (Denver Beanland, Attorney-General and Minister for Justice).
45 *Queensland Parole System Review: Final Report* (n 12) 48 [198].
46 CSA (n 1) and the *Corrective Services (Administration) Act 1988* (Qld).
47 *Queensland Parole System Review: Final Report* (n 12) 48 [199].

3.3.2 How prisoners are managed in custody

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

To understand how sentencing orders are administered post-sentence, the Council has reviewed publicly available Queensland Corrective Services ('QCS') publications that describe what happens when a prisoner is sentenced to a term of imprisonment in a Queensland correctional facility. The Council was interested to understand custodial classification, risk and needs assessments, and programs and interventions available to prisoners who have been declared convicted of an SVO. The Council notes that in 2016, Mr Walter Sofronoff QC undertook the Queensland Parole System Review ('QPSR') which involved an extensive review of the parole and broader correctional system. The QPSR made 91 recommendations for reform, with 89 recommendations supported or supported in principle.[48] The implementation of those recommendations is ongoing.

Custodial classification

The CSA prescribes security classifications for all prisoners – maximum, high and low. See Appendix 2 for a list of all high and low security prisons in Queensland.

Table 2: Queensland Corrective Services security classifications

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

Source: Queensland Corrective Service, Sentencing Management: Assessment and Planning, *Custodial Operations Practice Directive*, (03/06/2021: Public version) 5.

All prisoners admitted to a corrective services facility for detention must be classified into one of these three categories.[49] The classification level informs a prisoner's level of supervision, placement and management requirements. A prisoner's personal circumstances along with statutory criteria in section 12(2) of the CSA must be taken into account when determining a prisoner's security classification. This includes:

a) The nature of the offence for which the prisoner has been charged or convicted;
b) The risk of the prisoner escaping, or attempting to escape, from custody;
c) The risk of the prisoner committing a further offence and the impact the commission of the further offence is likely to have on the community; and
d) The risk the prisoner poses to himself or herself, or other prisoners, staff members and the security of the correctional services facility.

In addition to the statutory requirements, QCS is also required to consider a range of other factors.[50] Of those, several are particularly relevant to prisoners with an SVO declaration: [51]

- the length of sentence the prisoner has served to date and the proximity to their release dates (i.e. parole and full time discharge);
- any violence perpetrated by a prisoner in custody or in the community, with consideration of the nature of the violence, such as the relationship to the victim (i.e. domestic and family violence or stranger violence), any patterns of violent offending and/or the severity of the violent behaviour;
- access to activities and interventions to achieve planned goals and activities;
- any medical conditions including mental health issues and external medical requirements;

48 See Queensland Government, *Response to Queensland Parole System Review Recommendations* (2017).
49 CSA (n 1) s 12. Offenders on remand and not serving a term of imprisonment for another offence, may only be classified to high or maximum: s 12(1A).
50 See 'Placement Considerations' in Queensland Corrective Service, Sentencing Management: Classification and Placement, *Custodial Operations Practice Directive* (14/06/2021: Public version) 8.
51 Queensland Corrective Service, Sentencing Management: Assessment and Planning, *Custodial Operations Practice Directive* (03/06/2021: Public version) 8.

- the prisoner's safety including compatibility issues, associates, protection status and history of sexual assault in a correctional environment;
- the prisoner's association with Groups of Interest[52] including any active or recent intelligence information.

As a first option and where possible, female prisoners are considered for low security classification and placement. Additional considerations apply for Aboriginal and Torres Strait Islander prisoners, including proximity to family (unless it poses an unacceptable safety risk). Prisoners convicted of a sexual offence in Schedule 1 of the CSA,[53] murder, or sentenced to life imprisonment, are not eligible to be accommodated in a low security facility.[54] A prisoner's progress and classification level is reviewed at regular statutory intervals (see section 13, CSA).

Risk and needs assessments

QCS screens every sentenced prisoner and offender to determine the level of risk and consequently the level of service that will be provided. The outcome of this screening is determined by two Risk of Reoffending (RoR) tools – the Risk of Reoffending – Prison Version (RoR-PV) and Risk of Reoffending – Probation and Parole Version (RoR-PPV).[55] The RoR-PV is a validated tool for use with prisoners to assess the risk of general reoffending post release from prison, while the ROR-PPV is a validated tool that calculates the likely risk of general reoffending for those commencing community-based supervision.[56] Further tailored assessment tools are used post this initial screening tool for particular cohorts to inform the level of offence specific risk and need and the level of service that will be provided.

The RoR tool allocates a score to a person, derived from an actuarial assessment of a few, mostly unchangeable, factors (such as age and criminal history).[57] The score provides an indication of the likelihood of a person to commit another offence as a proportion of a cohort of offenders with similar characteristics. The score, alongside other variables such as an offender's time in custody or under a community-based order, or willingness, ability, or availability of suitable interventions, is an important factor in determining a person's eligibility for rehabilitation programs. The RoR-PPV score ranges from one to 20, and the RoR-PV score ranges from one to 22. The higher the score a person receives, the higher the predicted risk of reoffending, and the higher the service required by QCS. How the RoR score relates to QCS service on parole is discussed at section 3.3.4.

The RoR tool is administered only once at the start of each new episode in the correctional system 'to determine a prisoner's general risk of reoffending and to inform eligibility for QCS intervention programs'.[58] Neither tool is specifically designed to 'assist with making assessments of parole eligibility, pre-sentencing decisions, or to provide assessments of dangerousness'.[59] The QPSR observed tools such as the RoR tool are valuable only for identifying high risk offenders. These tools do not provide guidance on which criminogenic risk factors require addressing at the individual level.[60]

The QPSR recommended risk and needs assessments be replaced with validated assessment.[61] QCS is currently implementing the recommendations supported by Government from that review,[62] and the Council understands it is also currently reviewing the RoR tools as part of that work.

After a RoR-PV is completed, prisoners serving terms of imprisonment of more than 12 months undergo a series of internal processes and assessments[63] to ensure the prisoner's needs and risks are progressed and supported where possible. This can include programs, educational needs in the areas of literacy/numeracy, secondary, tertiary and vocational education and training, and 'the needs of specific prisoner groups, including a prisoner's learning

52 Such as prison gangs and outlaw motorcycle gangs.
53 All of the sexual offences listed in sch 1 of the *Penalties and Sentences Act 1992* (Qld) are included.
54 Queensland Corrective Service, Sentencing Management: Classification and Placement, *Custodial Operations Practice Directive* (03/06/2021: Public version) 10. Until recently, prisoners with an SVO declaration would also have been excluded from low security classification - see Queensland Sentencing Advisory Council, *History of the Serious Violent Offences Scheme* (Background Paper 1, 2021) for more details.
55 Both tools were developed by Griffith University and validated on a sample of prisoners and offenders in Queensland.
56 Queensland Corrective Services, *Queensland Parole System Review: Issues Paper* (2016) 17 ('*Queensland Parole System Review: Issues Paper*').
57 *Queensland Parole System Review: Final Report* (n 12) 107 [529].
58 Queensland Corrective Services, Sentencing Management: Assessment and Planning, *Custodial Operations Practice Directive*, (03/06/2021: Public version) 4. This means a new RoR assessment will only be completed if an offender fully disengages from QCS supervision. Should an offender commit new offences while under supervision, a new RoR assessment will not be undertaken.
59 *Queensland Parole System Review: Issues Paper* (n 56) 17.
60 Ibid 109 [555].
61 Recommendations 8, 9 and 10. All were supported by the Queensland Government, *Response to Queensland Parole System Review Recommendations* (2017) 4.
62 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2021) 31.
63 For example, activating warning flags of any current and/or historical factors on the QCS database IOMS, Literacy and Numeracy assessments, Rehabilitation Needs Assessment (RNA) and in the case of sexual offenders sentenced to an offence listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) a Specialised Assessment with STATIC 99-R.

style and ability, cognitive impairments, gender, physical disability and cultural diversity'.[64] Professional support will be engaged for prisoners with complex needs.

Specialised risk assessment

QCS also uses specialised risk assessment tools for sexual offenders. Sexual offenders sentenced for an offence listed in Schedule 1 of the CSA must undergo a Specialised Assessment with the STATIC 99-R.[65] This is an actuarial assessment tool to predict sexual offending recidivism. In addition to the STATIC 99-R, QCS also uses STABLE-2007 and ACUTE-2007. STABLE-2007 is used to identify treatment needs and ACUTE-2007 identifies acute factors indicative of a heightened risk of sexual offending.[66] 'The STATIC 99-R and STABLE-2007 provide QCS with the risk assessment information needed to allocate prisoners to either high or moderate intensity sexual offending programs'.[67]

In terms of specialised risk assessment for violence offenders, according to the QPSR, QCS primarily uses the RoR score, the number of violent offences and the available time in custody to determine whether a prisoner should be referred to an intensive violence program.[68] A Violence Risk Scale[69] is used as a pre-program assessment to determine treatment needs.

Programs and interventions

According to the 2020-21 Annual Report, QCS delivers a range of programs and services that:

> target employability, education, family and parenting, violence and domestic violence, substance misuse, psychological wellbeing and sexual offending, with the goal of giving prisoners the best possible chance to stop offending.[70]

Within that suite of programs and interventions, there are several which may be relevant to a prisoner with an SVO declaration, although none are targeted or directed solely towards SVO prisoners. Many offenders may require more than one type of program to address their offending and risk factors.

QCS has a range of programs to address substance misuse, including group-based programs and individual interventions in prison and the community – refer to Table 3.

Table 3: QCS substance misuse programs available in 2020-21

Program name	Details
Short Intensity Substance Intervention	A short 6-to-12-hour psycho-education program.
Low Intensity Substance Intervention	A range of 16-to-24-hour psycho-education programs, including motivational interviewing and contingency management approaches to reduce problematic substance use or reduce drug-related harm.
Moderate and High Intensity Substance Interventions	40-to-50-hour and 100-hour programs respectively that are relapse-prevention based and target those with higher levels of need and risk.
Substance Abuse Maintenance Interventions	Follow up programs for those who have previously completed a substance misuse program.
Positive Futures Program	A 32-to-36-hour, culturally sensitive program for eligible male Aboriginal and Torres Strait Islander prisoners and offenders that helps them address aspects of their offending behaviour, including family violence, alcohol and drug abuse, power and control, jealousy, trust and fear, family and community and parenting. Available in all correctional centres and multiple central and remote Community Corrections locations.

Source: Queensland Corrective Service, *Annual Report 2020-21*, 43. The Annual Report does not expand on whether these programs are available in all correctional facilities across the state, however according to the Queensland Parole System Review some programs were available in all correctional centres – see Appendix 12.

QCS also has a range of sexual offending programs that aim to reduce sexual offending recidivism – see Table 4. While prisoners are encouraged to participate (as outlined in their Progression Plan), participation is voluntary and prisoners must have sufficient time left on their sentence to participate. All sexual offenders are required to complete the preparatory program first, prior to transitioning to the higher intensity programs. There is no

64 Queensland Corrective Services, Sentencing Management: Assessment and Planning, *Custodial Operations Practice Directive*, (03/06/2021: Public version) 6.
65 Offenders sentenced for child exploitation material offences including possession, making or production, or procurement of minors for objectional computer games, films or publications are not assessed using this assessment tool.
66 *Queensland Parole System Review: Final Report* (n 12) 119 [600].
67 Ibid 119 [601].
68 Ibid 119 [599].
69 This is a widely used and validated tool.
70 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2021) 41.

differentiation in the QCS sexual offending programs for offenders who committed offences against children or adults.

In 2020-21, there were 378 sexual offender program completions.[71]

Table 4: QCS sexual offender programs in correctional centres and in community locations in 2020-21

Program name	Details
Getting Started: Preparatory Program (GS:PP)	A 24-hour introductory, motivational program designed to assist offenders reduce barriers and responsivity factors known to inhibit further intensive sexual offending programs. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Wolston, Townsville, Lotus Glen, Cairns, Brisbane, Central, Ipswich, South Coast
Medium Intensity Sexual Offending Program (MISOP)	75-to-175-hour program for prisoners and offenders assessed as low to moderate risk of sexual reoffending. The offender must have sufficient time to complete the program with their current sexual offence conviction. Available in: Wolston, Townsville, Cairns, Brisbane, Central, Ipswich, South Coast
High Intensity Sexual Offending Program (HISOP)	350-hour program for prisoners assessed to be at high risk of sexual reoffending. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Wolston
Inclusion Sexual Offending Program	108-hour program for prisoners with low cognitive and/or low social/emotional abilities, that have been assessed as requiring support to participate in a sexual offending program. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Wolston
Sexual Offending Program for Indigenous Males (SOPIM)	75-to-350-hour program for Aboriginal and Torres Strait Islander male offenders. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Lotus Glen
Sexual Offending Maintenance Program (SOMP)	16-to-24-hour program to build on and strengthen offenders' cognitive, emotional and behavioural skills linked with living an offence free lifestyle. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction, must have completed a previous sexual offending intervention, and can be referred to multiple SOMPs. Available at: Wolston, Townsville, Lotus Glen, Brisbane, Central, Logan/Ipswich, Townsville and Cairns.

Source: Queensland Corrective Service, *Annual Report 2020-21*, 44, with details about the programs taken from the Queensland Parole System Review, Appendix 12

According to the QCS Business Plan 2021-22, the existing Aboriginal and Torres Strait Islander sexual offender program, SOMP, will be redeveloped in partnership with the University of the Sunshine Coast, Murridhagun Cultural Centre and stakeholders including community Elders.[72]

The QCS 2020-21 Annual Report did not refer to any specific programs to address violence. However, the Council understands there are programs for violent offenders offered by QCS – see Table 5 – and that QCS is considering changes to these. The Council appreciates that delivery of comprehensive rehabilitation programs for violent offenders requires significant funding.

The Council has also been advised that a Domestic and Family Violence Program trial has been conducted in 2019-20 and was evaluated in 2020–21.[73] The outcome of that evaluation is yet to be published, but QCS advises that the program will be recommenced at three locations before the end of the 2021 year.

QCS is in the progress of replacing the Cognitive Self Change Program with a new moderate intensity violence program, with implementation currently in the planning stages.

71 Ibid 44.

72 Queensland Corrective Services, *Business Plan 2021-22* (Report, 2021) 16. The Murridhagun Cultural Centre is unit based at the QCS Correctional Services Academy at Wacol. The centre is a 'priority reference point for matters designed to address the needs of Aboriginal and Torres Strait Islander staff, prisoners, offenders and victims': The Honourable Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, 'Corrective Services celebrates NAIDOC Week' (Media Release,4 July 2017).

73 Queensland Corrective Services, *Annual Report 2019-20* (Report, 2020) 24.

Table 5: QCS violence offending programs

Program name	Details
Disrupting Family Violence Program	75-hour moderate intensity program targeted at perpetrators of domestic and family violence. Prisoners at Wolston, Woodford and Maryborough can participate in this program if they have sufficient time to complete the program and a history of domestic violence ('DV') offending/current Domestic Violence Order. This program is not suitable for high risk DV offenders.
Men's Domestic Violence Education and Intervention Program	A 48-hour program delivered in the community by an external provider in various Community Corrections locations across Queensland. Participants are referred by the Court.
Positive Futures Program	A 32-to-36-hour, culturally sensitive program to eligible male Aboriginal and Torres Strait Islander prisoners and offenders that helps them address aspects of their offending behaviour, including family violence, alcohol and drug abuse, power and control, jealousy, trust and fear, family and community and parenting. Available in all correctional centres and multiple central and remote Community Corrections locations.

Source: Queensland Parole System Review: Final Report, Appendix 12 with the replacement of the Cognitive Self Change Program by the Disrupting Family Violence Program as notified in private correspondence received 28 October 2021 from the Office of the Deputy Commissioner QCS to the Director, QSAC.

3.3.3 How the Parole Board decides whether a person should be released on parole

When a prisoner approaches their parole eligibility date, they become eligible to make an application to the Parole Board to be released on parole.[74] A prisoner's parole eligibility date does not create a right or entitlement for a prisoner to be granted parole and released into the community. There is always the potential that a prisoner may serve their full sentence of imprisonment in prison.

Section 242E of the CSA authorises the Minister to make guidelines about policies to assist the Board in performing the functions (the *Ministerial Guidelines to Parole Board Queensland*). The current ministerial guidelines that include criteria for the Parole Board to use when deciding applications provide that the overriding consideration for the Board's decision-making process is community safety.[75] The Parole Board must assess community safety both in terms of whether a prisoner poses an unacceptable risk to the community if released on parole, and whether the risk to the community would be greater if the person does not spend a period on parole under supervision before completing the full term of their sentence.[76]

The Parole Board makes decisions based on evidence it has before it, which can include:

- a prisoner's criminal history and pattern of offending;
- sentencing remarks;
- a Parole Board Assessment Report;
- advice to the Parole Board;
- program completion reports;
- Accommodation Risk Assessment;[77]
- submissions from the prisoner and his/her family;
- letters of support from community based organisations;
- victim submissions;
- medical reports;
- Psychiatric and Psychological Risk Assessments;
- Verdict and Judgment Records; and
- toxicology reports.[78]

74 A prisoner can apply for parole up to 180 days before their parole eligibility date. See CSA (n 1) s 180.
75 Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland* (at 3 July 2017) 2 [1.2]–[1.3].
76 Ibid [1.3].
77 The Accommodation Risk Assessment includes 'Is the offender a declared serious violent offender (current sentence)?' as a criterion to respond to. A 'yes' response to this criterion results in further assessment being required: Parole Board Queensland, *Parole Manual* (2019) 101-103.
78 Parole Board Queensland, *Parole Manual* (2019) 13.

The ministerial guidelines set out factors the Parole Board should consider when determining the level of risk a prisoner may pose to the community. One of these factors is whether the prisoner has been convicted of a serious violent offence.[79]

Under section 234 of the CSA, when the Parole Board meets to discuss 'prescribed prisoners', the Board must sit as 5 members and comprise (at minimum) the President or Deputy President, a professional board member, a community board member, a public service representative and a policy representative.[80] A 'prescribed prisoner' includes, among other criteria, prisoners imprisoned for an SVO-eligible offence where convicted on indictment, or a serious sexual offence.[81]

As noted above, all parole orders include mandatory conditions[82] and breaching these can result in the Parole Board amending, suspending or cancelling parole orders. In addition to the mandatory conditions, the Parole Board can tailor conditions specifically to individual prisoners and set any extra conditions it reasonably considers necessary to ensure the prisoner's good behaviour in the community, to mitigate against escalating risk, or stop them from committing another offence.[83]

Delays in assessing parole applications may shorten the time an offender spends on parole

The Council notes that the Parole Board is currently experiencing significant delays in assessing parole applications. The Council understands that these delays are due to an increasing backlog caused by high prisoner numbers, the impact of increased parole applications due to COVID-19 and the time required to obtain any supporting materials, including psychiatric reports. These delays have led to the Supreme Court receiving numerous applications for judicial reviews, and on 5 October 2021, the Senior Judge Administrator, Justice Helen Bowskill, released an updated protocol for applications.[84]

In August 2021, the Parole Board issued a statement advising that applications received in June 2021 would be unlikely to be heard until March 2022 – an 8-month delay.[85] This does not mean that prisoners will be held at least 8 months longer than their parole eligibility date, as they can apply for parole up to 6 months prior to reaching their parole eligibility date.[86] The Council understands the Queensland Government has provided for two additional Parole Board panels (to a total of 5) to help address delays.[87] The Government also recently introduced the Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 to provide temporary extensions to the time the Parole Board must hear an application – up from 120 to 180 days — or if a matter is deferred, from 150 to 210 days. When introducing the Bill to Parliament, the Minister for Police and Corrective Services and Minister for Fire and Emergency Services said:

> For a six-month period the independent Parole Board Queensland will have an extra 60 days to decide parole matters. These amendments will provide the board with greater flexibility to manage its responsibilities and the risks that different prisoners pose to the community. This builds on our further investment in the Parole Board by continuing the operation of the fourth temporary operating team and establishing a fifth temporary operating team.[88]

For prisoners with an SVO declaration currently waiting on a parole decision, or soon reaching eligibility, these delays may further shorten the already comparatively short time under supervision in the community if the prisoner is deemed suitable for release on parole.

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79 CSA (n 1) s 234(7)(b)(i). Section 234(7) identifies a range of other offences the Parole Board must also give regard to such as serious sexual offences, choking, suffocation and strangulation (Criminal Code, s 315A) and terrorism offences.

80 There is a Bill currently before the Queensland Parliament that, if passed, will result in amendments to section 234 and the quorum requirements that currently apply under that section: Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (Qld) cl 16.

81 CSA (n 1) s 234(7). A prescribed prisoner also includes prisoners convicted of an offence under section 315A of the Criminal Code (choking, suffocation or strangulation in a domestic setting).

82 CSA (n 1) s 200. Examples include reporting to Community Corrections as required, complying with urine tests, not committing an offence, notifying Community Corrections of any changes to employment or residential address and attending courses, programs, meetings and counselling as directed by Community Corrections. See Parole Board Queensland, *Parole Manual* (2019) 90-91.

83 CSA (n 1) s 200. See Parole Board Queensland, *Parole Manual* (2019): examples include imposing a curfew, electronic monitoring, abstaining from alcohol, undergoing psychological assessment and treatment: 91.

84 This protocol had not come into effect for the purposes of this Issues Paper, with the former protocol of 24 September 2021 in operation.

85 'PBQ Delays' *Parole Board Queensland* (Release) <https://www.pbq.qld.gov.au/wp-content/uploads/2021/08/PBQ-delays.pdf>.

86 See CSA (n 1) s 180.

87 Tony Keim, 'Prisoners Inundate Supreme Court to Avoid Parole Hearing Delays', *QLS Proctor* (online, 27 September 2021) <https://www.qlsproctor.com.au/2021/09/prisoners-inundate-supreme-court-to-avoid-parole-hearing-delays/>.

88 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 September 2021, 2767 (Mark Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services).

3.3.4 Management of prisoners on parole

When a prisoner has been granted parole and released from prison, they will be supported by a range of re-entry services. In 2020-21, QCS delivered almost 41,700 re-entry service contacts to prisoners and offenders. A person transitioning to parole is required to report to Community Corrections shortly after leaving custody.

QCS applies a person-centric approach to supervision, with case management strategies and intervention tailored to the individual in accordance with evidence-based principles. The supervision of offenders is designed to correspond to risk and manage the individual's treatment and intervention requirements. Following the Risk-Need-Responsivity (RNR) principles, Community Corrections undertake front-end assessments (RoR, Immediate Risk Assessment and STATIC-99R for sex offenders) to determine an individual's overall risk level before then applying graduated levels of intervention and supervision. Generally, high risk offenders who require a higher level of service receive more in-depth assessments to inform their management by experienced officers.[89]

An offender's level of service is primarily determined by their RoR score, with some exclusionary factors and professional discretion applied. Offenders convicted of a declared SVO are included in the intensive level of service ('LOS'). The LOS guides how frequently an offender is required to report to their Community Corrections case manager and the frequency of substance testing. Those in Intensive LOS are subject to more frequent reporting and a lower threshold for risk and non-compliance. While the above activities increase QCS monitoring of the individual, the manner in which an offender's criminogenic needs are identified and responded to remains the same as other offending types, regardless of their SVO status.

In addition to determining the level of service, QCS also undertakes a series of assessments to identify immediate risks of harm and basic needs, goals and rehabilitation activities. The main assessment is the Benchmark Assessment,[90] which forms the basis of case management for parolees. It takes about 2 months to complete, so parolees must have longer than 3 months supervision remaining on their sentence to warrant one. The Benchmark Assessment examines 'risk factors that may destabilise an offender on supervision in the community and forms the basis of case management for offenders with a level of service of 'standard' or greater'.[91] There are 14 risk factors considered, including accommodation, substance misuse, employment, criminal history and DV (both as a perpetrator and as a victim). For offenders in Enhanced and Intensive levels of service with identified medium or high risk factors, additional offender planning is also undertaken.[92] Once assigned to Intensive LOS, an offender can progress through different phases of supervision depending on their engagement with case management and intervention. This can include being placed into Maintenance phase, achievable once they have completed all required interventions or demonstrated a period of stability in their engagement over a period of time. Ultimately the assessment pathway and any presenting dynamic risk determines the planning and case management activities for individuals subject to community supervision.

In July 2021, QCS released the *End-to-End Offender Management Framework*, an evidence-based approach to the management of offenders developed in response to the QPSR recommendations. The implementation of end-to-end case management across QCS is ongoing, and includes 'new offender pathways, validated assessment tools and [a] new engagement plan for use across Community Corrections'.[93]

89 *Queensland Parole System Review: Issues Paper* (n 56) 17.
90 Developed by QCS for use by Community Corrections, it is not a validated tool: *Queensland Parole System Review: Final Report* (n 12) 115 [576].
91 *Queensland Parole System Review: Final Report* (n 12) 115 [577].
92 Ibid 116 [582].
93 Queensland Corrective Services, *Business Plan 2021-22* (2021) 16.

4 Application of the SVO scheme

4.1 How the scheme is being applied

The Terms of Reference ask the Council to:

- assess how the scheme is being applied and whether it is meeting its objectives;
- identify any trends or anomalies caused by the application of the serious violence offences ('SVO') scheme; and
- examine how the scheme might be impacting sentencing practices.

To answer these questions, the Council undertook extensive data analysis and examined administrative data collected by Court Services Queensland and Queensland Corrective Services ('QCS'). An overview of some of the findings of this analysis have been included below. A more comprehensive analysis of the data regarding the application of the scheme is provided in Background Paper 4.

The methodology for the Council's data analysis is briefly set out in section 1.4 of this Issues Paper, and in greater detail in Background Paper 4 and the Technical Paper for Research Publications.

Issues identified through this data analysis are explored further in section 7 of this paper.

4.1.1 The SVO scheme is applied to a small proportion of schedule 1 offences

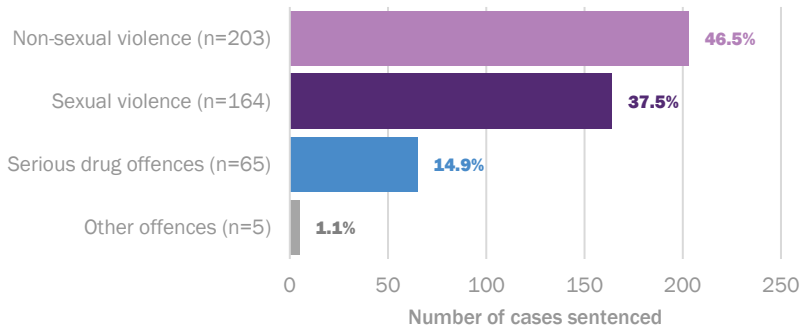
The Council found that during the 9-year data period, 2011–12 to 2019–20, an SVO declaration was made in 437 cases (MSO).

437 of the **20,187** Schedule 1 offences sentenced in the higher courts (MSO) resulted in an **SVO declaration**

4.1.2 SVO declarations were most common for non-sexual violence offences

Figure 5 shows that almost half of all SVO declarations (both mandatory and discretionary, n=437) were for non-sexual violence offences (46.5%, n=203). Sexual violence offences made up 37.5 per cent of SVO declarations (n=164), with the remaining 14.9 per cent being for serious drug offences (n=65).

Figure 5: Number of cases with an SVO declaration, by offence category (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

4.1.3 Mandatory SVO declarations were far more common than discretionary declarations

Discretionary declarations made up **one-quarter** of all SVO declarations (n=119)

Mandatory declarations accounted for almost **three-quarters** of all SVO declarations (n=318)

The Council's analysis found that over the data period, of the 437 SVO declarations, almost three-quarters (72.7%) were mandatory (n=318). This means the vast majority of SVOs were imposed on offenders sentenced to terms of imprisonment of 10 years or longer.

As shown in Table 6, of the 119 discretionary declarations, almost all were made under section 161B(3) in cases in which the offender received a sentence of imprisonment between 5 and 10 years (n=112), with the remaining 7 declarations made under section 161B(4).[1]

Table 6 also shows mandatory declarations were most commonly declared for sexual violence offences, followed by non-sexual violence offences, whereas discretionary SVOs were most often declared for non-sexual violence offences.

Table 6: Number of cases with an SVO declaration, by offence category and type of SVO

SVO Flag Type	N	%	Non-Sexual Violence	Sexual Violence	Drug offences	Other offences
Mandatory SVO	318	72.8	110	146	60	2
Discretionary SVO – s 161B(3)	112	25.6	89	16	5	2
Discretionary SVO – s 161B(4)*	7	1.6	4	2	0	0

Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
* One of the s 161B(4) cases was for a non-Schedule offence and is not displayed in the above table.

4.1.4 Common offences among SVOs

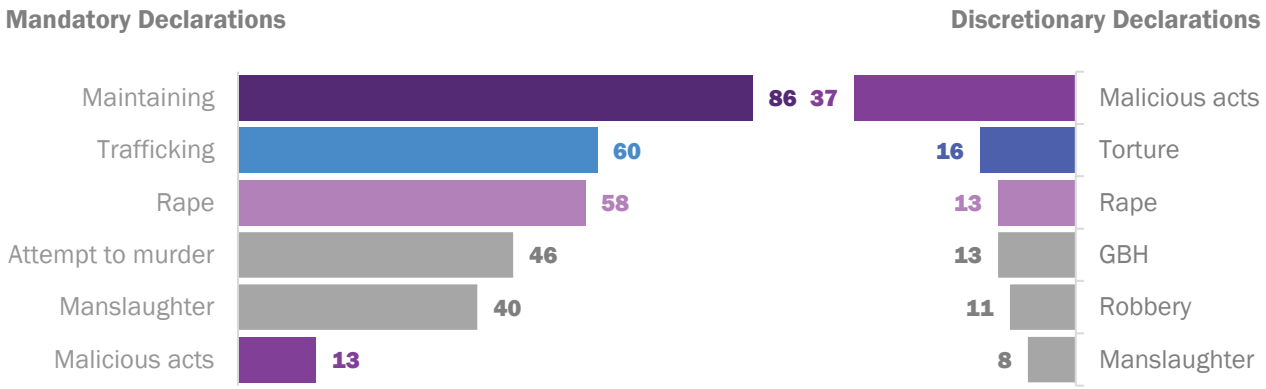
The Council examined the Schedule 1 offences that most commonly received an SVO declaration.[2] This paper presents the 6 most common offences to receive a mandatory or discretionary declaration – for a complete list, please see Table 2 and Table 3 in Background Paper 4.

Figure 6 shows that of the 318 mandatory declarations made during the data period, over a quarter were for maintaining a sexual relationship with a child (27.0%, n=86). This was followed by trafficking in dangerous drugs (18.0%, n=60), rape (18.2%, n=58), attempted murder (14.4%, n=46) and manslaughter (12.5%, n=40).

The offence profile of discretionary declarations is different. Figure 6 shows that of the 112 discretionary declarations made for Schedule 1 offences sentenced to a term of imprisonment of 5 to less than 10 years, one-third were for malicious acts (33.0%, n=37), followed by torture (n=16), rape (n=13) and grievous bodily harm (n=13).

1 *Penalties and Sentences Act 1992* (Qld), s 161B(4) ('PSA') enables the court to make a discretionary declaration for non-sch 1 offences and not for a statutorily defined term of imprisonment.
2 Due to only 7 offences receiving an SVO under s 161C(4) of the PSA (n 1) this is excluded from this analysis.

Figure 6: Top 6 most commonly sentenced offences for mandatory and discretionary SVOs (MSO)

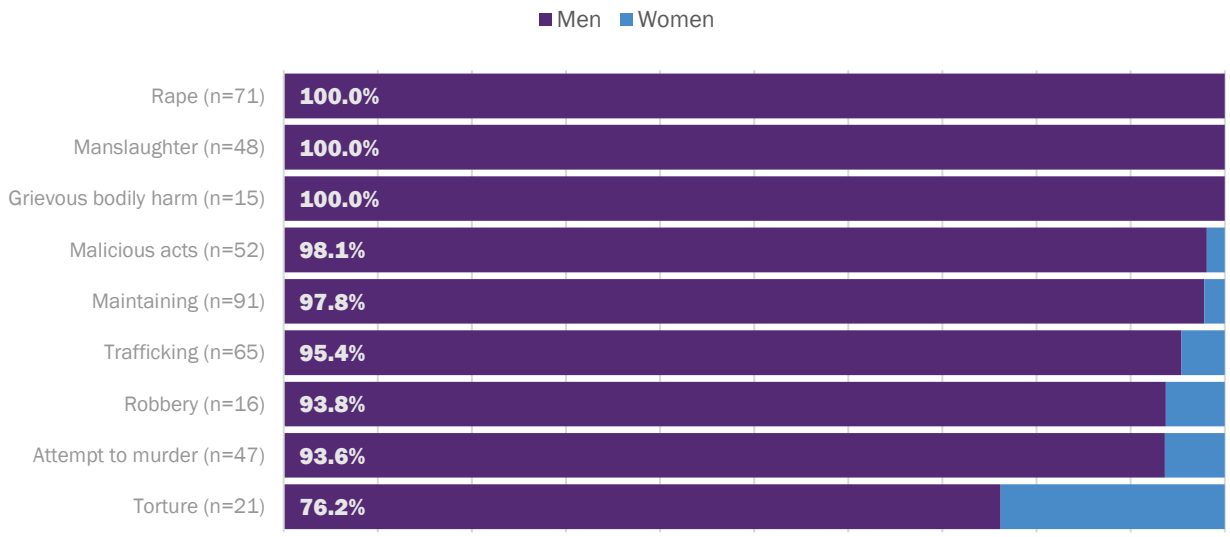


Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

4.1.5 The vast majority of offenders sentenced to an SVO were male

The vast majority of offenders who received an SVO declaration during the data period were male – see Figure 7 below. For the offences of rape, manslaughter and grievous bodily harm, all cases sentenced to an SVO were committed by male offenders. The proportion of male offenders was very high across all offence categories commonly attracting an SVO. Of the 21 offenders who received an SVO for torture, just under a quarter were female (n=5), the offence with the highest proportion of female offenders.

Figure 7: Proportion of men and women sentenced to a declared SVO offence, by type of offence, MSO



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

4.1.6 Aboriginal and Torres Strait Islander offenders were over-represented

The Council found that except for trafficking in dangerous drugs, Aboriginal and Torres Strait Islander offenders were over-represented across all offence categories commonly attracting an SVO.

During the data period, of the 437 SVO cases, 20.1 per cent were made for Aboriginal and Torres Strait Islander offenders (n=88). Further analysis shows that Aboriginal and Torres Strait Islander offenders comprised 30.3 per cent of all discretionary SVOs and 16.4 per cent of all mandatory SVOs.

The offence category with the highest proportion of Aboriginal and Torres Strait Islander people was non-sexual violence offences accounting for 24.6 per cent of all offenders who received an SVO for this offence category (n=50). This was followed by sexual violence offences with Aboriginal and Torres Strait Islander people comprising 20.7 per cent of all SVO cases for this offence category (n=34), and lastly by serious drug offences at 3.1 per cent (n=2)

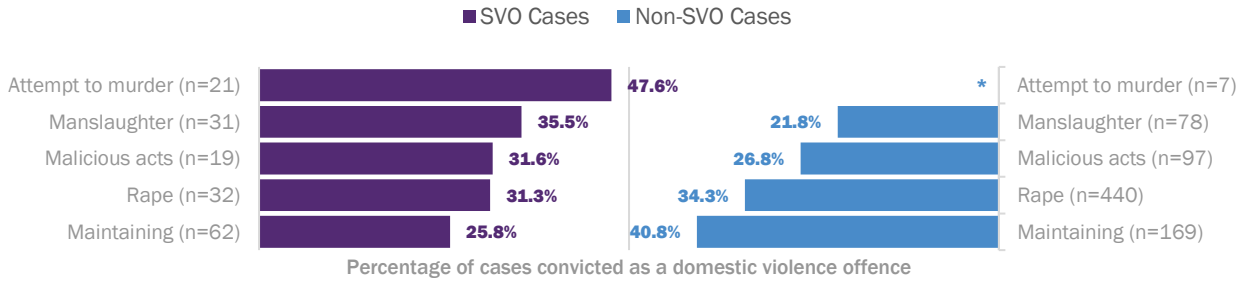
4.1.7 Domestic violence offences were more common among non-sexual violent SVOs

The Council analysed the proportions of cases flagged as a domestic violence offence ('DV offence') for SVO and non-SVO cases between 2016–17 and 2019–20.[3]

Figure 8 shows the proportion of non-sexual violence offences declared to be an SVO that were committed in a domestic and family violence relationship was higher, compared to non-SVO cases. For example, almost half of the attempted murder cases declared an SVO were DV offences (47.6% compared to only 5 non-SVO cases. Similarly, for manslaughter in which an SVO was declared, 35.5 per cent of cases were flagged as a DV offence, compared to only 21.8 per cent of non-SVO manslaughter cases. For malicious acts, 31.6 per cent of SVO cases were convicted as a DV offence, compared to 26.8 per cent of non-SVO cases.

This pattern was different for sexual violence offences. For rape, the proportion of cases recorded as a DV offence was similar for both SVOs and non-SVOs, 31.3 per cent and 34.3 per cent respectively. For the offence of maintaining a sexual relationship with a child, 40.8 per cent of cases not declared as an SVO were recorded as a DV offence. The proportion of DV offences among cases of maintaining a sexual relationship with a child declared to be an SVO was lower, at one-quarter (25.8%).

Figure 8: Percentage of cases that were convicted as a domestic violence offence, by SVO declaration (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2016–17 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
* data not displayed due to small sample size

[3] In 2015 amendments to the PSA included that, where a conviction is recorded for an offence charged as a domestic violence offence, it must be recorded as a domestic violence offence. Prior to this amendment, offences committed within a domestic and family violence relationship were not recorded as such on an offender's criminal history or in court records: see s 12A of the PSA (n 1).

5 Review principles

5.1 Introduction

The previous sections of this paper have considered the operation of the serious violent offences ('SVO') scheme, how parole eligibility is different for those subject to it, and how the scheme is being used and applied.

In this section, the Council sets out fundamental principles developed early in the project that have guided the Council's work to date and helped frame the questions posed in this Issues Paper. Together with feedback received in response to this Issues Paper, these principles will help shape the Council's final recommendations.

The Council has drawn these principles from a range of sources including the Terms of Reference for this review,[1] principles that have guided the Council in undertaking previous reviews,[2] the *Queensland Parole System Review: Final Report* ('QPSR')[3] and submissions made to that review, as well as views expressed by stakeholders during preliminary consultation.

5.2 Principle 1: Reforms to sentencing and parole laws should be evidence based with a view to promoting public confidence.

The Council has a strong ongoing commitment to evidence-based reform and draws on a range of sources of evidence to inform its work, including reports of other law reform bodies, analysis of relevant data, consultation with relevant stakeholders and academic research.

As discussed further in section 6.2 of this paper, the Council commissioned a separate review of the research literature to provide insights into the perceptions of seriousness, risk and harm, an evaluation of the effectiveness of mandatory or minimum non-parole period schemes and approaches to achieving community protection, deterrence and rehabilitation. The Council has also drawn on other sources of evidence, including its own analysis of administrative data and sentencing remarks in relation to the SVO scheme.

The availability of proper evidence about how well sentencing and parole orders are operating in relation to the SVO scheme and relevant offences is of direct relevance to the Council in determining what reform options should be explored, as well as which options may require further evidence and research to be gathered prior to considering potential implementation.

5.3 Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld).

It is important that the sentencing decisions under any Queensland sentencing scheme are consistent with the purposes of sentencing, and provide sufficient scope to take these purposes into account.

The purposes of sentencing, set out in section 9 of the *Penalties and Sentences Act 1992* (Qld) ('PSA') are:

(a) **Punishment**: to punish the offender to an extent or in a way that is just in all the circumstances;

(b) **Rehabilitation**: to provide conditions in the court's order that the court considers will help the offender to be rehabilitated;

(c) **Deterrence (specific and general)**: to deter the offender or other persons from committing the same or a similar offence;

(d) **Denunciation**: to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved;

(e) **Community protection**: to protect the Queensland community from the offender; or

(f) A **combination** of 2 or more of the purposes listed above.

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1 Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, 'Terms of Reference — Serious Violent Offences Scheme in the *Penalties and Sentences Act 1992*' (9 April 2021) reproduced in Appendix 1.

2 See Queensland Sentencing Advisory Council, *Community-Based Sentencing, Imprisonment and Parole: Final Report* (Report, July 2019); Queensland Corrective Services, *Queensland Parole System Review: Final Report* (Report, 2016) and submissions made to that review.

3 Queensland Corrective Services, *Queensland Parole System Review: Final Report* (Report, 2016) ('*Queensland Parole System Review: Final Report*').

All sentencing decisions must be made in accordance with the purposes of sentencing. The sentencing purposes guide judicial officers in their determination of a just sentence and are critical to the application of the SVO scheme, in particular in deciding to make an SVO declaration where this is discretionary.

5.4 Principle 3: Sentencing outcomes arising from the operation of the SVO scheme should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.

Ensuring that sentences imposed on offenders properly reflect the seriousness of the offences committed and the harm caused to victims, is a legitimate concern of any legal system. It is embedded within the common law principle of proportionality — which is reflected in the legislative sentencing purpose in Queensland of 'just punishment'. The assessment of offence seriousness includes not just an assessment of the person's culpability for the offence, but also the harm caused to a victim by their offending.[4]

Proportionality sets outer limits on the sentence to be imposed, and requires that a sentence should not exceed that level which can be justified as appropriate or proportionate to the gravity of the offence assessed in light of its objective circumstances.[5] This principle operates as a general prohibition against increasing a sentence of imprisonment beyond a level which is proportionate to extend the period of protection of the community from the offender by way of preventative detention.[6]

The PSA requires a court to have regard to the nature of the offence and how serious it was, including any physical, mental or emotional harm done to a victim.[7] In the case of offences involving physical harm caused to another person, or that involved the use, or attempted use, of violence, the court must have primary regard to factors including 'the personal circumstances of any victim of the offence'.[8] The effect of the offence on a child victim is also a primary sentencing consideration for sexual offences committed in relation to a child under 16 years and for child exploitation material offences.[9]

To the extent that the SVO scheme impacts on court sentencing practices, it is important that it provides sufficient recognition of the seriousness of this form of offending, while not resulting in unjust outcomes. This is a key focus of this review.

5.5 Principle 4: Parole serves an important purpose in helping prisoners to successfully and safely reintegrate into the community and in minimising the likelihood of a person reoffending, thereby promoting community safety.

In Background Paper 1,[10] we noted that concerns about community safety in relation to serious violent offences was one of the key drivers identified by the then Queensland National Liberal Coalition Government when committing to introducing the scheme. The objective of these and related reforms was to ensure the sentencing purpose of community protection would be treated as a primary consideration when sentencing offenders for these types of offences.

The SVO scheme addresses the issue of community safety in two ways:

1. It provides for an extended period of detention, thereby protecting the community during the time the person is in custody, from the risk that they will commit further offences in the community (a form of incapacitation);[11] and
2. It provides for the person who is subject to the declaration to apply for release under supervision on parole after they have served a minimum of 80 per cent of their sentence, or 15 years (whichever is less).

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4 *Veen v The Queen (No 2)* (1988) 164 CLR 465; [1988] HCA 14.
5 Ibid 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 484–6 (Wilson J), 490–1 (Deane J), 496 (Gaudron J); *Hoare v The Queen* (1989) 167 CLR 348,354.
6 Ibid 472, 484–6, 490–1, 496.
7 *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i) ('PSA'). This includes harm mentioned in information relating to the victim given to the court, such as in the form of a victim impact statement: see Part 10B.
8 Ibid s 9(3)(c).
9 Ibid s 9(6)(a).
10 Queensland Sentencing Advisory Council, *History of the Serious Violent Offences Scheme* (Background Paper 1, 2021).
11 See generally Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2012) and Andrew von Hirsch, 'Incapacitation' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 75. Imprisonment is only one form of incapacitation, with other incapacitative methods including home detention and electronic monitoring.

For these reasons, both the periods spent in custody and on parole are important when evaluating the extent to which the SVO scheme is meeting its objectives of enhancing community safety.

The QPSR recognised parole as being primarily a 'method that has been developed in an attempt to prevent reoffending',[12] and pointed to evidence suggesting that parole 'has a beneficial impact on recidivism, at least in the short term' and perhaps modestly.[13] Paroled prisoners are less likely to reoffend than prisoners released without parole.[14] The QPSR also found 'it is more risky to have a short period of parole' than a longer one.[15]

The University of Melbourne, in the literature review commissioned for this project, reached a similar conclusion: 'More and not less time on parole would allow time to engage in rehabilitative programs' to reduce their risk of reoffending, build strengths and take steps towards desistance.[16]

Consideration of the time required under supervision to successfully protect the community from the risk of future offending is of direct relevance to this review as the SVO scheme, by design, limits the time an offender is actively supervised in the community. This could potentially result in an increased risk of reoffending, rather than a reduction.

5.6 Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.

The Terms of Reference ask the Council to 'identify any trends or anomalies that occur in the application of the SVO scheme that create inconsistency or constrain the sentencing process'.

The Council has identified the benefits to be gained in removing anomalies and minimising the complexity of sentencing and parole laws in undertaking previous reviews, including promoting greater certainty and clarity about how the law is to be applied, reducing the risk of error (and any appeals required to correct such errors), and reducing the length of sentencing proceedings.[17] 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.[18]

During the initial stages of the review, the Council has identified a number of examples of potential inconsistencies, anomalies and complexities with the current operation of the SVO scheme. These include:

- Problems arising from the setting of 10 years as the cut-off point for a mandatory SVO declaration — which means that the only way a court can take factors such as a plea of guilty or other factors in mitigation into account, as required by law, is to reduce the head sentence.
- Limited scope for the application of the principle of parity in circumstances where an SVO declaration is made in one case for an offender, but not made in another involving a co-offender — where this principle would, but for the existence of the SVO scheme, otherwise be applied.[19]
- The lack of clear rationale for the offences included and excluded from Schedule 1.
- Additional complexities involved in sentencing offenders for multiple offences where only some of those convictions are serious enough to warrant, or can be subject to, an SVO declaration.
- Problems in understanding how to apply section 161C when calculating the relevant periods that apply for the purposes of section 161B. This has resulted in an additional layer of complexity in sentencing and problems for courts in interpreting how the calculation of these periods, particularly in the years following its introduction, were intended to be applied.[20] This has resulted in the need for a body of case law to settle areas of uncertainty and ambiguity.

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12 *Queensland Parole System Review: Final Report* (n 3) 2 [8].
13 Ibid 38 [140],2 [11] and 38 [139].
14 Ibid 1 [7] citing Wan Wai-Yin et al, 'Parole Supervision and Reoffending' [2014] (485) *Trends and Issues in Crime and Criminal Justice* 1.
15 Ibid 7 [46]. The comment was made in the context of provisions requiring some offenders to serve 80 per cent of their prison term before being eligible to apply for parole, such as in the case of offenders subject to an SVO declaration.
16 Andrew Day, Katherine McLachlan and Stuart Ross, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Summary Report, University of Melbourne, August 2021) ('*University of Melbourne Literature* Review') 13–14 and 22.
17 Queensland Sentencing Advisory Council, *Community-Based Sentencing Orders, Imprisonment and Parole Options: Final Report* (Report, 2019) 51 ('*Community-Based Sentencing Orders, Imprisonment and Parole Options*').
18 Ibid.
19 See Queensland Sentencing Advisory Council, Minimum Non-Parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions (Background Paper 2, 2021) section 2.9; *R v Crossley* (1999) 106 A Crim R 80; [1999] QCA 223.
20 As one example where a judge mistakenly thought the requirement to declare the offender convicted of an SVO did not apply, see *R v Dutton* [2005] QCA 17. See section 7.4.2 for other examples of complexities in the sentencing process.

More fundamental questions have also been raised during initial consultations about whether the way the scheme is structured has had the outcome of reducing head sentences.

These issues are explored in more detail in section 7.

5.7 Principle 6: Any reforms should take into account likely impacts on the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

The Terms of Reference ask the Council to advise on the impact of any recommendations on the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

Based on a preliminary analysis of the data, presented in Background Paper 4, the Council found Aboriginal and Torres Strait Islander offenders were over-represented across all offence categories commonly attracting an SVO declaration, with the exception of trafficking in dangerous drugs. Over the data period, of the 437 SVO cases, 20.1 per cent of sentenced cases involved an Aboriginal and Torres Strait Islander offender (n=88). This means that Aboriginal and Torres Strait Islander peoples are over-represented among offenders convicted of a declared offence given that Aboriginal and Torres Strait Islander peoples comprise only 3.8 per cent of the Queensland population aged 10 years or over.[21]

The proportion of SVO cases in which an Aboriginal or Torres Strait Islander person was sentenced to imprisonment with an SVO declaration made was higher for discretionary SVO declarations — 30.3 per cent compared to 16.4 per cent for mandatory SVO declarations.

The Council welcomes views on how to ensure that the application of the SVO scheme, if retained, is structured in a way that takes into consideration the unique circumstances of Aboriginal and Torres Strait Islander offenders.

5.8 Principle 7: The circumstances of each offender and offence are varied. Judicial discretion in the sentencing process is fundamentally important.

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

The Council recognises that the circumstances of each offender and offence are varied. For this reason, sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[22]

In previous reports, the Council has raised concerns about the potential for mandatory sentences to constrain available sentencing options, lead to anomalies and unintended consequences in sentencing, and cause inconsistency in sentencing.[23] For this reason, the Council's position has been that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the Act, or in reducing recidivism.[24] This is because, as a matter of principle, it assumes that every offence and every offender are the same. This is discussed further in section 7.5 of this paper.

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21 Queensland Sentencing Advisory Council, *Baseline Report* (Sentencing Profile, May 2021) 15. See also Queensland Government Statistician's Office, *Population Estimates by Indigenous Status, LGAs, 2001 to 2015* (Data, 2015).

22 See *University of Melbourne Literature Review* (n 16) 12–13.

23 See, for example, *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 17) 101–3.

24 See, for instance, Queensland Law Society, *Mandatory Sentencing Laws Policy Position* (4 April 2014), 3: 'The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism' citing Sentencing Advisory Council (Victoria) *Does Imprisonment Deter? A review of the Evidence* (Sentencing Matters, April 2011) 2. See also Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) 13–15.

5.9 Principle 8: Sentencing orders should be administered in a way that satisfies the intended purposes of the sentence. Services delivered under them, including programs and treatment, should be adequately funded and available across Queensland both in custody and in the community.

The sentencing orders of courts must be properly administered so as to satisfy the intended purposes of each order and facilitate a fair and just sentencing regime that protects community safety.[25]

Both the Queensland Productivity Commission in its inquiry into imprisonment and recidivism[26] and the QPSR[27] highlighted funding and resourcing challenges faced by the Queensland criminal justice system and made recommendations designed to improve the management of offenders. Recommendations made by the QPSR included several that are of relevance to this current review, including:

- The establishment of a body that is appropriately resourced to evaluate risk assessments, training and interventions used by Queensland Corrective Services ('QCS') (Recommendation 11);
- Independent evaluations of all rehabilitation programs offered by QCS to ensure they are effective in reducing reoffending, as well as regular re-evaluations of those programs (Recommendations 21 and 22);
- The introduction of a dedicated case management system that begins assessing and preparing a prisoner for parole at the time of entry into custody, and the involvement of the person's future case manager in the management of the prisoner before he or she is released from custody (Recommendations 12 and 15);
- An increase in the number and diversity of rehabilitation programs and training and education opportunities available to prisoners, and a greater variety of rehabilitation programs to address the specific and complex needs of women and Aboriginal and Torres Strait Islander offenders, and increased availability of these programs (Recommendations 17 and 18);
- Partnerships with non-government service providers to develop and increase rehabilitation program delivery (Recommendation 19) and increased delivery of accredited programs to offenders supervised by Probation and Parole in light of issues associated with delivering programs in custody (Recommendation 20);
- A review of resourcing of prison and community forensic mental health services (Recommendation 24);
- The delivery and design of new rehabilitation programs specifically designed for Aboriginal and Torres Strait Islander people by Aboriginal and Torres Strait Islander people (Recommendation 27);
- Consideration by Government of whether it would be appropriate to implement a brokerage model to address the significant treatment service gaps for offenders in the community (Recommendation 30);
- Expanded re-entry services to ensure that all prisoners have access to these services (Recommendation 33); and
- The provision of funding and associated resources necessary to bring Queensland in line with Australian average offender-to-staff ratios to make workloads more manageable and increase the efficacy of case management (Recommendation 62).

The Commissioner of QCS, in the department's 2020–21 Annual Report, reported that during this financial year:

> Work has continued on implementing the recommendations from the Queensland Parole System Review (QPSR) that are centred around increasing rehabilitation opportunities for prisoners. This aims to address the underlying causes of offending behaviour and recidivism prior to release. These recommendations include launching the first Case Management Unit (CMU) at Townsville; better supporting the readiness of frontline community corrections officers through revised training; expanding rehabilitation programs in correctional centres and community corrections; and considering the rollout of phase 2 of the Opioid Substitution Treatment (OST) Program.[28]

The Commissioner also refers to measures implemented to address capacity issues, including re-entry services to aid the transition of prisoners back into the community to reduce their likelihood of reoffending and returning to custody.[29]

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25 See Terms of Reference, 1 (Appendix 1).
26 Queensland Productivity Commission, *Inquiry into Imprisonment: Final Report* (Report, 2019).
27 *Queensland Parole System Review: Final Report* (n 3).
28 Queensland Corrective Services, *Annual Report 2020–21* (Report, 2021) 6 ('*QCS Annual Report 2020–21*').
29 Ibid.

The Annual Report notes QCS's commitment to 'consolidate the government's position [in implementing the QPSR recommendations] and the community's expectations of a parole system that underpins community safety, by providing prisoners and offenders with opportunities for rehabilitation across the entire corrections system'.[30]

While the Council has not been asked to recommend or evaluate the effectiveness of these reforms, the management of offenders — both in custody and in the community – is clearly of importance when assessing the extent to which the current SVO scheme is meeting its objectives.

5.10 Principle 9: Sentencing decisions for serious violent offences should be informed by the best available evidence of a person's risk of reoffending.

As identified in *R v Collins,*[31] and discussed in Background Paper 1, the paramount consideration of the legislature in enacting the SVO scheme appeared to have been the protection of the community from offenders who pose an ongoing risk to the community.

Underlying the SVO scheme is an assumption that a long period in custody is required, both to properly denounce and punish the offender for their offending, and for the purposes of community protection. This assumes that the sentencing judge is in a position to assess the future risk posed by an offender when deciding whether a longer period in custody is required to meet this purpose.

A concern raised with the Council by some stakeholders during early consultation has been that there is often limited information available to a court at the time of sentence about the level of risk an offender poses to the community at the time it is called on to exercise its discretion to make an SVO declaration. The court is typically reliant on expert reports being prepared and submitted by the defendant's legal representatives as to the level of risk an offender poses — although a court can also order that a pre-sentence report be prepared by QCS.[32]

The lack of specific provision for independently obtained pre-sentence reports for the purposes of determining whether an SVO declaration should be made is in contrast, for example, to provisions which apply to indefinite sentences[33] — although the consequences for an offender of an indefinite sentence being imposed are far greater than having their parole eligibility date deferred.

During the QPSR, similar concerns were raised by multiple stakeholders about a court's ability to assess future risk.[34] 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 and enable the Parole Board Queensland ('Parole Board') to assess risk closer to the date of release.

Pre-sentence reports (PSRs) (defence sourced) were criticised by some as often not very useful and not providing sufficient information to aid decision-making. This could reduce the ability to assess future risk.

The task faced by judicial officers when determining whether to make an SVO declaration in circumstances where this is discretionary are highlighted in the Court of Appeal's 2020 decision of *R v Free; Ex parte Attorney-General (Qld)* ('*Free*').[35] In *Free*, the Court emphasised the exercise of this discretion involves:

> considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required.[36]

A report from a psychologist was relied upon at sentence that concluded '[g]iven the unique nature of the offences, it is difficult to ascertain (with a high level of psychological certainty) the risk of recidivism', however 'some protective features' were present.[37] An SVO declaration in this case was not made and the offender was sentenced to 8 years' imprisonment, with parole eligibility after serving one-third.

The Court of Appeal allowed the appeal, and while not disturbing the original 8-year head sentence or finding an SVO declaration was warranted, decided that a recommendation for parole eligibility before the statutory eligibility date (50%) ought not to be made, finding:

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30 Ibid 32.
31 [2000] 1 Qd R 45, 49 [20], 52 [29].
32 Section 15 of the PSA (n 7) provides for a court to receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a pre-sentence report ordered by a court to be prepared by Corrective Services in accordance with section 344 of the *Corrective Services Act 2006* (Qld) ('CSA').
33 See Part 10 of the PSA (n 7) ss 166A–166C and 167(4).
34 Unpublished submissions in response to the Queensland Corrective Services, *Queensland Parole System Review: Issues Paper* (2016).
35 (2020) 4 QR 80; [2020] QCA 58.
36 Ibid 98 [49].
37 Ibid 90 [28]

> A further reduction in the time to be served before becoming eligible for parole is not justified, given the very serious nature of the offending, and the need to send a strong message of denunciation of, and deterrence against, offending of this kind. In a case of this kind, the mitigating effect of a guilty plea and cooperation, whilst still deserving of tangible recognition, must yield to other factors, such as denunciation and community protection.[38]

This case highlights the number of purposes and factors a court must consider when deciding whether to make an SVO declaration, demonstrating that the risk of reoffending is just one. If the scheme is to be retained, and given the strong focus of the SVO scheme on community protection, it seems important for a court to have access to the best information available about an offender's level of risk. This information can then be taken into account as part of the court's broader decision-making process, including in deciding if a declaration should be made. The court can also determine the appropriate weight to be placed on information about the offender's assessed level of risk, acknowledging the significant limitations of any risk assessment process.[39] Whether the offender is then released on parole on reaching their parole eligibility date then properly becomes a decision made by the Parole Board.

5.11 Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) or be reasonably and demonstrably justifiable as to limitations.

Under the *Human Rights Act 2019* (Qld) ('HRA'), human rights limitations must be justified as a proportionate way of achieving the purpose of legislation, provided there is evidence that it is the least restrictive option.

The imposition of higher penalties based on an assessment of offence seriousness, and future risk of reoffending, likely engages several human rights protected in the HRA including:

- the right to equality;[40]
- the right to liberty and security;[41]
- the right to a fair hearing;[42] and
- protection from cruel, inhuman or degrading treatment.[43]

Section 13(2) of the HRA sets out criteria for deciding whether a limit on a right is reasonable and justified including:

- the nature of the human right involved;
- the nature of the purpose of the limitation (including whether it is consistent with a free and democratic society based on human dignity, equality and freedom);
- the relationship between the proposed limitation and its purpose (including whether the limitation helps to achieve the purpose);
- whether there are any less restrictive and reasonably available ways to achieve the purpose;
- the importance of the purpose of the limitation;
- the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and
- the balance between these matters.

The SVO scheme was introduced prior to the operation of the HRA. Consequently, specific consideration was not given to whether any limitations the scheme placed on human rights were reasonable and justified.

The current review provides an opportunity to consider whether the scheme can be improved in any way to ensure it is structured to take into account the operation of the HRA.

This is discussed further at 7.8 of this paper.

DISCUSSION QUESTION: Principles guiding the review	
1.	**Do the principles adopted by the Council for the purposes of reviewing the operation and efficacy of the SVO scheme provide an appropriate framework for potential reform?**

38 Ibid 108 [93].
39 For a discussion of these problems, see *University of Melbourne Literature Review* (n 16); Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (2015) 15–16 [1.59]–[1.65].
40 *Human Rights Act 2019* (Qld) s 15.
41 Ibid s 29.
42 Ibid s 31.
43 Ibid s 17.

6 Overview of existing evidence

6.1 Introduction

As discussed in section 5.2, the Council has a strong ongoing commitment to evidence-based reform and draws on a range of sources of evidence to inform its work, including reports of other law reform bodies, consultation with relevant stakeholders and academic research.

As part of this review, the Council commissioned a literature review on the effectiveness of the serious violent offences ('SVO') and similar schemes. The review was completed by the University of Melbourne and a Summary Report and Technical Report can be found on the Council's website.[1]

Due to the specific nature of the SVO scheme in Queensland, there is only limited evidence available on the effectiveness of the SVO scheme and other minimum non-parole period ('MNPP') schemes. There are inherent challenges in evaluating the effectiveness of existing sentencing regimes. Reviewing both academic literature and government reports, only limited evidence was identified specifically addressing the effectiveness of MNPP schemes similar to the Queensland SVO scheme. No substantive evidence was identified that setting a threshold of 80 per cent of the sentence to be served in prison will contribute to improved community safety. Instead, the review concluded that providing longer periods of supervision in the community is likely to be more effective at reducing re-offending risk.

6.2 Key findings from the literature review

The literature review considered the effectiveness of MNPP schemes for serious non-sexual violence, sexual violence and serious drug offenders and evidence-based approaches to community protection, deterrence and rehabilitation. Three key issues – the concepts of risk, harm, and dangerousness, the scheme's impact and effectiveness, and existing evidence on 'what works' to reduce serious violent offending – were considered. The literature review concluded that there is only limited evidence available regarding the SVO and similar schemes and that therefore, the existing literature does not support the use of MNPP schemes as a measure to achieve effective deterrence or offender rehabilitation.

6.2.1 The concepts of risk, harm and dangerousness

- Existing evidence on the concepts of dangerousness, risk and harm have been important drivers of policy and practice in Australia, yet the review identified a lack of consensus in how to determine who a high-risk or dangerous offender is.[2]
- The review concluded that scientific risk assessment tools may offer a more transparent assessment compared to professional judgement alone, yet also pointed out there is currently insufficient evidence on the effectiveness of these tools and potential for cultural bias.[3]
- Research on Australian community attitudes towards punishment and sentencing found that public opinion is largely consistent with current sentencing practice and that there is only limited evidence in support of the notion that the public hold very punitive attitudes. Beyond sentencing outcomes, availability of rehabilitation programs and services is an important community concern.[4]
- Australian research into community perceptions of parole found that the public is critical of the concept of parole, identifying the need to increase public confidence in the parole system. The Australian public is generally optimistic about the successful re-integration of people being released from prison, including serious offenders, and supports increased funding to provide appropriate rehabilitation programs.[5]
- The review concluded that previously conducted research, reviews and stakeholder consultations found that MNPPs are not supported by the legal community with the main objection relating to the restriction of judicial discretion.[6]

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1 Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Summary Report, 2021) ('*University of Melbourne Literature Review*').
2 Ibid 5.
3 Ibid 6.
4 Ibid 10.
5 Ibid.
6 Ibid 11.

6.2.2 The effectiveness of minimum non-parole period schemes

- Existing studies found that the setting of non-parole periods does not achieve effective deterrence or rehabilitation of offenders. The review concluded that as MNPP schemes result in longer periods of actual imprisonment, they can be considered to achieve the purposes of punishment and denunciation.[7]
- The review addresses concerns regarding the reduction of judicial discretion as a result of MNPP schemes. Reduced judicial discretion is viewed as leading to poorer decision-making as it restricts the court's capacity to take all relevant factors into account. This may be particularly relevant for defendants with complex needs, those who are disadvantaged and Aboriginal and Torres Strait Islander defendants.[8]
- Existing literature discusses the criminogenic effects of imprisonment on offenders. While there is evidence that longer prison sentences increase short-term recidivism, there is no clear evidence available on the medium- to long-term impact. There is no evidence that the threat of a longer prison term has a deterring effect.[9]
- An Australian study found that offenders released on parole took longer to commit a new offence, were less likely to commit a new indictable offence, and committed fewer offences than those who were released unconditionally into the community.[10]
- There is no empirical research available on the views of victims on MNPP schemes.[11]

6.2.3 Evidence-based approaches to achieving community protection

- The review concluded that a range of measures need to work together to achieve the sentencing purposes of community protection, deterrence, rehabilitation, punishment and denunciation. To achieve most effective outcomes, interventions and measures need to be implemented at all stages of the criminal justice process and consider individual factors and the nature of the offence when designing policies, programs and interventions.[12]
- The review concluded that periods spent on parole are important to reduce an offender's risk of reoffending, rehabilitate offenders and support re-integration into the community. Previous studies showed that more and not less time on parole allows offenders to engage in rehabilitative programs.[13]
- Effectiveness of programs is increased by providing continuity of care, ensuring high levels of integrity, targeting offenders who are high risk and their specific criminogenic needs and adopting therapeutic community approaches. Studies found that the quality of the relationship formed with the community corrections officer is a significant indicator of success on parole.[14]
- The review concludes that policy-making needs to be based on a detailed analysis of offenders who are currently subject to the SVO scheme to understand their specific risks, needs and circumstances, and develop individualised measures to mitigate the risk of further offending.[15]

7 Ibid 12.
8 Ibid.
9 Ibid 13-14.
10 Ibid.
11 Ibid 17.
12 Ibid 23.
13 Ibid 20, 23.
14 Ibid.
15 Ibid 26.

7 Issues identified

Based on preliminary feedback, relevant reviews and reports, case law and data analysis, stakeholder consultation and subject matter expert interviews,[1] the Council has identified a range of issues to be considered as part of this review. These issues inform the questions posed in this Issues Paper.

7.1 Objectives and nature of the SVO scheme

The Council was asked to examine whether the scheme is meeting its objectives. To do this, the Council reviewed the creation of the scheme to identify its original objectives, as well as any reviews and/or amendments to the scheme since 1997 which may have impacted those objectives. For more detail about the history of the serious violent offences ('SVO') scheme please refer to the Background Paper 1.

This section examines whether the SVO scheme is:

- meeting its objectives; and
- being applied to the nature of the offence as originally intended.

7.1.1 Is the scheme meeting its objectives?

When the SVO scheme was introduced, its stated purpose was that it would ensure sentencing would reflect the 'true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it'.[2] Courts were expected to make protection of the community the primary sentencing consideration and to reflect 'community denunciation for this type of crime'.[3] Community safety was focused on the offender being incarcerated for at least 80 per cent of their sentence, and then, if found eligible for parole, being in the community under supervision for the remaining 20 per cent. The primary objectives of the SVO scheme are therefore to keep the Queensland community safe, while also ensuring sentences imposed for these offences reflect their seriousness.

The Council's analysis of parole outcomes for SVO-declared offenders

To determine whether the SVO scheme is meeting its objectives, the Council analysed data on parole outcomes for SVO declared offences. The Council wanted to know how close to their parole eligibility date SVO offenders were being released on parole and whether there were differences in parole outcomes for different types of Schedule 1 offences.

The Council reviewed Queensland Corrective Services ('QCS') data for prisoners who were declared convicted of an SVO between July 1997 and June 2020.[4] As shown in Figure 9, of the 1,036 prisoners in the data period, over a quarter had not reached their parole eligibility date as of 30 June 2020 (n=283, 27.3%) and a further 135 prisoners had not made an application for parole (17.9%).

The majority of the remaining 619 SVO prisoners who had applied for parole, had been granted parole and released under community supervision (n=390, 63.0%). Almost one-quarter of SVO prisoners who applied for parole had their application refused (n=145, 23.4%). The remaining applications (n=84, 13.6%) did not have a parole outcome recorded.[5]

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1 At the time of drafting, the Council had conducted 31 expert interviews up to 11 August 2021. Those participants comprised members of the judiciary, legal professionals (prosecutors and defence), members of the Parole Board Queensland and victim support and advocacy agencies. For more information on the expert interviews refer to section 1.4.

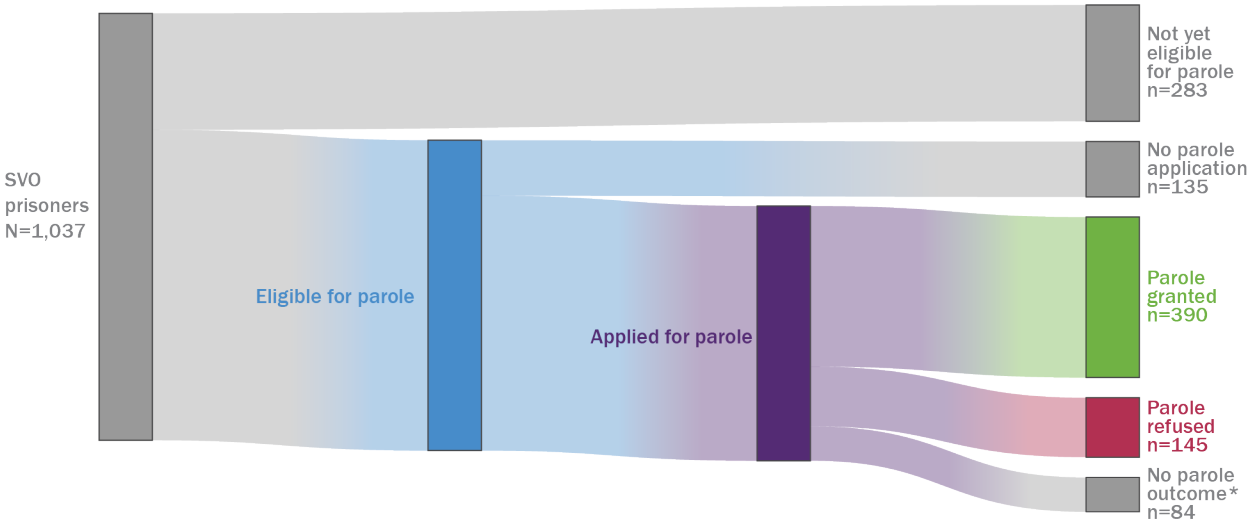
2 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice).

3 Ibid 595.

4 The data analysis presented in this section is based on data obtained from QCS and the offence classification used by QCS. It therefore differs from the offences included in other figures in this Issues Paper. Further information on the methodology and counting rules can be found in Queensland Sentencing Advisory Council, *Analysis of Sentencing and Parole Outcomes: The Who, What and How Long of Serious Violent Offences* (Background Paper 4, October 2021), Appendix 2 ('Background Paper 4').

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

Figure 9: Parole application outcomes for prisoners sentenced for an SVO declared offence, 1997-98 to 2019-20

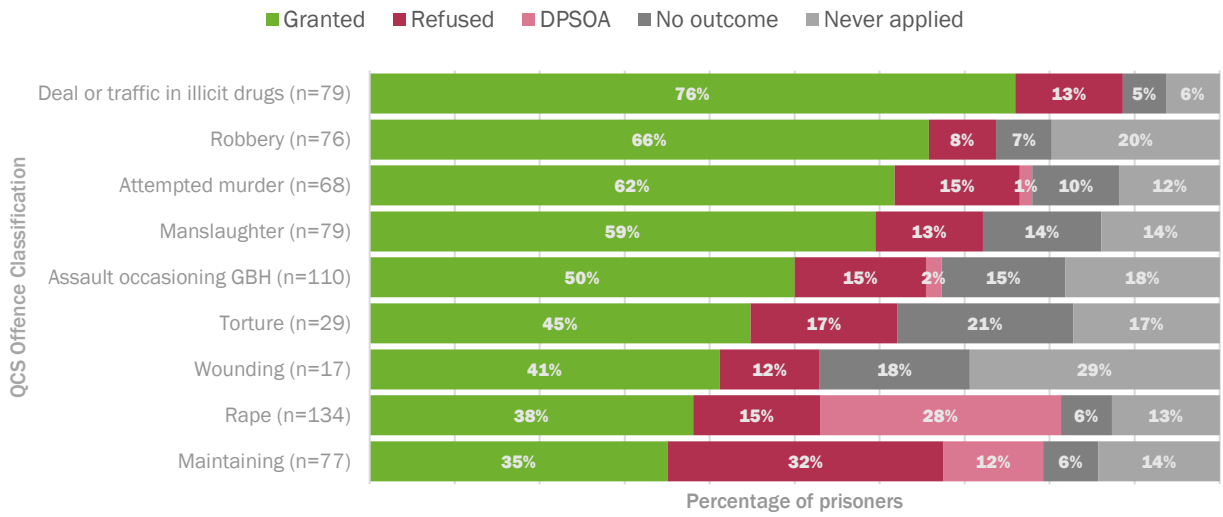


Source: QCS unpublished data.
Note: * 'No parole outcome' refers to cases in which no final outcome was recorded in the QCS system. There are many reasons for this, including situations in which the parole application was incomplete and additional information was not provided by the prisoner, the prisoner decided to withdraw the application, the application may have been cancelled, the parole application may still be in progress pending review, or other similar reasons.

The Council found that parole outcomes varied based on offence type. Figure 10 shows that prisoners convicted of sexual violence offences were the least likely cohort to be granted parole, with both the offences of rape and maintaining a sexual relationship with a child having similar rates of successful parole applications at 38.1 per cent and 35.1 per cent respectively.

Comparatively, prisoners convicted of drug trafficking were most likely to be granted parole, with only 12.7 per cent of drug trafficking offenders having their parole application refused. Parole outcomes for non-sexual violence offences ranged considerably, with between 41 and 66 per cent of prisoners granted parole.

Figure 10: Parole application outcomes for prisoners sentenced for an SVO declared offence, by offence, 1997-98 to 2019-20



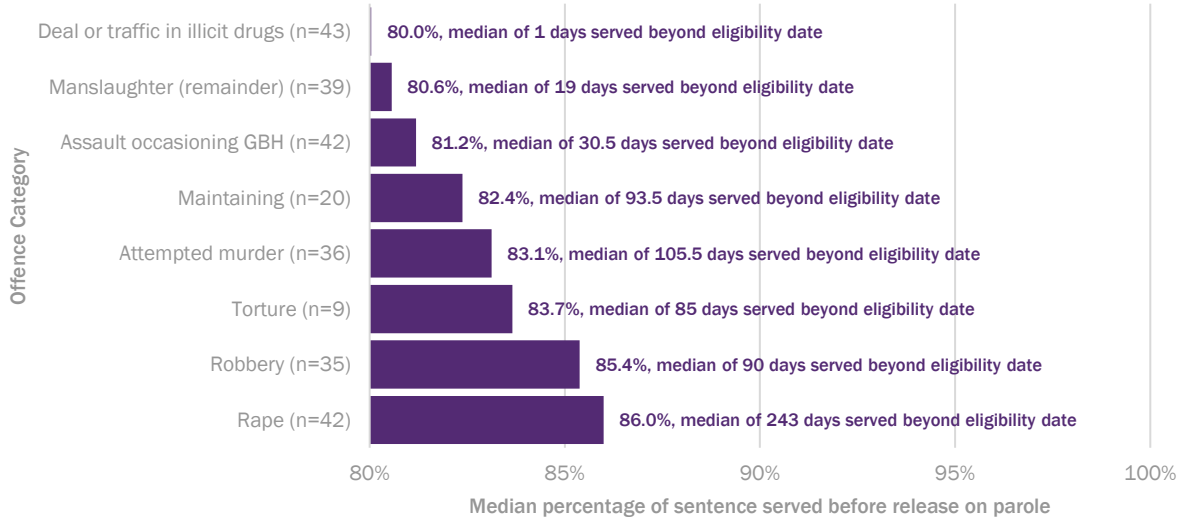
Source: QCS unpublished data.
Note: For more details on the QCS offence classification, including how it corresponds to legislative offences, please refer to Background Paper 4, Appendix 1.
'No outcome' refers to cases in which no final outcome was recorded in the QCS system. There are many reasons for this, including situations in which the parole application was incomplete and additional information was not provided by the prisoner, the prisoner decided to withdraw the application, the application may have been cancelled, the parole application may still be in progress pending review, or other similar reasons.

The Council also examined how much time prisoners with an SVO declaration served in custody beyond their parole eligibility date. Figure 11 shows prisoners convicted of sexual offences served the longest median time post their

parole eligibility date, whereas prisoners convicted of drug trafficking offences served the shortest median time – being most likely to be released as soon as they became eligible for parole.

Prisoners sentenced for the offence of rape served the longest amount of time in custody beyond their parole eligibility date, with a median of 8.1 months.

Figure 11: Median percentage of sentence served in custody before release on parole and median number of days served beyond parole eligibility date for cases declared to be an SVO – 1997-98 to 2019-2020



Source: QCS unpublished data.
For more details on the QCS offence classification, including how it corresponds to legislative offences, please refer to Background Paper 4, Appendix 1.

Stakeholder views

During initial consultation, the Council found there were different views about whether the SVO scheme was meeting its intended purposes to keep the Queensland community safe and to ensure sentences reflect the seriousness of the offences to which the scheme is applied.

Those who were of the view that the scheme is effective in meeting its objectives pointed to the serious consequences that flow from an SVO declaration – being that an offender must serve 80 per cent of their sentence (or 15 years, whichever is less) before being eligible for release on parole. This aspect of the scheme was viewed as supporting the sentencing purpose of denunciation by ensuring those who committed these types of offences served a significant period of actual custody, in line with community expectations. For Fighters Against Child Abuse Australia ('FACAA') this was particularly important where the victim was a child, with FACAA submitting that not only should the scheme be used more often, but it should be mandatory in all cases where a child under 12 is killed.[6] Sentences of at least 10 years were recommended for those offences.

Others were concerned that while the SVO scheme might result in offenders spending a longer portion of their sentence in prison, this was to the detriment of achieving the other primary objective of the scheme (community protection). Primarily these concerns related to the limited duration of community supervision SVO offenders would be subject to and whether this increased risk to the community. Bravehearts noted in its preliminary feedback that the parole period is important 'to provide for the supervision and reintegration of a person who has committed an offence' and suggested that the Council consider in its review any implications the scheme may be having on post-release supervision and reintegration of offenders in the community.[7] Subject matter expert interviews identified concerns that the scheme is not meeting its intended purpose of community protection. Some interviewees stated that the short period of time an offender is supervised in the community as a result of the scheme negatively impacts community safety, referring to the positive impact of parole on an offender's chances of successful rehabilitation and noting that the mandatory nature of the scheme may disincentivise some prisoners from participating in programs.

In the Council's 2019 *Community-based Orders, Imprisonment and Parole* Final Report, the Council briefly examined the SVO scheme, noting that the mandatory non-parole period of 80 per cent can impact community safety as offenders 'will spend less of their sentence being supervised in the community and therefore have less time to

6 Preliminary feedback (Fighters Against Child Abuse Australia).
7 Preliminary feedback (Bravehearts).

receive supervision while they re-integrate into the community'.[8] The Council received numerous submissions during the review voicing concerns about the impacts of mandatory sentences, with particular emphasis on how such schemes:

- limit the ability of the courts to respond to individual circumstances of a case;
- increase sentencing complexity (including administratively in calculating an offender's sentence); and
- limit community-based monitoring and support provided to prisoners most in need of it.[9]

Data and literature review findings

A clear consequence of the SVO scheme is that offenders who received a declaration will spend a shorter period of time on parole. The median parole eligibility dates and information about release on parole for non-declared Schedule 1 offences is presented in Background Paper 4. The data shows the significant impact that being declared convicted of an SVO can have on an offender's parole eligibility date.

For example, the parole eligibility dates for both maintaining a sexual relationship with a child and rape (without an SVO declaration) tend to be clustered around one third and half of the head sentence, with the majority being set at or below 50 per cent.[10] A small number of parole eligibility dates in the data period were also set above the 80 per cent mark. The median percentage of the sentence served in custody of these non-declared SVO sentences prior to the offender being released on parole was 46.6 per cent (maintaining) and 50.5 per cent (rape) — while the median number of days served beyond the offender's parole eligibility date was 170 days for maintaining (about 5.5 months) and 218 for rape (a little over 7 months).[11]

The University of Melbourne literature review considered the effects of longer periods of custody and shorter periods of parole on community safety. The review found there is 'consistent evidence that imprisonment has criminogenic effects and that the parole system plays a key role in protecting community safety'.[12] The review considered one Australian study which concluded that the threat of a longer sentence did not act either as a specific or general deterrent.[13] Relevant findings include:

- The effectiveness of schemes such as the SVO scheme as they apply to serious violent offences 'needs to be considered in relation to the different purposes of sentencing, as well as indicators of improved victim satisfaction, any unintended consequences, and the effect on community safety of keeping people in custody for longer';
- 'There is evidence to suggest that the setting of non-parole periods does not achieve effective deterrence and fails to support rehabilitation, but will incapacitate people in prison in the short term and do result in longer periods of imprisonment'. Therefore, schemes such as the SVO scheme, 'can be considered to achieve the sentencing purposes of punishment and denunciation'.
- People 'who have been convicted of more serious offences and who have served longer sentences will require longer periods of supervision in the community' to achieve the outcome of community protection, although 'the nature of community supervision is also critical in terms of the intensity of services provided, the types of service, and the way in which they are delivered'.[14]

The *Queensland Parole System Review: Final Report* ('QPSR') made similar observations about the potential benefit of extended periods of supervision for these types of offenders, observing that:

> Offenders who are convicted of serious violent offences or offences of trafficking drugs such as methamphetamines may be the types of offenders that *most* require an extended period of parole. These offenders could have a significant drug history that is linked to offending and the community's safety would be more assured not only by the rehabilitation and programs that can form part of a parole order but also from supervision as the parolee adjusts to life in the community after a significant period in custody.[15]

8 Queensland Sentencing Advisory Council, *Community-Based Sentencing Orders, Imprisonment and Parole Options*: *Final Report* (Report, 31 July 2019) 90 ('*Community-Based Sentencing Orders, Imprisonment and Parole Options*').
9 Ibid 87-90, 101-103.
10 Background Paper 4 (n 4) Figure 26.
11 Ibid Figure 27.
12 Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Summary Report, University of Melbourne, 2021) 13 ('*University of Melbourne Literature Review*').
13 Ibid 13.
14 Ibid.
15 Queensland Corrective Services, *Queensland Parole System Review: Final Report* (2016) [517] (emphasis in original) ('*Queensland Parole System Review: Final Report*').

7.1.2 Is the scheme being applied due to the nature of the offence as originally intended?

Case law analysis

When the SVO scheme was introduced, it was targeted at serious violent offences rather than at serious violent offenders.

> The provisions of the new Part in the *Penalties and Sentences Act 1992* will expressly reflect the Government's concern with community safety in relation to serious violent offences, as well as community denunciation for this type of crime.[16]

Since 1997, Queensland case law has developed in relation to the scheme, broadly following this approach, and in particular, to the making of discretionary SVO declarations.

In 2002, the Court of Appeal in *R v DeSalvo* ('*DeSalvo*')[17] first referred to the need for courts to identify offending 'beyond the norm',[18] when deciding whether to order a discretionary declaration. Noting in his remarks that the *Penalties and Sentences Act 1992* (Qld) ('PSA') does not provide a definition of 'serious violence offence', Williams JA said:

> The court is given an express discretionary power to declare the commission of an offence specified in that Schedule to be a conviction for a serious violent offence. That must mean that there is something about the circumstances of the offence in question which takes it beyond the norm and justifies the making of the declaration; such circumstance though need not be categorized as exceptional. Given the concentration on the 'offence' in ss 161A and 161B rather than on the 'offender', the criminal history of the offender will not ordinarily be a decisive consideration on the exercise of that discretion.[19]

The Court of Appeal tempered its language in the 2006 judgment of *R v McDougall; R v Collas* (*'McDougall and Collas*')[20] stating that:

> the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside "the norm" for that type of offence.[21]

However, recently this approach has changed. In 2020 in *R v Free; Ex parte Attorney-General (Qld)* ('*Free*')[22] the Court of Appeal determined that focusing on 'whether there are factors in a particular case which take it outside "the norm" for the type of offence' was 'too narrow'.[23] The Court observed that 'to speak of a "norm" is justifiably jarring, for victims of the offending, and also for the broader community, let alone for the sentencing judge'.[24]

The Court found that an SVO decision is part of the wider 'integrated process of arriving at a just sentence'[25] and that judges must consider factors relevant to community protection and adequate punishment when deciding whether to make a declaration, and therefore requiring an offender to serve a longer period in actual custody before parole eligibility.[26] In *Free*, when considering community protection, the Court found it was necessary to consider the offender's risk of reoffending 'driven by long standing paedophilic tendencies and long standing history of struggling with impulse control'.[27] The Court stated that 'protection of the community is relevant to both the fixing of the head sentence and the period before the offender becomes eligible for parole'.[28] The Court regarded the consideration of the period before the offender becomes eligible for parole (whether an SVO or a period less than 80%) to be 'a forecast of future behaviour'.[29] That is, 'a finding that all prospects of rehabilitation for the offender are so limited as to require them to serve all, or almost all, of the sentence imposed'.[30]

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16 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 595 (Denver Beanland, Attorney-General and Minister for Justice).
17 (2002) 127 A Crim R 229; [2002] QCA 63 ('*DeSalvo*').
18 Ibid. See also *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219 decided shortly after *DeSalvo*, which confirmed that courts have an unfettered discretion to make discretionary declarations and that 'it is not necessary that the circumstances of the case should take it beyond the 'norm' for cases of this type': at 430-1 [111] (Fryberg J).
19 *DeSalvo* (n17) 4 [15] (Williams JA) (citations omitted).
20 [2007] 2 Qd R 87; [2006] QCA 365 ('*McDougall and Collas*').
21 Ibid 97 [20]–[21].
22 (2020) 4 QR 80; [2020] QCA 58.
23 Ibid 98 [50].
24 Ibid 98-9 [51].
25 Ibid 96 [46].
26 Ibid 98 [49].
27 Ibid 106 [85] and 107 [89].
28 Ibid 107–8 [90].
29 Ibid.
30 Ibid.

This decision reinforces that a court is permitted to take into account not only the seriousness of the offence and the harm caused to the victim, but also factors personal to the offender such as their criminal history and antecedents when determining whether a declaration is warranted.[31]

Stakeholder views

During preliminary consultation, some stakeholders voiced concerns about placing too much focus on an offender's prior criminal history when applying the scheme, with the suggestion made that by focusing on the offender, rather than the offence, the scheme is not being implemented according to its original intent. Sisters Inside further questioned the efficacy of long-term imprisonment as a deterrent of future crime.[32]

Additional concerns were raised that sentencing courts are often not provided with sufficient information about the offender's risk to make an informed decision about their likelihood of reoffending. Generally, psychiatric and/or psychological reports about the offender are provided by the defence, and it is at the discretion of defence counsel as to whether a report will be used in sentencing. This means that judges rarely receive reports commissioned by the prosecution. This affects the ability of a judge to be informed about the drivers of the offender's behaviour and their offending, the recidivism risk and how they will respond to rehabilitation.

The Australian Lawyers Alliance was concerned that the scheme may be 'predominantly used for people with extensive criminal histories' and whether this indicated a 'relationship between recidivism and serious violent criminal offending'.[33]

Data and research findings

The Council was only able to undertake a very limited analysis of prior offending and, for this reason, focused on whether SVO offenders were more likely to have been sentenced to a term of imprisonment in the 5 years prior to being sentenced for the offence or offences that attracted an SVO declaration.[34] Offenders with long periods of prior imprisonment (i.e., for very serious prior offending) are undercounted due to having been in custody for all or most of the data period, which limits the amount of time that the person was able to offend in the community. Analysis of specific offences by type of SVO declaration resulted in very small cell sizes across many categories, which further limited this analysis.

Overall, cases that attracted a mandatory SVO declaration had a higher proportion of prior imprisonment, whereas cases that did not have an SVO declaration had a lower proportion of prior imprisonment. For discretionary SVO declarations, only four offences (all of which were non-sexual violence offences) had a large enough sample size to allow comparison. These were malicious acts, grievous bodily harm, robbery and torture. Excluding those offences for which the number of cases was too small for the purposes of comparison, those offenders who were convicted of an offence for which an SVO declaration was made were generally more likely to have been sentenced to imprisonment in the previous 5 years — with the exception of offenders convicted of torture where the reverse was true.

Offenders convicted of the offence of maintaining a sexual relationship with a child were the least likely to have had a prior sentence of imprisonment (ranging from 2.3% in circumstances where an SVO declaration was not made, to 2.6% for those subject to a mandatory declaration).

The Council's case analysis, based on a review of sentencing remarks for the period 1 January 2019 to 28 February 2021, showed that in circumstances where the making of an SVO was discretionary, the lack of relevant prior convictions was mentioned as one reason why an SVO declaration was not appropriate to be made in some circumstances, although in other cases, the lack of prior serious sexual or violent offending was not determinative.[35]

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31 See also *R v Kampf* [2021] QCA 47 in which the Court of Appeal, in hearing an appeal against sentence imposed for armed robbery in company with personal violence and grievous bodily harm, when considering the factors set out in section 9(3) of the *Penalties and Sentences Act 1992* (Qld), noted that the making of an SVO declaration is 'part of the sentence' and expressly recognised that 'an offender's criminal history may be relevant to the exercise of discretion whether or not to declare a conviction for an offence to be a conviction of a serious violent offence': at [57]–[59]. This case and other Court of Appeal decisions that have considered this issue are discussed in section 3.2.6 of Background Paper 3: Queensland Sentencing Advisory Council, *Analysis of Key Queensland Court of Appeal Decisions and Select Sentencing Remarks* (Background Paper 3, October 2021) ('Background Paper 3').

32 Preliminary feedback (Sisters Inside).

33 Preliminary feedback (Australia Lawyers Alliance).

34 Background Paper 4 (n 4) section 3.6.

35 Background Paper 3 (n 31) section 10 'Reasons SVO declaration made/not made where discretionary'.

DISCUSSION QUESTIONS: Objectives and focus of the SVO scheme	
2.	**Are the purposes of the SVO scheme clear? Is any additional legislative guidance required?**
3.	**Is the current scheme meeting its intended objectives?**
4.	**Is the SVO scheme, as it is currently being applied, targeting the right types of offences and offenders?**
5.	**How, if at all, should a person's criminal history and other personal circumstances factor into whether an SVO declaration is made?**
6.	**How well are prison and post-prison rehabilitation or reintegration measures working for people who have been declared convicted of an SVO? How can they be improved?**

7.2 Impact on guilty pleas

The Council examined the rate of guilty pleas for Schedule 1 offences and found that the rate of guilty pleas was high for offences commonly attracting an SVO. However, over the 9-year period, the analysis found that, with the exception of grievous bodily harm, guilty plea proportions were consistently lower for declared SVO cases across all offences – see Figure 12.

Figure 12: Percentage of cases with guilty plea, by offence and SVO status – 2011-12 to 2019-20

Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Note: A small number of homicide cases involved a plea of 'not guilty' to the offence of murder, where the defendant was later found guilty of the lesser charge of manslaughter. The judgments involving SVO declarations were reviewed and have been re-coded as 'not guilty'. Given the volume of non-SVO cases, these remain coded as 'no plea' in the chart above.

Figure 12 shows this difference was particularly stark for attempted murder, with offenders pleading guilty in 80.0 per cent (non-SVO) and 48.9 per cent (SVO) of cases respectively. For manslaughter, offenders pleaded guilty in 88.1 per cent of non-SVO cases, compared to only 62.5 per cent in cases attracting an SVO. This suggests that due to the seriousness of these offences and the possibility of a sentence of imprisonment of 10 years or more, offenders were less willing to plead guilty. In addition, there are complex evidentiary matters at play in these types of cases and some offenders convicted of manslaughter might initially have been charged with murder, which carries a mandatory life sentence on conviction.

However, for some offences, rates of guilty pleas were largely the same for declared SVO and non-SVO declared offences. In particular, grievous bodily harm with guilty pleas at 93.4 per cent (non-SVO) and 93.3 per cent (SVO), rape with 66.5 per cent (non-SVO) and 69 per cent (SVO), maintaining a sexual relationship with a child with 75.3 per cent (non-SVO) and 69.2 per cent (SVO) and drug trafficking with 98.9 per cent (non-SVO) and 90.8 (SVO). As with the homicide offences, there may be complex evidentiary matters at play. For example, sexual violence offences often proceed to trial as there is a good chance the matter will be discharged.[36] Comparatively, there is often a strong prosecution case for drug trafficking.

[36] The Queensland Law Reform Commission reviewed 135 rape and sexual assault trials run in 2018 and found that only one-third were convicted (36%, n=48) with the majority being discharged (65%, n=87): Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 31 [3.21].

7.3 Limited guidance in making discretionary SVO declarations

7.3.1 Statutory guidance

The limited statutory guidance for making discretionary SVO declarations was raised with Council in preliminary consultation and feedback, during expert interviews and has been commented on frequently by the Court of Appeal.

As noted in section 7.1.1, the primary objective of the SVO scheme is to keep the Queensland community safe, while also ensuring sentences imposed for these offences reflect their seriousness. However, when the scheme was legislated, Part 9A of the PSA did not include the purpose of the scheme, nor did it define a 'serious violent offence' nor detail how courts were to determine discretionary declarations.

As discussed in section 3.1.3, Part 9A provides minimal guidance for judicial officers in relation to discretionary declarations. The only guidance the PSA provides for discretionary declarations is that a person: [37]

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

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

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

> The Act gives no specific guidance as to what factors should be considered by a sentence judge exercising the discretion pursuant to s. 161B(3) of the Act…In the absence of guidance from the Act one would expect that normally no such declaration would be made unless there were reasons to justify the making of a declaration.[38]

In the same judgment, McPherson JA noted that:

> The provisions of Part 9A provide no specific guidance about the way in which the discretion under s. 161B(3) is to be exercised in making a declaration of a serious violent offence. That being so, the general principles or considerations ordinarily governing the sentencing of offenders fall to be applied so far as they are relevant and applicable to a matter like this.[39]

Part 9A provides more guidance in relation to the making of discretionary declarations for non-Schedule 1 offences. A court may order a discretionary declaration for non-Schedule 1 offences that 'involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person' or 'that resulted in serious harm to another person'.[40] The PSA defines 'serious harm' as 'any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent'.[41]

Serious violence is not defined in the PSA, however when sentencing offences involving violence, courts are required to consider 'the nature or extent of the violence used, or intended to be used, in the commission of the offence'.[42] When the scheme was being introduced, the then Attorney-General stated in his second reading speech that 'the new Part 9A will provide that in considering the question of the protection of the community, a court must have regard to'[43] a list of 11 factors. While Part 9A does not do this in the specific way stated, the 11 factors now are reflected in section 9(3).[44] One of these factors is 'the nature or extent of the violence used, or intended to be used, in the commission of the offence'.[45]

There has been no review of the SVO scheme since its creation and very limited amendments to Part 9A of the PSA. The most significant amendment to Part 9A to provide additional guidance was the insertion of section 161B(5) in 2010. This amendment requires courts to treat violence against, or death of a child under 12 years as an aggravating factor 'in deciding whether to declare the offender to be convicted of a serious violent offence'.[46] The primary objective of the change was 'to strengthen the penalties imposed upon…offenders who commit violence

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37 *Penalties and Sentences Act 1992* (Qld) s 161B(3) ('PSA').
38 *R v Collins* [2000] 1 Qd R 45, 48 [14] (McMurdo P).
39 Ibid 56 [46] (McPherson JA).
40 PSA (n 37) s 161B(4).
41 PSA (n 37) s 4.
42 PSA (n 37) s 9(3)(e).
43 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 596 (Denver Beanland, Attorney-General and Minister for Justice). Two further statements on that page repeat the intention that the 11 factors apply to serious violent 'offenders' (a term which does not appear in the PSA, as distinct from serious violent 'offences' as defined).
44 In 1997 this was section 9(4) in Part 2, and it was also introduced by the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld).
45 PSA (n 37) s 9(3)(e).
46 Inserted by the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 7.

upon a young child and/or who cause the death of a young child',[47] to ensure that genuine regard is had to the special vulnerability of these young victims'.[48] In 2019 the Court of Appeal discussed the application of section 161B(5) in *R v O'Sullivan and Lee; Ex parte Attorney-General (Qld).*[49] In relation to this amendment the Court stated:

> This sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[50]

However, aside from this amendment there have been no other changes to the original legislation.

Due to the limited legislative guidance on the scheme, Queensland case law has developed to provide guidance to judicial officers and legal professionals. Judicial interpretation of Part 9A is set out in Background Paper 1 in greater detail, however the most recent judgment of note on this matter, *R v Free,*[51] should be considered. Please refer to Background Paper 3 for more information about Queensland Court of Appeal case law.

7.3.2 Guidance for prosecutors

Courts rely on the submissions made at sentence by the prosecution and defence. For discretionary declarations, the first step is whether the prosecutor makes submissions to the court asking for an SVO declaration. Judges may also stop proceedings and request both parties make submissions in relation to the scheme, however this is likely to be done only for the most extreme examples.[52] The Council's preliminary analysis of sentencing remarks found that during the 2-year review period, of the 88 Supreme Court cases and 141 District Court cases, a total of 90 SVO declarations were made in both courts. Of those 90 declarations, discretionary declarations were made in 4 cases in the Supreme Court and 18 cases in the District Court.[53] Of the cases where a declaration was not made, a common reason given was that the prosecution did not ask for one.

The Director of Public Prosecutions *2020 Director's Guidelines* do not provide any guidance for public prosecutors on the SVO scheme.[54]

7.3.3 Stakeholder views

During the expert interviews, participants identified the following circumstances where a submission calling for a declaration might be made — although these are not exhaustive, and the decision often involves a combination of these factors:

- extreme levels of violence and/or sexual violence were involved;
- weapons were used;
- significant injury was inflicted;
- the violence occurred in public (e.g. taking a weapon to a public place with the potential to injure many people);
- the offence was 'out of the norm' and 'shocking';
- the offence was premeditated and the offender intended to harm the victim;
- offences committed aimed to humiliate and degrade the victim;
- the victim was vulnerable and the offender was in a caregiving or domestically violent relationship with the victim;
- the persistent nature of the offending conduct — particularly in the case of offenders being sentenced for the offence of maintaining a sexual relationship with a child; and
- for drug trafficking offences, the scale of the drug trafficking operation.[55]

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47 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 2.
48 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2308 (Cameron Dick, Attorney-General and Minister for Industrial Relations).
49 (2019) 3 QR 196; [2019] QCA 300.
50 Ibid 231 [93].
51 *Free* (n 22).
52 This was done in the recent District Court decision of *R v MJB* [2021] QDC 170. This case involved the infliction of an acquired brain injury and lifelong conditions to a 7week old baby by his father. The judge ultimately declined to exercise his discretion to make an SVO declaration on the basis of the mitigating factors and ordered a 7-year head sentence with no parole eligibility date set.
53 Background Paper 3 (n 31).
54 Director of Public Prosecutions, *Director's Guidelines* as at June 2020 (under review).
55 Many of these factors were identified in the Council's preliminary analysis of sentencing remarks in Background Paper 3 (n 31) – see section 3.1.3 for more details.

Notably, section 161B(5) of the PSA was not mentioned and the Council's sentencing remarks analysis did not identify its application in any cases reviewed. Although outside the Council's coding timeframe, there has been some mention of this provision in an August 2021 decision,[56] however to the Council's knowledge this is the only case, excluding *R v O'Sullivan and Lee; Ex parte Attorney-General (Qld),*[57] where section 161B(5) has been mentioned.

Some participants in expert interviews noted that the limited guidance available about when to make a discretionary SVO declaration means that legal practitioners and members of the judiciary have different interpretations of circumstances that warrant a discretionary SVO declaration. Participants also raised concerns that once the possibility of an SVO declaration is raised in court or it is clear that a case might receive a sentence over 10 years, the serious consequences of a declaration lead to arguments becoming binary (focused solely on whether an SVO declaration should be made or not). This then limits parole eligibility date considerations to deciding whether parole eligibility should be set at the statutory 50 per cent, or 80 per cent under the SVO scheme, rather than consideration of parole eligibility being set somewhere between these two points based on the individual circumstances of the case.

7.3.4 Other models in the PSA

The Council has considered whether other sentencing schemes in the PSA include statutory guidance for the courts. Part 10 of the PSA sets out the process for courts ordering an indefinite sentence and provides statutory guidance on the application of this serious sentencing order.[58] Part 10 sets out the factors which may identify an offender as a serious danger to the community and then how the court is to determine whether this is the case.

Section 163(3)(b) states 'the court must be satisfied the offender is a serious danger to the community because of:

i. the offender's antecedents, character, age, health or mental condition; and
ii. the severity of the qualifying offence; and
iii. any special circumstances.'

This is followed by section 163(4) which states 'when determining whether the offender is a serious danger to the community, the court must have regard to:

a) whether the nature of the offence is exceptional; and
b) the offender's antecedents, age and character; and
c) any medical, psychiatric, prison or other relevant report in relation to the offender; and
d) the risk of serious harm to members of the community if an indefinite sentence were not imposed; and
e) the need to protect members of the community from the risk mentioned in paragraph (d).'[59]

Although the indefinite sentencing regime is very different to the SVO scheme, the way section 163 is drafted provides some guidance as to the types of factors that might be identified in legislation and how these might be framed.

If specific statutory criteria were introduced, consideration would also need to be given to how any additional guidance is intended to operate in conjunction with the existing purposes, principles and factors set out in section 9 of the PSA — including guidance provided regarding the sentencing of offenders for offences that involved the use, or attempted use, of violence against another person or that resulted in physical harm, and offences of a sexual nature committed in relation to a child.

DISCUSSION QUESTIONS: Guidance on the making of an SVO declaration and provision of reasons	
7.	**Is the current guidance and the information provided to courts on the making of a discretionary declaration sufficient? If not, what additional guidance or information is required?**
8.	**Should there be a statutory requirement for a court to provide reasons for declining to make a declaration when asked by the prosecution to do so?**

7.4 Impact on court sentencing practices

The Council has identified a range of issues and trends emerging from the application of the SVO scheme, which may be creating inconsistencies or serving to constrain the sentencing process. These issues will briefly be examined in this paper and submissions are invited in response.

The issues examined in this section include:

56 *R v MJB* [2021] QDC 170, 3 [5], 11 [55] and 19 [108].
57 (2019) 3 QR 196; [2019] QCA 300.
58 Indefinite sentences are prison sentences for an indefinite period, usually for serious violent or sexual offences. The court is required to review the indefinite sentence to see if the order is still needed.
59 PSA (n 37) s 163(5) states the court is not limited to the factors listed in subsection 4.

- the SVO scheme may distort sentencing practices by exerting downward pressure on head sentences;
- the scheme adds unnecessary complexity to sentencing, for example in relation to dealing with multiple offences, parity and resulting in unintended sentencing outcomes; and
- the mandatory nature of the scheme may result in unjust outcomes.

7.4.1 The SVO scheme may be exerting downward pressure on head sentences

When the Penalties and Sentences (Serious Violence Offences) Amendment Bill was being introduced in 1997, the then Attorney-General addressed the issue of whether the scheme would affect head sentences:

> The public need not fear that the 80% rule and the intention of Parliament will be circumvented by the lowering of sentences or tariffs. The public can have every faith in Queensland's criminal courts.[60]

However, despite that assertion by the then Government, the Council has heard and identified through case law that the SVO scheme is, in fact, having this effect. The scheme does so in the following ways, which will be discussed further below:

- a just sentence outcome may warrant sentencing an offender to less than 10 years where there are mitigating factors that cannot otherwise be taken into account in setting an earlier parole eligibility date; and
- a just sentence outcome may warrant sentencing an offender at the 'lower end of the applicable range' and/or reduce the head sentence where an SVO declaration is made (for both mandatory and discretionary declarations).

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

The Court of Appeal confirmed this approach in *R v Ali.*[61] In that case, Burns J concluded that the only way to arrive at a sentence that is just in all of the circumstances, where the sentence is 10 years or more and there are mitigating factors, is to reduce the head sentence.[62]

The Court of Appeal has also confirmed that as part of an integrated approach to sentencing, courts may consider that in fashioning a sentence that is just in all the circumstances, where an SVO declaration is made, the offender should be sentenced towards the lower end of the applicable range and/or reduce the head sentence. In *R v Lawler*[63] the Court of Appeal dismissed Mr Lawler's appeal against an 8-year sentence with an SVO declaration made in relation to the offence of manslaughter. The Court concluded the sentencing judge had sentenced appropriately at the lower end of the range with an SVO declaration.[64] However, the Court of Appeal has also affirmed that a sentencing judge is not obliged to sentence at the lower end of the range.[65]

Other Courts of Appeal in Australia have observed that where mandatory minimum non-parole period ('MNPP') schemes operate the usual sentencing principles continue to apply, such as a discount for a plea of guilty:

> there will be a compression of sentences towards the lower end of the range, with offences at the bottom of the range of culpability treated effectively in the same way as those which are towards the lower end, but not at the extreme lower end, of culpability.[66]

The Court has also made clear that structuring sentences to avoid the operation of the SVO scheme, as was proposed on appeal in *R v Carrall*,[67] was something the Court will not do.[68]

The Council identified in 2018 and 2019, in two reviews, that the SVO scheme effectively operates counter-productively because, by removing the court's discretion, the ways to express the effect of mitigating factors (a

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60 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice).
61 [2018] QCA 212.
62 Ibid [28] (Burns J, Fraser and Gotterson JJA agreeing).
63 [2020] QCA 166.
64 Ibid [61]–[62].
65 *R v Carrall* [2018] QCA 355 [19] (Sofronoff P), citing *R v Cowie* [2005] 2 Qd R 533, 538 [19] (Keane JA and McMurdo J).
66 *Mammoliti v The Queen* (2020) 281 A Crim R; [2020] VSCA 52, 517 [23] (McLeish and Emerton JA) citing *Director of Public Prosecutions (Cth) v Haidari* (2013) A Crim R 134 at 144 [42]; [2013] VSCA 149 [42] and *Atherden v Western Australia* [2010] WASCA 33 at [42]-[43] (Wheeler JA, McLure P and Owen JA agreeing).
67 Ibid.
68 Ibid. The appellant sought to have his 10-year sentence for drug trafficking reduced on the basis that the mandatory 80 per cent non-parole period was manifestly excessive. Mr Carrall argued he should be sentenced to 9.5 years for trafficking with a cumulative 6-months' imprisonment for the other two offences, so as to avoid the scheme at [17], [22].

fundamental aspect of a justice system in a democracy and an issue not referred to in the Explanatory Notes or Parliamentary speech) are severely limited:

> A review of cases where an offender has been declared to be convicted of an SVO indicates that head sentences are being reduced to take into account a plea of guilty and other matters in mitigation....
>
> Reducing a head sentence to take into account mitigating factors that cannot otherwise be taken into account in the setting of a parole eligibility date due to the mandatory nature of these provisions can result in a head sentence being imposed that does not reflect the true criminality of the offending.[69]

The current review is in part a response to Advice 3 in the Council's *Sentencing for Criminal Offences arising from the Death of a Child* Final Report.[70] In that report, the Council had observed that:

> the SVO scheme may have had the unintended consequence of placing downward pressure on head sentences for child manslaughter – including due to courts' consideration of the impact of the non-parole period should a sentence of 10 years or more be imposed. When setting a sentence of 9 years, the court still has the ability to take an offender's plea and other mitigating factors into account in setting the appropriate parole eligibility date; however, once the sentence is set at 10 years or higher, the court's discretion to set the date for parole eligibility is removed.[71]

The Court of Appeal recently remarked on the distorting effect of the SVO scheme in sentencing. In the 2019 decision of *R v Sprott; Ex parte Attorney-General (Qld),*[72] the Court of Appeal dismissed an appeal against a 9.5-year sentence for two counts of attempted murder (with parole eligibility at 4.5 years), on the basis that the case involved 'singular circumstances'[73] which required the sentencing judge to 'give substantial weight to the factors in mitigation'.[74] In his remarks, the President observed that in this case the SVO scheme impaired the court's ability to sentence appropriately:

> But for the distorting effect of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld), which introduced the regime under which prisoners sentenced to 10 years or more must serve at least 80 per cent of the sentence before being eligible for parole, this was a case which might have been dealt with by the imposition of a sentence of 10 to 12 years accompanied by a parole eligibility date after about four years. But that option was unavailable.[75]

The Council examined sentence length data for the 7 most common Schedule 1 offences sentenced between 2011–12 and 2019–20 as part of its analysis. Those offences were: maintaining a relationship with a child; rape; trafficking in dangerous drugs; attempted murder; manslaughter; malicious acts; and torture. This analysis was descriptive in nature. It was not possible to conclude anything specific about the impact of the SVO scheme on sentence length, primarily due to the fact that there was no data available on how sentencing outcomes would have been distributed had the SVO scheme not been introduced.

Analysis of sentencing outcomes for the offence of drug trafficking showed an increased number of cases sentenced at the 9-year mark, relative to sentences of 8 and 10 years, which may indicate that sentences are gravitating to the 9-year-mark – see Figure 13. However, other offences such as malicious acts and torture did not show a considerable increase in sentences at the 9-year mark. The sentence distribution for attempted murder showed a marked increase at 10 years and higher, reflecting the seriousness of those offences, the harm involved and the high culpability (blameworthiness) of offenders.

Analysis of the offence of manslaughter showed a clear central tendency of 9 years; however, the analysis was inconclusive as to whether a significant number of sentences would have had longer head sentences in the absence of the SVO scheme. The analysis of the offences of rape and maintaining a sexual relationship with a child both showed bi-modal distributions, reflecting the broad range of offending that is covered by these offences, with a lower range of sentencing outcomes (3-5 years for maintaining; 2-3 years for rape) and a higher range of outcomes (8 to 10 years for maintaining; 5 to 7 years for rape).

While these findings cannot be established in an empirical way, the Council's analysis of sentencing remarks over a 2-year period shows that for offences where the sentencing range straddles the 10-year mark, such as rape and manslaughter, the courts often have difficulty in arriving at a just and appropriate sentence. For example, in one case where maintaining a sexual relationship with a child was the most serious offence charged,[76] the sentencing

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69 *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 8) 90. See also Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences arising from the Death of a Child* (Final Report, 31 October 2018) xxxix, 158 [9.4.4].

70 See Terms of Reference, Appendix 1, para 1 which references this advice.

71 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences arising from the Death of a Child* (Final Report, 31 October 2018) xxxix, 158 [9.4.4] ('*Sentencing for Criminal Offences arising from the Death of a Child*').

72 [2019] QCA 116.

73 Ibid [35] (Sofronoff P).

74 Ibid [40].

75 Ibid [41].

76 QDC 2019/57.

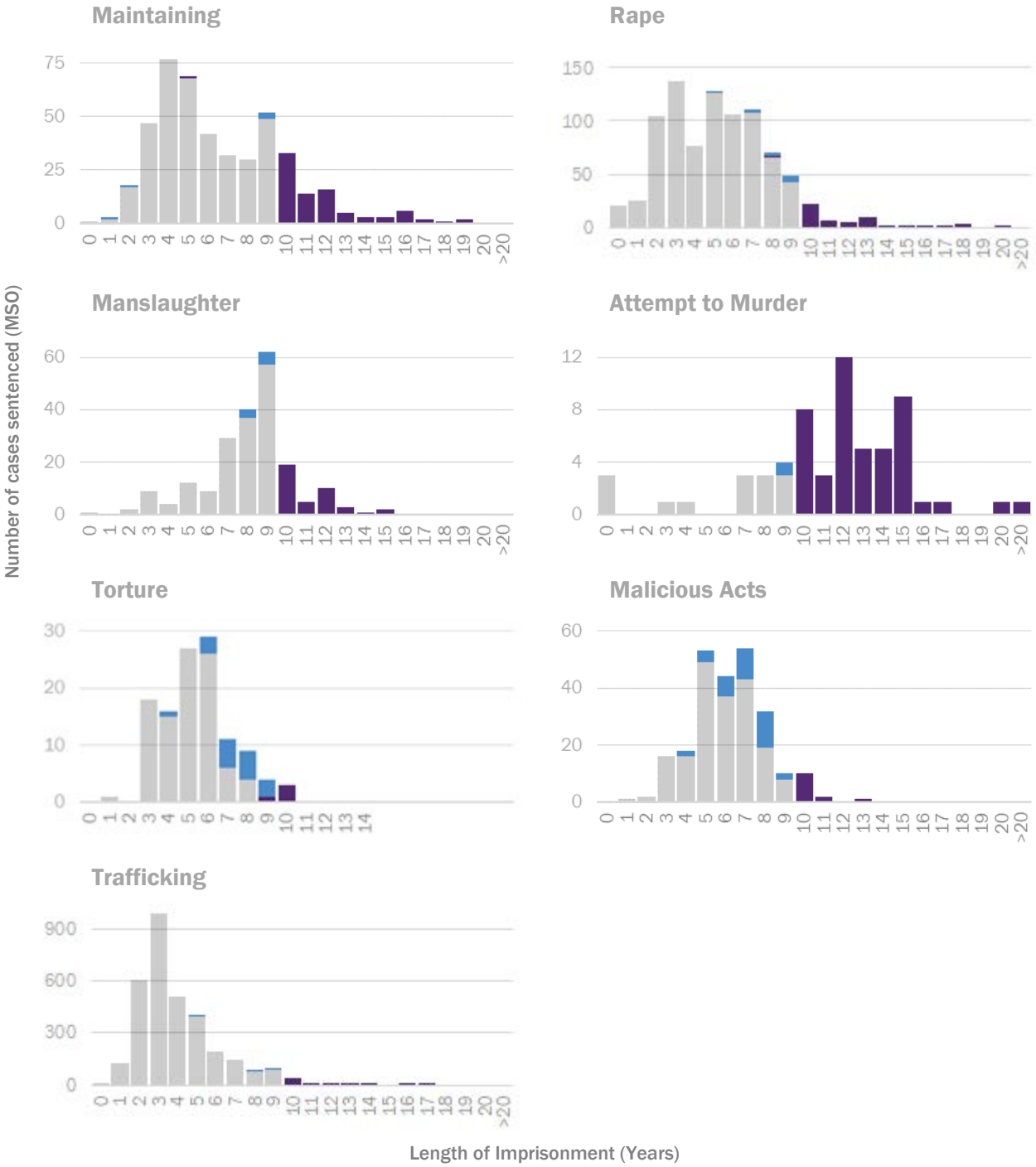
judge in reducing the sentence to 9.5 years with no parole eligibility set, noted that while 'a sentence in the order of nine to 10 years imprisonment would be the appropriate range', a sentence of 10 years imprisonment would result in the automatic declaration for the most serious charge.[77] While this was 'not the determinative issue on sentence', they had to take into account the fact the defendant had entered pleas of guilty, which saved the complainant from having to give evidence and be cross-examined.[78] This would not be possible if a sentence of 10 years' imprisonment was imposed. The sentence was reduced to 9.5 years with no parole eligibility date set (meaning the offender would be eligible to apply for parole at the half-way mark).

In another District Court decision involving two counts of rape, aggravated burglary and assault occasioning bodily harm committed by a young offender, the sentencing judge, in imposing a 9-year sentence, noted the consequences should the sentence have been one of 10 years or more. While declining to make a declaration, they did not set a parole eligibility date for reasons including the 'serious nature' of the offending.[79]

Interviewed experts also commented on their impression of the scheme's impact on sentencing practices, noting that mitigating factors are recognised by courts in practice by sentencing under the 10-year mark or by adjusting the head sentence in cases in which a discretionary SVO declaration is made. Several participants were of the view that courts adjusted head sentences down for the purpose of ensuring a just sentencing outcome where this could not otherwise be reflected by setting an earlier parole eligibility date. The Council heard that in this sense, the scheme interferes with judicial officers' instinctive synthesis approach to sentencing.[80]

77 Ibid p. 3, lines 27–30.
78 Ibid p. 3, lines 31–40.
79 QDC 2019/17 p. 5, line 23.
80 For a discussion of the instinctive synthesis approach, see *Markarian v The Queen* (2005) 228 CLR 357.

Figure 13: Distribution of imprisonment length for cases with an SVO declaration, MSO – 2011-12 to 2019-20



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020

DISCUSSION QUESTION: Impact of the SVO scheme on court sentencing practices

9. How is the SVO scheme affecting court sentencing practices? For example:
   (a) What is the impact of the SVO scheme on the length of head sentences?
   (b) Where the automatic application of the scheme is avoided due to the sentence falling below 10 years, how does this affect the setting of parole eligibility dates?

7.4.2 The SVO scheme and the complexity of the sentencing process

When the Council examined the case law for the SVO scheme, several examples were identified demonstrating that the scheme was making sentencing more complex for the courts. Many of these issues were also raised with the Council through preliminary feedback and expert interviews. These are discussed below in no particular order.

The SVO scheme and dealing with multiple offences

One of the main areas of complexity caused by the SVO scheme is sentencing offenders for multiple offences where only some of those convictions are serious enough to warrant, or which can be subject to an SVO declaration.

There are two ways to sentence multiple offences. The general sentencing approach to 'imposing sentences for a number of distinct, unrelated offences'[81] is to fix a sentence for the most serious offence, which is higher than it would be alone, but takes into account the overall criminality involved in the other offences. This is referred to as the 'global sentence'. This approach is complicated, however, in circumstances where the head sentence for an offence to which an SVO declaration attaches is increased on the basis that there is other offending for which a declaration is not (or cannot be) made.[82] In those circumstances it is necessary for the sentencing judge to moderate the sentence to recognise the impact of the SVO scheme.[83]

The other way to deal with this situation is to impose two or more cumulative sentences, however the Court of Appeal has noted such an approach is vulnerable to 'inadvertent error' due to 'unintended consequences on parole eligibility and release dates'.[84] In 2020 in the case of *R v RBD*[85] the Court of Appeal agreed with the sentencing judge's approach to cumulative sentences for three 'sets' of offending, with SVO declarations on all of the Schedule 1 offences. The applicant was sentenced to a total effective sentence of 12 years, with a parole eligibility date of 9.6 years.

The SVO scheme and unintended sentencing outcomes

Due to the complexity of making an integrated sentencing order with an SVO declaration, there are cases where judicial officers make orders in relation to the scheme which have resulted in sentencing outcomes that were not intended by the court. This most often occurs when dealing with multiple offences committed over different time periods or with different complainants, and where some of the offences may be subject to the SVO scheme.

For example, in *R v Dutton* ('*Dutton*'),[86] the sentencing judge made an SVO declaration on the 7-year term of imprisonment for rape and sentenced the other six offences to a head sentence of 3 years, which was to be served cumulatively to the 7-year sentence. This meant Mr Dutton was sentenced to an effective head sentence of 10 years, with the sentencing judge intending that parole eligibility would be reached at 7 years.[87] However, because one of those six offences (attempted rape) was also a Schedule 1 offence, section 161C of the PSA was enlivened and Mr Dutton was required to serve 80 per cent of the 10 years, until he was eligible for parole (so parole eligibility would be 8 years).[88] This was not the effect the sentencing judge had intended. The Court of Appeal determined that it was appropriate to resentence the appellant 'to preserve the outcome his Honour evidently had in mind in arriving at the sentence he imposed'.[89]

The Council's analysis of sentencing remarks over a 2-year period identified some examples similar to *Dutton*. For example, in one instance[90] the court structured the sentence to:

- reduce the head sentence for the most serious two charges of manslaughter to 13 years (still at a level attracting the automatic declaration), ordering a sentence for a related offence (a third charge of dangerous driving causing grievous bodily harm) to run concurrently; and
- order an 18-month sentence for serious assault with a circumstance of aggravation to be served cumulatively on the 13-year sentence, with lesser concurrent sentences for other related offences, with parole eligibility set at one third.

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81 *R v Nagy* [2003] QCA 175, [39] (Williams JA).
82 *R v Derks* [2011] QCA 295, [44] (Fryberg J) ('*Derks*').
83 *R v Baker* [2021] QCA 150, [17]–[24]. Cf *R v Hasanovic* [2010] QCA 337 in which the Court determined 'the sentencing judge was not required to reduce the total period of imprisonment under the sentences for the SVOs to reflect that for the offences that were not SVOs the applicant would otherwise have been entitled to parole eligibility at an earlier date than the 80 per cent point' at [41].
84 *Derks* (n 82) [26] (McMurdo P).
85 [2020] QCA 136.
86 [2005] QCA 17 ('*Dutton*').
87 Ibid [12] (McPherson JA).
88 Ibid [15].
89 Ibid.
90 QSC 2020/34 (subject to appeal – lodged 21/6/21).

As a consequence of this approach, the parole eligibility date set was lower than would have been the case had the 80 per cent requirement applied to the total sentence of 14 years and 6 months (at about 10 years and 11 months, instead of at 11 years and 7 months). The sentencing judge explained the sentence had been structured in this way so as not to fall into the same error found by the Court of Appeal in *Derks*.[91]

The Council's sentencing remarks analysis identified a second example[92] involving a head sentence of 14 years, comprising a 13-year sentence for drug trafficking and a 12-month cumulative sentence for non-trafficking charges. The parole eligibility would be reached after serving approximately 10 years and 11 months. This suggests that while this is likely to apply to a small number of cases, the scheme is contributing to sentencing complexity.

Another more recent example is *R v Stable (a pseudonym)*.[93] The judge sentenced Mr Stable to an accumulated head sentence of 12 years, which comprised several sets of cumulated terms of imprisonment for 20 serious sexual offences committed against his daughter (both as a child and an adult) and all three of his granddaughters.[94] The sentencing judge did not make an SVO declaration because he 'thought the total term of 12 years' imprisonment would engage the provisions of the Act [s 161A] … which would refer the applicant to serve 80 per cent of his term of imprisonment before becoming eligible for parole'.[95] However, 'that was not the effect of the orders' and the cumulative total for scheduled offences was 'only six years and six months'.[96] The Court confirmed that the only way the sentencing judge's decision would engage the SVO scheme was if the offender 'is sentenced to a term of 10 years or more for a single scheduled offence or to a cumulative term of 10 years or more for several scheduled offences'.[97] The Court of Appeal agreed there was an error and considered whether another sentence should be set. To do this the Court reviewed Queensland[98] and High Court sentencing case law[99] for serious child sexual offences, and legislative amendments that had come into effect since the offender commenced his offending (e.g. increased maximum penalties and significant changes to sentencing practices and the PSA).[100] The Court concluded that 'a 12-year sentence with parole eligibility deferred until the applicant had served 80 per cent of that period was a sentence that was well within the proper range' and gave leave to Mr Stable to consider whether he wished to continue his appeal.[101]

The SVO scheme and parity

Another complexity is how the SVO scheme operates in the context of the common law principle of parity.[102] The parity principle requires a court to assess differences between co-offenders including their 'age, background, criminal history, general character and the part each has played'.[103] This issue was raised during expert interviews with some participants commenting on the scheme's impact on parity.

The scheme, in some circumstances, operates inconsistently with the principle of parity. This typically arises when the making of an SVO declaration is automatic for one offender, but not for another (due to their sentence falling below 10 years), meaning rough equivalency or consistency between sentences for co-offenders cannot be achieved.

In the primary appeal judgment, *R v Crossley,*[104] the Court observed that the principle of parity requires comparison not only of the head sentence but also the period of actual custody, although the principle is qualified by the

91 *Derks* (n 82). The Court found that the sentencing judge was in error in taking a global approach to the sentence in circumstances where the offences, other than the manslaughter, would not have otherwise attracted an SVO declaration.
92 QSC 2020/25 (subject to appeal – lodged 23/10/20).
93 [2020] QCA 270 ('*Stable*').
94 Ibid [2].
95 Ibid [11].
96 Ibid.
97 Ibid [15]. The Court also noted that the scheme would be engaged if an offender is sentenced to a cumulative sentence of 10 years or more and 'all of the offences listed in Schedule 1' or are offences the sentencing judge declares to be an SVO under section 161C(2)(b)(ii) at [11].
98 Ibid [46]-[60].
99 *R v Kilic* (2016) 259 CLR 256 at [21] in which the majority found that current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason of changes in understanding about the long-term harm done to victims.
100 *Stable* (n 93) [26]–[44].
101 The Court of Appeal has the power under s 668E(3) of the Criminal Code 1899 (Qld) to increase a sentence. In *Neal v The Queen* (1982) 149 CLR 305 at 308 it was decided that a strict procedure should be followed and the applicant informed that their sentence may increase and be given leave to decide whether to continue with the appeal.
102 One of the sentencing principles that has developed under common law and legislation, parity is consistency of punishment for co-offenders in a case. This supports the principle of equality before the law.
103 *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462; [2011] HCA 49,474–5 [31] (French CJ, Crennan and Kiefel JJ).
104 (1999) 106 A Crim R 80; [1999] QCA 223.

statute.[105] This case is 'authority for the conclusion that, once an SVO declaration is appropriately made in one case but not made in the other, the principle of parity that would ordinarily apply has little scope for operation'.[106]

In the 2018 decision of *R v Dang,*[107] the Court noted that if the legislature intended for parity (as a fundamental principle) to be substantially compromised or excluded, it should be expected that this intention would have been clearly expressed in the legislation[108] (and it was not).[109]

7.4.3 Anomalies and inconsistencies in sentencing

The SVO scheme also gives rise to a number of potential anomalies and inconsistencies. This includes the marked difference in an offender's parole eligibility date that may arise from a sentence being set at 10 years or above, compared to being set just below this (in which case the making of a declaration is discretionary), as well as differences in sentencing where some offences are captured under the scheme, while others are not.

Taking the treatment of serious drug offences under Commonwealth law and the SVO scheme as one example. Trafficking in dangerous drugs and producing a dangerous drug (if certain circumstances apply) are Schedule 1 offences under the PSA. These offences are commensurate to the Commonwealth offences of commercial manufacture of controlled drugs[110] and trafficking controlled drugs.[111] In circumstances where an offender may be charged either under State provisions or Commonwealth provisions, the opportunity for inconsistency in sentencing arises with respect to both the relevant maximum penalty and parole release. An offender sentenced for a Queensland offence may be subject to either a mandatory or discretionary SVO declaration, depending on the length of the sentence imposed, making them subject to a non-parole period of 80 per cent, compared to an offender who is sentenced under an equivalent Commonwealth provision, where there is no fixed ratio for non-parole periods.[112] This raises issues of consistency in sentencing and may also limit the usefulness of comparative Commonwealth offences in Queensland sentencing.[113]

Examples of state offences that are currently excluded from Schedule 1 are discussed in section 7.6.6. The exclusion of these offences from Schedule 1 means that, unless a discretionary declaration is made pursuant to section 161B(4) where the relevant criteria are met, any sentence imposed does not 'count' towards the calculation of whether the threshold for the making of an automatic declaration (a sentence of 10 years or more) has been met. This is in contrast to the rules that apply where all sentences imposed for offences listed in Schedule 1 (or that involve the counselling or procuring the commission of, or attempting or conspiring to commit, such an offence) count towards this calculation.

DISCUSSION QUESTIONS: Anomalies that create inconsistency or constrain the sentencing process and complexities

10. **Does the current application of the scheme and anomalies in its structure and operation create inconsistencies or other problems? How might these be overcome?**
11. **Are there any other issues with the operation of the scheme as it impacts court sentencing practices not identified that should be considered as part of the review?**

7.5 Automatic operation of the scheme and parole eligibility

7.5.1 Concerns that the mandatory nature of the scheme results in unjust sentencing outcomes

The Terms of Reference ask the Council to have regard to 'the importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the PSA'. One of the principal means of limiting flexibility and discretion is mandatory sentencing.

105 Ibid 86-7 [25]–[27] (Pincus JA, McPherson JA agreeing at 88 [34], McMurdo P not deciding), applying *Postiglione v The Queen* (1997) 189 CLR 295, 302 (Dawson and Gaudron JJ).
106 *R v Mikaele* [2008] QCA 261 [36] (MacKenzie AJA, Keane JA and Douglas J agreeing).
107 [2018] QCA 331.
108 Ibid [38] (McMurdo JA).
109 See Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997.
110 *Crimes Act 1914* (Cth) s 305.
111 Ibid s 302.
112 See *Hili v The Queen* (2010) 242 CLR 520, [11].
113 See also Judicial Commission of NSW, *Sentencing Commonwealth Drug Offenders* (Research Monograph 28, June 2014).

The mandatory application of the SVO scheme to sentences of 10 years and higher is a form of mandatory sentencing, as is the mandatory MNPP of 80 per cent when a declaration is made (either as a mandatory or discretionary declaration). When a person is sentenced to a term of imprisonment of 10 years or more for a Schedule 1 offence, they will automatically be subject to the SVO scheme. This means courts are restricted in their ability to recognise relevant mitigating factors, such as a plea of guilty or cooperation with law enforcement, which may result in unjust sentencing outcomes. It also may discourage offenders from cooperating with law enforcement authorities and pleading guilty.

The Council's review of the creation of the SVO scheme did not identify any information about why the 10-year mark was chosen for the mandatory application of the scheme, nor why the non-parole period was set at 80 per cent. No evidence base was identified to justify the ratio of 80:20 or why it was considered appropriate for serious violent offences. Expert interviews conducted by the Council identified concerns among legal stakeholders regarding the arbitrary nature of the 10-year mark and its impact on sentencing practices.

The Council has observed previously[114] that mandatory sentences may also have a distorting effect on sentencing, which was examined in greater detail above (section 7.4.1). Generally, those supportive of mandatory penalties argue that schemes like the SVO scheme promote consistency in sentencing. However, there is evidence that fixed penalties may result in unjust outcomes by treating different cases alike. The existence of a mandatory penalty means courts are not able to take into account the individual circumstances of the offence and the offender when determining a sentence. Mandatory or fixed penalties suggest all offences within a category should attract the same penalty, regardless of the individual circumstances of the case.

Arguments in favour and against mandatory sentencing provisions include:[115]

Against mandatory sentencing provisions	Support mandatory sentencing provisions
Constrain judicial discretion and interfere with the courts' capacity to adapt sentences to the objective facts and the subjective features of the case.	Deter offenders from engaging in criminal conduct (although there is a little evidence they are effective as a deterrent).
Displace discretion in other parts of the criminal justice system, namely the police and prosecution.	Promote consistency in sentencing.
Are inconsistent with the rule of law and the separation of powers.	Denounce the offending behaviour.
Reduce the incentive to plead guilty, resulting in increased workloads for the courts and prosecution, and impact on victims and witnesses who must participate in trials.	Ensure a minimum level of punishment for offenders convicted of the offence.
Increase the prison population and the associated cost to the state.	Protect the community through incapacitation of the offender in prison.
There is little evidence they are effective and act as a deterrent.	Send a clear and strong message about community expectations of sentencing for serious offences.

7.5.2 Stakeholder views

Several stakeholders shared their views about mandatory sentencing with the Council, both for and against.

FACAA was supportive of the mandatory component of the SVO scheme and argued it should be extended to 'all offenders who take the life of a child under the age of 12 or get convicted of repeated sexual offences against children'.[116]

FACAA also expressed concerns that the SVO scheme was being used as a plea-bargaining tool and recommended that the scheme's mandatory nature be increased so that 'this scheme can…not be negotiated away as part of a plea deal'.[117]

Some participants in the expert interview project described the scheme as a 'bargaining tool', indicating that the SVO scheme is displacing discretion to other parts of the criminal justice system. Some participants felt that the scheme does not allow enough discretion to take guilty pleas into account.

Stakeholders opposing mandatory sentencing, emphasised the importance of judicial discretion[118] and argued that the SVO scheme results in 'unfair, disproportionate sentences that do not consider mitigating circumstances'.[119]

114 Queensland Sentencing Advisory Council, *Penalties Imposed on Sentence for Criminal Offences arising from the Death of a Child* (Final Report, October 2018); *Community Based Sentencing Orders, Imprisonment and Parole Options* (n 8).

115 *Community Based Sentencing Orders, Imprisonment and Parole Options* (n 8) 86–103. See also Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) 274–75; Law Council of Australia, *Mandatory Sentencing* (Policy Discussion Paper, May 2014).

116 Preliminary feedback (Fighters Against Child Abuse Australia).

117 Ibid.

118 Preliminary feedback (Sisters Inside); preliminary feedback (Queensland Law Society).

119 Preliminary feedback (Sisters Inside).

The Queensland Law Society ('QLS') argues that mandatory sentencing laws can result in 'serious miscarriages of justice, are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime'.[120] QLS further argued that the mandatory SVO declaration for sentences of 10 years and more 'excessively fetters judicial discretion' and that the judiciary are 'best placed to administer justice when they have discretion to consider and assess the seriousness of the offence and the circumstances of the offending'.[121]

The Australian Lawyers Alliance was concerned that the scheme may disproportionately affect people with 'extensive and severe mental health issues i.e. paranoid schizophrenia and paranoid personality disorder'.[122] The Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships was concerned that the scheme may disproportionately affect or impact on people with disabilities, especially Aboriginal and Torres Strait Islander people with disabilities who are over-represented within the criminal justice system and 'experience multiple discrimination due to the intersection of race and ableism',[123] people with cognitive and or psychosocial disabilities, and young people with disabilities who are at 'heightened risk of violence, abuse, neglect and exploitation in criminal justice settings'.[124]

DISCUSSION QUESTIONS: Mandatory application of the SVO scheme and level at which parole eligibility is set

12. Are mandatory sentencing schemes appropriate in certain cases – such as for serious violent offences?

13. Should the distinction under the SVO scheme between sentences at or above 10 years and below 10 years be retained?

14. If retained, should the discretion for the SVO scheme to be applied to a listed offence for sentences of imprisonment of 5 to 10 years be retained, or should this apply to a sentence of any length where a listed offence is dealt with on indictment?

15. Is the 80 per cent/20 per cent split between the minimum period in custody and maximum period on parole appropriate for offenders declared convicted of an SVO or should this be changed? If changed, what approach do you support:

- **(a) A fixed standard percentage non-parole period scheme (e.g. parole eligibility at two-thirds, 70%, 75% or other defined percentage of the head sentence); or**
- **(b) A minimum standard percentage non-parole period scheme (e.g. a minimum of two-thirds, 70%, 75% or other defined percentage of the head sentence); or**
- **(c) A fixed set range (e.g. between 50–80% of the head sentence)?**

16. If the SVO scheme is retained in some form, should a court have the ability to depart by setting either:

- **(a) a lower non-parole period; and/or**
- **(b) a higher non-parole period?**

17. If a court has the ability to depart from the scheme's mandatory application, is any legislative guidance required to a court in the setting of:

- **(a) a lower non-parole period; and/or**
- **(b) a higher non-parole period; and**

what form should this take (e.g. where there are 'exceptional circumstances' or 'special circumstances' or where this is 'in the interests of justice')?

18. What factors should be considered in the setting of either a higher or a lower non-parole period, and should these be legislated?

7.6 Offences included in the scheme

7.6.1 History of offences included in Schedule 1

As noted in Background Paper 1, offences have been added to and removed from the schedule over time. In 1997, the scheme included 46 provisions and in its current form, Schedule 1[125] captures 60 offences. These include:

- 47 offence provisions under the Criminal Code;
- 6 repealed Code provisions;
- 2 provisions under the *Corrective Services Act 2006* (Qld) ('CSA');[126]

120 Preliminary feedback (Queensland Law Society).
121 Ibid.
122 Preliminary feedback (Australia Lawyers Alliance).
123 Preliminary feedback (Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships).
124 Ibid.
125 PSA (n 37) sch 1.
126 These are s 122(2) take part in a riot or mutiny and s 124(a) prepare to escape from lawful custody.

- 2 equivalent provisions under the repealed *Corrective Services Act 2000* (Qld); and
- 3 offences under the *Drugs Misuse Act 1986* (Qld).[127]

The Council's review of the scheme's history did not reveal any criteria for deciding which offences would be part of the SVO scheme nor has one been created since. There are offences in Schedule 1 that do not have violence of any kind as an element. The scope of the schedule, being the tool to determine whether an offence qualifies for the SVO scheme's application, was explained, as well as the justification for its extension to inchoate offences:

> The Government went to the people at the last election and made a promise that: "serious violent offences will include rape, child molestation, armed robbery, serious assault, violent attacks in the home and attempted murder. Because of the enormous damage done in the community by drug trafficking, those convicted of this offence will be treated similarly".
>
> This Bill delivers that promise. The expression "serious violent offence" will extend to any of the indictable offences listed in the new Schedule.
>
> Because this Government is concerned to see that Queenslanders feel secure in their homes and on the streets, this Bill addresses both inherently violent crimes and all other crimes in which serious violence is used or contemplated or which results in serious harm.
>
> A solely Schedule based approach, though it can list most violence related offences, may fail to catch some offences in which a serious degree of violence or harm can be inflicted although actual violence is not an element of the offence.
>
> A conspiracy to murder is as serious a "violent" crime as any other, as is an attempted abduction which renders the victim afraid to go anywhere alone.
>
> Therefore attempts and conspiracies to use violence are included in the definition of a serious violence offence as are counselling or procuring of such offences.[128]

When the scheme was being debated in Parliament in 1997, objections were raised regarding the inclusion of section 421(2) (Entering or being in premises and committing indictable offences) on the basis that it is not a violent offence. However, despite those objections the offence was included in the original schedule.[129] At the time, Opposition members otherwise supported the scheme, including the inclusion of the three drug offences.

Generally, the SVO provisions have remained largely unchanged since their introduction, however some offence provisions have been added to and removed from the schedule over time. An example of a recent addition to the scheme was the insertion of section 324 of the Criminal Code (Failure to supply necessaries) on 7 May 2019 by the *Criminal Code and Other Legislation Amendment Act 2019* (Qld).[130] Its inclusion, which took place in conjunction with an increase in the maximum penalty that applies to this offence from 3 years to 7 years' imprisonment, was justified on the basis that it:

> Reflects the seriousness of this offence and is consistent with the current inclusion of other offences such as endangering life of children by exposure (section 326 of the Criminal Code) and cruelty to children under 16 (section 364 of the Criminal Code).[131]

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

- taking a child for immoral purposes (Criminal Code, s 219);
- conspiring to murder (Criminal Code, s 309); and
- taking control of aircraft (Criminal Code, s 417A).[132]

7.6.2 Dual purpose of Schedule 1

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

- a prisoner serving a prison sentence; or

---

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

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

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

130 *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 10.

131 Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019 5.

132 *Justice and Other Legislation Amendment Act 2004* (Qld) s 84.

- released on parole; or
- at large after escaping from lawful custody under a sentence of imprisonment; or
- on a leave of absence granted under the *Corrective Services Act 2000* (Qld) or the CSA.[133]

This means any changes to Schedule 1 will also affect the application of this provision.

7.6.3 Schedule 1 offences and maximum penalties

Reviewing the 60 offences currently listed in Schedule 1 shows a wide range of maximum penalties from as little as 2 years[134] to life imprisonment. For the full list of Schedule 1 offences, details of the offence and the maximum penalties see Appendix 4. As noted above, the review into the creation of the scheme did not identify any criteria for offences being included in the scheme, such as the maximum penalty.

Many offences in Schedule 1 comprise multiple subsections with different maximum penalties. For example, the offence of carnal knowledge of a child under 16[135] contains 6 subsections and depending on the age of the child, the child's intellectual capacity and/or the offender's relationship to the child, maximum penalties vary between 14 years and life imprisonment.

There are 29 offences or subsections of offences listed in the Schedule which have a maximum penalty of 7 years or less. Of those 29 offences or subsections, 9 have a maximum penalty of 5 years or less.

Some of these offences are included in Schedule 1 due to its dual function under the PSA section 156A. However, a maximum of 7 years imprisonment means few of these offences are likely to be sentenced to a term of imprisonment of 5 years or more, and therefore become eligible for a discretionary SVO declaration under section 161C(3). While section 161C(4) allows courts to make SVO declarations for any offence and not for a statutorily defined term of imprisonment, the Council's analysis showed that the 7 times this provision was used, it was for Schedule 1 offences (MSO – see 4.1.1). This suggests prosecutors are not asking for SVOs in cases where the head sentence is likely to be less than 5 years, and if they are, courts are not inclined to make a declaration.

7.6.4 Should serious drug offences be included in the scheme?

During preliminary feedback, some stakeholders questioned the inclusion of serious drug offences within the scheme. Drug trafficking and drug offences are not inherently violent offences. The inclusion of non-violent offences in the scheme was discussed in Background Paper 1, however legislators pointed to the 'enormous damage done in the community by drug trafficking' as justification for its inclusion.[136]

The offence of drug trafficking has been subject to reform since its introduction. The *Drugs Misuse Act Amendment Act 1990* (Qld) reduced the maximum penalty from mandatory life imprisonment to 25 years' imprisonment for Schedule 1 drugs and 20 years' imprisonment for Schedule 2 drugs.[137] In 2013, significant changes occurred to the sentencing of drug trafficking. The changes resulted in offenders being required to serve a minimum of 80 per cent of their sentence before being eligible for parole, regardless of the length of sentence imposed on them.[138] This approach was in contrast to the previous position under the SVO scheme, which only mandated an 80 per cent non-parole period in cases where an offender was sentenced to 10 years or more. In 2016, these changes were reversed, and the offence was re-inserted into the SVO scheme.[139] Former Attorney-General and Minister for Justice, Yvette D'Ath, noted that 'the mandatory 80 per cent non-parole period created delays in our criminal justice system and potential inequity in sentencing'.[140] In late 2016, the maximum penalty of 25 years' imprisonment was made universal for trafficking Schedule 1 and 2 drugs.[141]

Other Australian jurisdictions have sentencing schemes which include drug offences and narrow the court's discretion (see Background Paper 2 for further detail). South Australia and Victoria have similar 'serious offender schemes' which enable them to depart from the principle of proportionality for serious offenders (including drug offenders), however these schemes focus primarily on the offender, rather than the offence, and legislative

133 PSA (n 37) s 156A.
134 *Corrective Services Act 2006* (Qld) s 124(a) and *Corrective Services Act 2000* (Qld) s 94(a) (since repealed) both require that 'a prisoner not prepare to escape from lawful custody' which has a maximum penalty of 2 years. These offences are in the schedule because of its dual function.
135 Criminal Code s 215.
136 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 596 (Denver Beanland, Attorney-General and Minister for Justice).
137 *Drugs Misuse Act Amendment Act 1990* (Qld) s 5.
138 *Justice and Other Legislation Amendment Act 2013* (Qld) s 68B.
139 *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) ss 21 (amending *Corrective Services Act* 2006 (Qld) s 182A (Parole eligibility date for prisoner serving term of imprisonment for other particular serious offences) and 165 (amending *Drugs Misuse Act 1986* (Qld) s 5). These changes commenced on the date of assent.
140 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 September 2016, 3402 (Yvette D'Ath, Attorney-General and Minister for Training and Skills).
141 *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) s 164.

exceptions allow for the exercise of judicial discretion.[142] The Northern Territory has mandatory MNPPs of 70 per cent for offenders convicted of drug offences and sentenced to 12 months' imprisonment or more, however the court can decline to set that non-parole period if it considers it inappropriate.[143] Victoria's sentencing legislation creates category 1[144] and category 2 offences,[145] whereby an offender convicted of an offence listed in those categories must be sentenced to imprisonment (unless, with respect to category 2 offences, there exist special reasons).[146]

Western Australia's sentencing legislation includes the provision for offences to be declared as 'serious offences'. A 'serious offence' is defined as an offence which involved serious violence against another person, an indictable offence that included the use or attempted use of a firearm, or an offence which resulted in serious harm to, or the death of, another person.[147] Therefore, drug offences are not capable of being declared a 'serious offence'.

The Council's data analysis shows that between 2011-12 to 2019-20, of the 65 SVO declarations made with respect to serious drug offences, all were for drug trafficking (MSO). Of those 65 offences, 60 were mandatory declarations (being as a result of sentences of 10 years' imprisonment or more being imposed), with only five discretionary SVO declarations made for drug trafficking sentences of more than 5 years but less than 10 years' imprisonment.[148] Offenders convicted of drug trafficking were the most likely SVO offenders to be granted parole, and the most likely to be released as soon as they became eligible.[149] SVO declarations (MSO) were not made for the two other serious drug offences listed in Schedule 1, aggravated supply of dangerous drugs[150] and producing dangerous drugs.[151]

The fact that drug trafficking offences are not typically considered 'violent offences', may provide an explanation for why SVO declarations were made overwhelmingly as a result of the automatic operation of the SVO provisions. This suggests that it may be necessary to consider whether or not it is appropriate for serious drug offences to continue to be included within the SVO scheme.

Drug offences were the most common offence category in the SVO scheme that stakeholders suggested should be removed. During preliminary consultation and expert interviews, several stakeholders queried the inclusion of drug offences as an SVO, although it was recognised that drugs cause harm at a wider societal level.

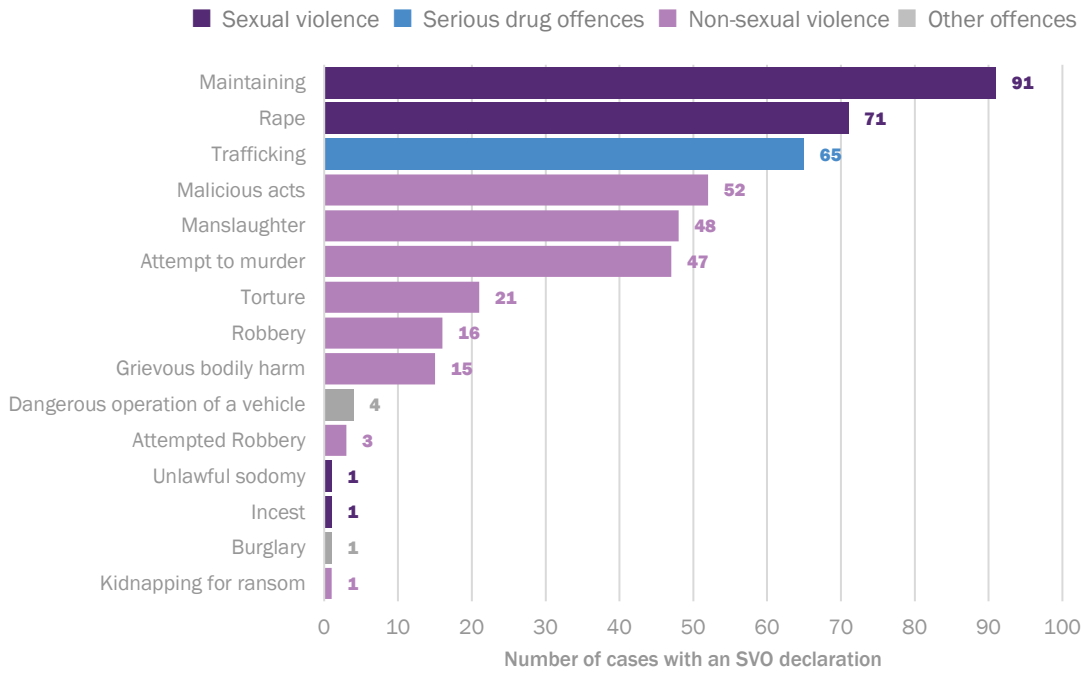
7.6.5 The SVO scheme is applied overwhelmingly to 9 offences in Schedule 1

The Council's data analysis shows that between 2011–12 to 2019–20, of the 60 offences[152] in Schedule 1, only 15 offences received at least one SVO declaration (MSO).[153] This means three-quarters of listed offences (75%) as an MSO did not receive an SVO declaration during the 9-year data period. During the data period, declarations were also made for two non-Schedule 1 offences - deprivation of liberty and burglary.[154]

Of those 15 Schedule 1 offences (MSO), SVOs were overwhelmingly applied to only 9 offences - see Figure 14. During the data period, of the 437 SVO declarations (MSO) the scheme was most commonly applied to the offence of maintaining a relationship with a child (20.8%, n=91), followed by rape (16.2%, n=71), trafficking in dangerous drugs (14.8%, n=65), malicious acts (11.8%, n=52), manslaughter (10.9%, n=48), attempted murder (10.7%, n=47), torture (4.8%, n=21), robbery (3.7%, n=16), and grievous bodily harm (3.4%, n=15). Dangerous operation of a vehicle (MSO) received an SVO in 4 cases, and attempted robbery (MSO) received an SVO in 3 cases. Four offences (MSO) received only one SVO declaration.

142 *Sentencing Act 2017* (SA), Pt 3, Div 4; *Sentencing Act 1991* (Vic) ss 6B(2)-(3).
143 *Sentencing Act 1995* (NT) s 55.
144 *Sentencing Act 1991* (Vic) s 3. Includes trafficking in a drug (large commercial quantity) or trafficking in a drug (for the benefit of or at the direction of a criminal organisation - commercial quantity).
145 Ibid. Includes trafficking a drug of commercial quantity.
146 Ibid s 5. See also Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria* (June 2021) 8: 'the legislation does not, though, specify a minimum period of imprisonment. It is therefore possible for a very short prison sentence, which may even be a time served prison sentence, to meet the requirement of Category 1 offence classification'
147 *Sentencing Act 1995* (WA) s 97A.
148 Background Paper 4 (n 4).
149 Ibid. The median amount of time served beyond their eligibility date was 1 day.
150 *Drugs Misuse Act 1986* (Qld), ss 6(1)(a), 6(1)(b), 6(1)(d) and 6(1)(e). The data analysis shows that one SVO (non-MSO) was ordered for a case of aggravated supply of drugs during the data period.
151 Ibid ss 8(1)(a), 8(1)(b)(i) and 8(b)(b)(ii).
152 Of those 60 offences, 7 offences which were not sentenced during the 9-year period were excluded from the Council data analysis.
153 Most serious offence (MSO). Refer to Background Paper 4 (n 4) for more detail.
154 Not the sch 1 offence of burglary (section 419(3)(b)(i) or (ii)). The deprivation of liberty charge was not the MSO; however, of the 3 burglary cases, one was the MSO.

Figure 14: Number of cases with an SVO declaration, by offence (MSO) – 2011-12 to 2019-20



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

The Council's analysis also identified where a declaration was made for a Schedule 1 offence, but it was not the MSO. This analysis showed that a further 11 Schedule 1 offences received an SVO (non-MSO). These were:[155]

- abuse of persons with an impairment of the mind;
- aggravated supply of drugs;
- indecent treatment of a child under 16;
- sexual assault;
- attempt to commit rape;
- assault with intent to commit rape;
- taking a child for immoral purposes;
- assault occasioning bodily harm;
- stupefying in order to commit indictable offence;
- wounding; and
- kidnapping.

This means the remaining 34 offences listed in Schedule 1 have never received an SVO, either as an MSO or a non-MSO, during the 9-year data period.

7.6.6 Are offences missing from the scheme?

Some stakeholders and expert interview participants expressed concerns about why some offences are included in the scheme, and others are not. It was observed that the SVO scheme applies to a range of offences which do not involve the use of violence. Examples cited were dangerous operation of a vehicle, failure to supply necessaries, bomb hoaxes and endangering the life of children by exposure.

Stakeholders during preliminary feedback[156] and expert interviews also suggested several offences that could be included in the scheme. It was noted that like prisoners with an SVO declaration, prisoners convicted of the offence

155 See Table 5, Appendix 1 of Background Paper 4 (n 4). As these offences were not MSO offences, they did not form part of the Council's data analysis. This means the cleaning and validation applied to MSO offences was not undertaken for these non-MSO offences. These findings are indicative only and should not be used for analytical purposes.

156 Preliminary feedback (Fighters Against Child Abuse Australia).

of choking, suffocation and strangulation in a domestic setting (Criminal Code, s 315A) are 'prescribed prisoners' under the CSA, which affects how the Parole Board Queensland can assess their applications.[157]

Table 7: Suggested offences to add to the SVO scheme

Offence	Maximum Penalty
Choking, suffocation and strangulation in a domestic setting (Criminal Code, s 315A)	7 years
Arson (Criminal Code, s 461)	14 years
Deprivation of liberty (Criminal Code, s 355)	3 years
Involving child in making child exploitation material (Criminal Code, s 228A)	20 or 25 years
Making child exploitation material (Criminal Code, s 228B)	20 or 25 years
Distributing child exploitation material (Criminal Code, s 228C)	14 or 20 years
Possessing child exploitation material (Criminal Code, s 228D)	14 years
Fraud (Criminal Code, s408C)	5 years or 14 years or 20 years
Aiding suicide (Criminal Code, s 311)	Life imprisonment

The Council noted in Background Paper 2 that in a 2013 report to the NSW Government, the NSW Sentencing Council had recommended principles to identify offences for the NSW standard non-parole period (SNPP) scheme. These principles were whether the offence:[158]

- has a significant maximum penalty;
- is triable on indictment only;
- involves elements of aggravation;[159]
- involves a vulnerable victim;
- involves special risk of serious consequences to the victim and the community;[160]
- is prevalent;
- is subject to a pattern of inadequate sentencing; and
- is subject to a pattern of inconsistent sentences.[161]

The NSW Sentencing Council also recommended an additional consideration that may warrant exclusion for offences which potentially encompass a wide range of offending behaviour. An example was the offence of manslaughter. The NSW Sentencing Council advised these principles should be applied flexibly, and none should be solely necessary or sufficient to include an offence in the SNPP scheme.

While the SNPP and SVO schemes are different in their operation, the factors recommended by the NSW Sentencing Council are relevant in determining whether an offence should be included in the SVO scheme. Should the SVO scheme be retained, similar criteria could be developed to ensure the most relevant offences are included and to determine whether some offences should be removed.

DISCUSSION QUESTIONS: Offences to which the SVO can be applied

19. If the SVO scheme is retained, should a schedule of offences to which the SVO scheme applies form the basis for its application?

20. If a separate schedule is retained, should the schedule be separate to that which applies for the purposes of section 156A(1)(a) of the *Penalties and Sentences Act 1992* (Qld) ('PSA')?

21. Is the current list of offences to which the scheme can, or must, be applied (depending on the sentence length) as listed in Schedule 1 of the PSA appropriate?

- **(a) Are there any offences not included in Schedule 1 that should be?**
- **(b) Should any offences be removed?**

22. Should the ability to make a declaration for an offence not listed in the schedule be retained and if so, are the criteria under s 161B(4) appropriate?

23. If retained, should the scheme be renamed to better reflect the types of offences captured by it?

157 *Corrective Services Act 2006* (Qld) s 234(7).

158 NSW Sentencing Council, *Standard Non-Parole Periods: Final Report* (Report, December 2013) 9.

159 Ibid. Examples include the offender was in the company of another person or people, the offender deprives the victim of his or her liberty before or after the offence, or the victim is under 16 years of age, under the authority of the offender or has a serious physical disability or cognitive impairment: at 12-13.

160 Ibid. For example, sexual offences against children result in significant and long lasting harms, and supply or manufacture of illegal drugs which relate to organised criminal activities: at14.

161 Ibid. The NSW Sentencing Council suggested patterns of inadequate sentences could be 'measured by reference to public opinion, views formed by the government or other indicators such as the number of Crown appeals against sentences imposed for the offence': at 16.

7.7 Victim satisfaction with the scheme and sentencing

The Council has been asked to examine 'whether the scheme is impacting victims' satisfaction with the sentencing process and if so, in what way'. As part of its preliminary consultation, the Council heard the views of a range of stakeholders involved with victims and survivors of crime, including support services, about how the scheme impacts on victims' and survivors' satisfaction with the scheme. Further consultation with victims and survivors of serious crime will be undertaken to inform the Council's Final Report and recommendations.

Early feedback suggests that victims of crime have clear expectations of the criminal justice system and sentencing outcomes. The perception that offenders 'walk free' from court at sentence due to factors such as significant time spent on remand prior to sentence and a plea of guilty distresses many victims and survivors.[162] For victims and survivors and their families, the setting of the parole date is particularly important; with the offender in custody, the anxiety and fear associated with the offence and the offender is significantly reduced. The Council was informed during expert interviews that the SVO scheme improves victim satisfaction, as many victims and survivors are concerned about the minimum length of time the offender will spend in custody.

The Council was also told during expert interviews that many victims and survivors and their families experience trauma when an offender applies for, or is released on parole. This is one of the main reasons the scheme is seen to contribute to victim satisfaction – victims and survivors know the offender will be in prison for a fixed, significant period of time, thereby extending the time they know they will have no possibility of seeing the offender in the community.

The University of Melbourne's literature review examined victim satisfaction regarding parole. The review found there were limited studies on the views of victims and survivors of crime, and in particular, to the setting of non-parole periods or sentencing of serious violent offences. However, the available studies did provide evidence that 'many victims of crime will only support release from custody on parole when they feel satisfied that the person has been successfully rehabilitated and poses no ongoing risk to the community'.[163]

However, the Council also heard during preliminary consultation that the operation of the SVO scheme may adversely impact victims and survivors in other ways. Stakeholders advised the Council that the possibility of a sentence of 10 years or more (and a mandatory SVO declaration) may disincentivise offenders to plead guilty, thereby increasing the likelihood of the matter proceeding to trial requiring victims and survivors to give evidence, which may increase their trauma. The Council's analysis of guilty pleas and the SVO scheme is discussed briefly in section 7.2 and in Background Paper 4.

DISCUSSION QUESTIONS: Victim satisfaction and the impact of the SVO scheme

24. **Does the SVO scheme impact on victims' satisfaction with the sentencing process and if so, in what ways?**
25. **How important is the parole eligibility date to victims' overall satisfaction with the sentencing process?**
26. **What considerations are important to victims in enhancing their satisfaction with the sentencing process for offences that could attract an SVO declaration?**

7.8 Human rights issues

The Council has been asked to 'advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews and any recommendations, are compatible with rights protected under the *Human Rights Act 2019*'. A statutory provision is compatible with rights if it does not limit a right; or, if it does, that the limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[164]

When the SVO scheme was introduced in 1997, consideration of its compatibility with human rights was not a required legislative exercise.[165] It might be argued that the SVO scheme limits human rights. For example, automatic SVO declarations, being a form of mandatory penalty, may be of concern to the 'right to liberty' and the right to not be subjected to arbitrary detention.[166] Other human rights which might be engaged as a result of the SVO scheme include, but are not limited to: the right to humane treatment when deprived of liberty, right to a fair hearing and rights in criminal proceedings.[167] The Human Rights Commission has made previous submissions to this Council

162 Preliminary consultation.
163 *University of Melbourne Literature Review* (n 12) 15.
164 *Human Rights Act 2019* (Qld) s 8.
165 Ibid s 38 requires a statement of compatibility to be tabled when a Bill is introduced.
166 Ibid s 29.
167 Ibid ss 30-32.

which comment on mandatory penalties, drawing attention to the need for significant evidence 'to demonstrate that mandatory minimum sentences are the least restrictive manner of achieving the purposes' of sentencing.[168]

Preliminary feedback from the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships included that the UN *Convention on the Rights of People with Disabilities* should also be considered by the Council. Relevant principles set forth in the Convention include accessibility and respect for difference and acceptance of persons with disabilities as part of human diversity and humanity. Rights set out in the Convention are mirrored by the *Human Rights Act 2019* (Qld) ('HRA') and include the right to liberty and freedom from cruel, inhumane or degrading treatment or punishment.[169] While there is no available data which verifies the proportion of SVO offenders who are experiencing mental health issues or have psycho-social or cognitive disabilities, general prison population data suggests that two in five (40%) prisoners reported a diagnosis of a mental health condition,[170] and 'several studies have found that 25-30 per cent of people in prison have a borderline intellectual disability, and 10 per cent have a mild intellectual disability'.[171] This group represents a significant portion of the prison population and consideration of the UN *Convention on the Rights of People with Disabilities* alongside the HRA is relevant.

DISCUSSION QUESTIONS: Human rights considerations

27. **Is the current SVO scheme compatible with rights protected under the *Human Rights Act 2019* and other human rights instruments (e.g. UN *Convention on the Rights of Persons with Disabilities*)? If it is not compatible, are any existing limitations reasonable and demonstrably justifiable (*Human Rights Act 2019*, s 13)?**
28. **What reforms could be made to the scheme to improve its compatibility with and/or to meet the test of being 'reasonably and demonstrably justifiable'?**

7.9 Absence of post-sentence orders for high risk violent offenders

While consideration of the *Dangerous Prisoners (Sexual Offenders) Act 2003* ('DPSOA') scheme is outside the scope of this review, it was raised in preliminary feedback and during expert interviews.

The DPSOA scheme applies to offenders who have been sentenced to a term of imprisonment for committing a serious sexual offence[172] and have been assessed to be at high risk of reoffending. It is only intended for serious sex offenders who pose the greatest risk to the community. To identify which prisoners should be referred to the Attorney-General for consideration of making a DPSOA application, QCS conducts specialised identification and risk assessments.[173] The Attorney-General then applies to the Supreme Court for a continuing detention order or a supervision order within the last six months of an offender's term of imprisonment.[174] The Supreme Court makes this order in its civil, not its criminal, jurisdiction and is separate to the sentencing order for the criminal offence originally committed by an offender.[175] There is no comparable scheme in place for high-risk violent offenders.

The Council briefly examined the relationship between the DPSOA scheme and the SVO scheme in Background Paper 4. The Council analysed offenders in the 9-year data period who were sentenced to a declared SVO sexual violence offence and fully served their sentence. This analysis showed that for offenders sentenced to rape with an SVO, DPSOA orders were made in 35 cases (33.9%) and for offenders sentenced for maintaining a sexual relationship with a child, 8 offenders (17.3%) were subject to a DPSOA order.

The Council also examined whether there was a correlation between sentence length for the offence of rape (SVO) with a subsequent DPSOA order. The average imprisonment length for offenders who were subject to a DPSOA order was 10.6 years – slightly shorter than the average sentence of 11.1 years for non-DPSOA prisoners. This difference

168 Human Rights Commission, Submission no 3 to Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (9 January 2020) p.9 [31].
169 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, (entered into force 3 May 2008).
170 Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Catalogue no. PHE 246, 2019) vi.
171 Ibid 77. See also: Mike Hellenbach, Thanos Karatzias and Michael Brown, 'Intellectual Disabilities Among Prisoners: Prevalence and Mental and Physical Comorbidities' (2017) 30(2) *Journal of Applied Research in Intellectual Disabilities*, 230.
172 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) sch 1: a serious sexual offence is defined as an offence of a sexual nature, whether committed in Queensland or outside Queensland involving violence; or against a child; or against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years.
173 *Queensland Parole System Review: Final Report* (n 15) 76 [353].
174 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5.
175 *Queensland Parole System Review: Final Report* (n 15) 76 [353].

was not statistically significant.[176] As such, no correlation was identified between the length of sentence, and the making of a DPSOA order. See Background Paper 4 for more information, including the relevant data.

Some stakeholders were concerned about high-risk non-sexual violence offenders, and whether there should be a scheme to monitor them in a similar way to offenders subject to the DPSOA scheme. The Council notes that while this is outside scope its current review, the Women's Justice and Safety Taskforce is considering post sentence orders in relation to domestic and family violence, including whether the DPSOA should be extended to serious domestic violence perpetrators.[177]

7.10 Any other issue not addressed

The issues identified above address specific questions the Council has been asked to respond to under the Terms of Reference.

The Council invites submissions on any other issue relating to the operation of the SVO scheme that may impact on its operation or efficacy.

DISCUSSION QUESTION: SVO scheme - other issues

29. Is there any other issue in relation to the SVO scheme or sentencing responses for serious violent offences that have not been addressed in the questions, that you would like to raise with the Council?

176 Independent groups t-test: $t(20.937) = 1.00, p = 0.3311, r = 0.21$ (equal variances not assumed).

177 Women's Safety and Justice Taskforce, *Options for Legislating against Coercive Control and the Creation of a Standalone Domestic Violence Offence* (Discussion Paper 1, 27 May 2021) 59, Option 12.

8 Options – SVO scheme

8.1 Introduction

In section 7 of this paper, we identified a number of issues with the current operation of the serious violent offences ('SVO') scheme.

The Terms of Reference ask the Council to 'advise on any reforms to ensure sentencing outcomes reflect the seriousness of these offences and if retained, the making of an SVO declaration only in appropriate cases'.

The options below are concerned with how this outcome can best be achieved.

8.2 Reform options

There are a number of different reform models that might be considered to improve current responses to serious offences in the interests of community safety and to meet the other purposes of sentencing, including just punishment and denunciation, to properly reflect the seriousness of these offences.

8.2.1 Benefits and risks of reform options

An important consideration for the Council in reaching its findings and making recommendations is the particular benefits and risks of different options for reform. The Council invites views on what the potential advantages of particular reform options might be, and their potential risks – including any unintended consequences.

DISCUSSION QUESTIONS: SVO scheme – benefits and risks of reform options

30. What would the benefits and risks be if the SVO scheme was:

- **(a) retained in its current form – with no changes to its operation or scope;**
- **(b) automatically applied to sentences for listed offences of 5 years or more, but less than 10 years;**
- **(c) presumptive (as to sentences of 10 years or more for listed offences) rather than mandatory;**
- **(d) presumptive (as to sentences of 5 years or more, but less than 10 years) rather than discretionary;**
- **(e) entirely discretionary (applying to listed offences dealt with on indictment, in a discretionary way, regardless of sentence length); or**
- **(f) abolished completely, without replacing it?**

31. Are there any specific benefits or risks of the above listed reform options that would apply to:

- **(a) Aboriginal and Torres Strait Islander peoples; and**
- **(b) people who are vulnerable or marginalised?**

8.2.2 Structure of the SVO scheme

If the SVO scheme is retained, it is likely a number of elements of the existing SVO scheme will remain, including:

- an identified list of offences to which the scheme can (or must) be applied;
- the limiting of the application of the scheme to cases dealt with on indictment (in the District or Supreme Courts);
- a requirement that a sentence of immediate imprisonment is imposed.

Under any reforms, the offences to which the scheme applies might be the same as currently listed in Schedule 1 with some exclusions or inclusions, a smaller more targeted group of offences (such as those for which an SVO is most often made) or a wider range of offences. [See questions 19–22 of this paper.]

The level at which parole eligibility is set under the below models might be:

- a fixed percentage of the head sentence (as is currently the case) — such as 80 per cent (current model), 75 per cent, 70 per cent, two-thirds, or 60 per cent;
- a minimum defined percentage of the head sentence – as above, but allowing a court to impose a parole eligibility date that is greater than the period specified; or
- a percentage range based on the head sentence — for example no less than 50 per cent, but no more than 80 per cent.

[See question 15 of this paper.]

The options summarised in Table 8 below consider the broader architecture of any reformed SVO scheme, as defined by whether the scheme would be:

- **Mandatory** - meaning a court must make a declaration in certain circumstances, without any discretion to depart (meaning the scheme must be applied).
- **Presumptive** - meaning a court must make a declaration, but has the ability not to make a declaration or to depart from the non-parole period specified.
- **Discretionary** - meaning a court can decide whether to make a declaration.
- **A split model** - a combination of the above.

Table 8: SVO scheme – reform options

OPTION A	**Mandatory SVO model**
Option A–1	Mandatory requirement to declare convictions for certain serious offences attracting a sentence of imprisonment of the specified defined length or longer to be a conviction of an SVO (but without discretion to declare sentences under this as an SVO) – but no discretionary application. This could either be set at the current 10-year level, higher than 10 years, or lower; or
Option A–2	Mandatory requirement to declare convictions on indictment for certain serious offences attracting a sentence or imprisonment of any length (not suspended in whole or in part) to be convictions for an SVO. This would focus attention solely on the offence of which the person has been convicted, rather than the length of the of sentence imposed; or
Option A–3	As for Options A–1 or A-2, but with an additional requirement, for example, that the person must also be found to be at high risk of reoffending and/or has been convicted of a serious repeat offence.
OPTION B	**Presumptive SVO model**
Option B–1	Presumptive for certain listed offences attracting a sentence of imprisonment of the specified defined length or longer to be a conviction of an SVO. This could either be set at the current 10-year level, higher than 10 years, or lower; or
Option B–2	Presumptive for listed offences dealt with on indictment where imprisonment is imposed, regardless of sentence length, with the same standard minimum percentage to apply (e.g. current 80% or set at a different level, such as 75%, 70% or two-thirds); or
Option B–3	Presumptive for listed offences dealt with on indictment where imprisonment is imposed, with a graduated minimum percentage depending on sentence length (e.g. 80% for a sentence of 10 years or more, 70% for a sentence of 5 years, but less than 10 years, not less than 50% for a sentence of less than 5 years); or
Option B–4	As for Options B-1, B-2 or B-3 above, but with an additional requirement, for example, that the person must also be found to be at high risk of reoffending and/or has been convicted of a serious repeat offence.
OPTION C	**Discretionary SVO model**
Option C-1	Discretionary when a person is dealt with on indictment and sentenced to imprisonment for a listed offence. If a court does not make a declaration, the usual approach to the setting of a parole eligibility date would apply; or
Option C–2	Discretionary when a person is dealt with on indictment and sentenced to imprisonment for any offence to which broad statutory criteria apply (e.g. offence involving serious violence or resulting in serious harm). If a court does not make a declaration, the usual approach to parole would apply.
OPTION D	**Split SVO model [variations of current model]**
Option D–1	Mandatory for sentences at, or above, a defined term (e.g. 10 years), and discretionary below this (no change — current model); or
Option D–2	Presumptive for sentences at or above a specified defined term (e.g. 10 years), and discretionary below this; or
Option D–3	Mandatory for sentences at or above a defined term (e.g. 10 years - current model), and presumptive for sentences below this, with the same percentage minimum non-parole period applying to each (e.g. 80%); or
Option D–4	Mandatory for sentences at or above a defined term, and presumptive for sentences below this, with a graduated percentage applying (e.g. 80% for a sentence of 10 years or more, 70% for a sentence of 5 years, but less than 10 years).
OPTION E	**Other**
Model retaining SVO scheme in a modified form not otherwise described above.	

The Council invites feedback on which option is preferred and why. If an alternative option is preferred rather than one listed, details of this preferred model are invited.

DISCUSSION QUESTION: SVO scheme – options for reform

32. **If the SVO scheme is retained (in its current or modified form), which of the options do you prefer and why?**

9 Alternative approaches

9.1 Introduction

The previous sections of this paper have identified issues with the current operation of the SVO scheme and invited feedback on how the scheme might be reformed — as well as the benefits and risks of various options.

In this section we consider alternatives to the serious violent offences ('SVO') scheme and what models could be considered if it is replaced, rather than reformed.

A key consideration is what approaches are most likely to ensure that sentencing outcomes reflect the seriousness of the offences to which the SVO scheme is most commonly applied — with a focus on serious sexual violence offences and non-sexual violence offences. Whether serious drug offences should continue to be captured within the SVO scheme (and, by extension, any alternative model) is explored in section 7.6.4.

9.2 Literature review findings

The findings of the University of Melbourne literature review, discussed in section 6, provide a useful basis to consider potential alternative reform options. These findings include that those convicted of more serious offences and who have served longer sentences would seem to require longer (rather than shorter) periods of supervision in the community to achieve the purpose of community protection, with the nature of the community supervision provided also being critically important.[1] The review authors suggest, given the limitations of sentencing approaches in rehabilitating people in the interests of community protection, the best way to respond to the needs of specific groups of people who have committed serious offences is to: 'incorporate high levels of discretion into judicial decision-making, allowing consideration of how gender-, age-, cultural-, and disability-responsive sanctions and programmes can best be incorporated into effective sentencing'.[2]

9.3 Overview of alternative models

In Background Paper 2, we explored a number of minimum non-parole period ('MNPP') and standard non-parole period ('NPP') schemes operating in other Australian and international jurisdictions.

The models presented offer an alternative to the existing SVO scheme in Queensland.

We noted the models adopted are different in each jurisdiction as to:

- whether they provide for minimum sentences and/or minimum NPPs and/or standard sentences and standard NPPs;
- for NPP schemes, whether they specify a defined minimum term (for example '3 years'), or a minimum (or standard) percentage of the head sentence to be served;
- what types of offences these schemes apply to and whether they are targeted at specific types of offences (including repeat offences), or also take into account characteristics of the offender and specific purposes of sentencing;
- whether the court has discretion to depart from the minimum terms specified in legislation, and the basis for this (for example, if 'special circumstances' or 'exceptional circumstances' apply, or if the court considers that imposing the presumptive minimum term would not be 'in the interests of justice'); and
- whether post-release supervision can extend past an offender's ordinary sentence end date, as it does for some sentences in England and Wales, and the minimum periods specified.

The level at which minimum NPP percentage schemes operate also differ across jurisdictions, as does the level of judicial discretion.

A high-level summary of the advantages and potential disadvantages of each is below in Table 9.

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1 Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-based Approaches to Community Protection, Deterrence and Rehabilitation* (University of Melbourne, August 2021) 11–17, section 2 'Mandatory Non- Parole Periods (MNPPs): Impact and Effectiveness' 13 ('*University of Melbourne Literature Review*').

2 Ibid 19. See also discussion at 23–4 as to the importance of individualised decision-making.

Table 9: Summary of potential advantages and risks of fixed, standard and minimum non-parole period and sentencing schemes

Type of model	Potential advantages	Potential risks
Fixed penalties *Examples: SVO scheme, life sentence for repeat serious child sex offences and murder in Queensland*	Provides certainty to offenders, victims and the broader community about the sentence and/or NPP that applies. If applied to offences that involve a level of premeditation and pre-planning (e.g. drug trafficking), it has potential to act as a deterrent to offending.[3] Fixed non-parole periods still allow a court to decide the appropriate head sentence - preserving some level of discretion.	As a 'one size fits all' approach, does not allow a court to determine the sentence based on the individual circumstances of the offence, the offender, and the impact on the victim, and may lead to unjust outcomes. May displace discretion to other parts of the criminal justice system and discourage those charged with an offence from pleading guilty - resulting in more trials and fewer convictions. May increase the number of appeals against conviction and sentence. If set as a fixed NPP, may result in lower head sentences due to the need to take mitigating factors, such as a guilty plea, into account and to ensure the sentence is just in all the circumstances. May be unlikely to act as a deterrent as the offender would need to be aware of the penalty that applies before committing the offence, believe the risk of detection and conviction is high, respond rationally to that risk, and view the penalty as the most important consequence when deciding whether to commit the offence.[4] If set at a high level, may result in offenders taking more extreme action to evade detection and prosecution (e.g. threats to kill sexual assault victims, or threats or use of violence against clients of drug traffickers). Depending on what offences the scheme applies to, it may disproportionately affect Aboriginal and Torres Strait Islander offenders or other marginalised and disadvantaged groups.
Mandatory minimum non-parole period schemes *Examples:* *Commonwealth: 'Three-quarters rule' for national security offences.* *NT: 70% mandatory minimum NPP scheme for prescribed offences.* *Tas: NPP, if fixed, must not be less than 50% of the head sentence.* *WA: Mandatory minimum sentences.*	Gives structured guidance to courts and ensures a minimum period of a person's sentence will be served. Provides greater certainty to offenders, victims and the broader community about the sentence and/or NPP that applies. If applied to offences that involve a level of premeditation and pre-planning (e.g. drug trafficking), it may act as a deterrent to offending.[5]	The court cannot set a shorter NPP - even if special circumstances apply. May displace discretion to other parts of the criminal justice system and discourage those charged with an offence from pleading guilty - resulting in more trials and fewer convictions. May increase the number of appeals against conviction and sentence. Depending on what offences the scheme applies to, it may disproportionately affect

3 As to problems with deterrence, see the *University of Melbourne Literature Review* (n 1) which notes criticisms of sentencing on the basis of general and personal deterrence given the lack of empirical support.

4 On these complications, see generally Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2019) 7 *Criminal Law Review* 564.

5 See n 3 above.

Type of model	Potential advantages	Potential risks
	Unlike fixed penalties, allows a court to depart by setting a higher NPP where the circumstances warrant this.	Aboriginal and Torres Strait Islander offenders or other marginalised and disadvantaged groups.
Presumptive minimum schemes *Examples:* *NSW: Balance of sentence not to exceed one-third of the NPP, unless there are special circumstances.* *NT: Level 5 sexual offences, a court must order set minimum penalties, unless there are exceptional circumstances.* *Vic: NPPs for standard sentence offences, statutory minimum sentences.*	As above, but also allows a court to depart from the scheme by setting a lower sentence or NPP if the circumstances warrant this.	May compromise community confidence in the scheme if the criteria to depart are framed broadly and the scheme is commonly departed from. May discourage those charged with an offence from pleading guilty if there is uncertainty about whether or not the minimum NPP or sentence will be applied. May result in additional complexity in sentencing, and a higher number of appeals where the discretion to depart may be viewed as not having been appropriately exercised. Depending on what offences the scheme is applied to, it may disproportionately affect Aboriginal and Torres Strait Islander offenders or other marginalised and disadvantaged groups.
Structured discretion *Examples* *Qld: Sentencing violent and sexual offences under section 9 of the PSA, discretionary SVO declarations.* *NSW: Standard NPP scheme.* *NT: For non-level 5 sexual offences the court must record a conviction and impose actual imprisonment or a partially suspended sentence.* *Vic: Category 1 and 2 offences, standard sentencing scheme.*	Gives some guidance to courts, while preserving judicial discretion to impose a just and appropriate sentence. Allows a court to take a wide variety of factors into account when determining the appropriate sentence. May increase the consistency and severity of sentences (where this is an objective sought to be achieved) (especially standard sentencing and SNPP schemes).[6] Gives less prominence to deterrence as a sentencing purpose, consistent with the lack of empirical evidence of its effectiveness.[7] Leaves the issue of sentences that are manifestly inadequate or excessive to be the subject of appellate court review and for the person to be re-sentenced if an error is found.	Provides less certainty than the other approaches described above to offenders, victims and the broader community about the likely sentence and/or NPP that will be applied. Has limited ability to act as an effective deterrent beyond the general deterrent effect of an offender's assessment that they will receive a punishment of some sort if they commit an offence that is detected and they are convicted. May result in appeals if it is not clear a sentencing judge took listed factors or the standard sentence or NPP into account, or gave these insufficient weight, or too much weight. If sentencing ranges and NPPs are not relatively settled based on similar cases and local conventions, it may discourage those charged with an offence from pleading guilty if there is uncertainty as to the sentence or NPP that will be applied.
Broad discretion	As above, but in this case gives courts full discretion to take sentencing purposes, principles and factors into account when determining the appropriate sentence as part of the integrated process of determining the sentence.	Similar to those above under structured discretion.

6 See Sentencing Advisory Council (Victoria), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (Report, 2021) cited in *University of Melbourne Literature Review* (n 3) at 11.

7 See Mirko Bagaric and Theo Alexander, 'The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing' (2012) 36 *Criminal Law Review* 159 and Warner et al. 'The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?' (2017) 41 *Criminal Law Journal* 69 cited in *University of Melbourne Literature Review* (n 10) at 18.

9.4 Discussion questions

The Council invites views about whether any of the potential alternative models is supported in preference to retaining and potentially reforming the SVO scheme.

DISCUSSION QUESTIONS: Alternative models

33. If the SVO scheme was repealed or replaced, what approach would best ensure sentencing outcomes reflect the seriousness of offences to which the SVO scheme currently applies. For example:
    (a) give courts full discretion to set a parole eligibility date applying current legal principles about the setting of a parole eligibility date;
    (b) introduce a requirement that if a court sets a parole eligibility date for a listed offence, it must not be set below the statutory 50 per cent that applies where no parole eligibility date is set — or only be set below 50 per cent if the court considers it unjust not to do so or there are exceptional circumstances;
    (c) introduce a requirement that parole eligibility for listed offences not be set below a standard percentage of the head sentence set above the current 50 per cent statutory level (for example, at least two-thirds or 70%) but with an ability for a court to depart if unjust to do so or there are exceptional circumstances;
    (d) introduce a standard sentence model (similar to Victoria) (expressed as a number of years, rather than as a standard percentage) for specific offences as another guidepost as to the appropriate sentence, with presumptive minimum non-parole periods;
    (e) other?
34. If standard parole provisions were to apply in place of the SVO scheme to all Schedule 1 offences, are any legislative changes required to help guide the court in setting an appropriate non-parole period for serious violent (non-sexual) offences, serious violent sexual offences and serious drug offences (beyond the guidance contained in s 9 of the *Penalties and Sentences Act 1992* (Qld))?

Appendix 1: Terms of Reference

TERMS OF REFERENCE

QUEENSLAND SENTENCING ADVISORY COUNCIL

SERIOUS VIOLENT OFFENCES (SVO) SCHEME IN THE PENALTIES AND SENTENCES ACT 1992

I, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, having regard to:

- advice 3 of the 2018 Queensland Sentencing Advisory Council *Sentencing for Criminal Offences arising from the death of a child: Final report*, suggesting that the Queensland Government consider initiating a review of the serious violent offence (SVO) scheme both in relation to its operation for child manslaughter and more generally;
- 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 in allowing an offender to serve an appropriate portion of their period of imprisonment in the community in order to successfully and safely reintegrate a prisoner into the community and minimise the likelihood of an offender reoffending; and
- the significance of supporting and promoting public confidence in the criminal justice system to the overall administration of justice;

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(1) of the *Penalties and Sentences Act 1992*, a review of the operation and efficacy of the SVO scheme in Part 9A of the *Penalties and Sentences Act 1992*.

In undertaking this reference, the Queensland Sentencing Advisory Council will:

- assess how the SVO scheme is being applied (including where the making of an SVO declaration is discretionary) and whether the scheme is meeting its objectives;
- assess how the SVO provisions are impacting on court sentencing practices;
- identify any trends or anomalies that occur in application of the SVO scheme that create inconsistency or constrain the sentencing process;
- examine whether the SVO scheme is impacting victims' satisfaction with the sentencing process and if so, in what way;
- without limiting the scope of any recommendations, advise on any reforms to ensure sentencing outcomes reflect the seriousness of these offences and if retained, the making of an SVO application only in appropriate cases;

- examine the approach to similar sentencing provisions involving minimum non-parole periods for serious criminal offences in other Australian and international jurisdictions;
- have regard to any relevant research, reports or publications regarding the SVO scheme;
- consult with the community and other key (legal and non-legal) stakeholders, including but not limited to the judiciary, legal profession, victims of crime groups, child protection and domestic, family and sexual violence advocacy groups, or any relevant government department and agencies;
- identify, if possible, broadly any potential financial and practical implications associated with any recommendations;
- advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews, and any recommendations, are compatible with rights protected under the *Human Rights Act 2019;* and
- advise on the impact of any recommendation on the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

The Queensland Sentencing Advisory Council is to provide a report on its examination to the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence by 11 April 2022.

Dated the 9th day of April 2021

SHANNON FENTIMAN
Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence

Appendix 2: List of Queensland correctional facilities and security classification

Correctional facility	Security classification
Arthur Gorrie Correctional Centre	High
Borallon Training and Correctional Centre	High
Brisbane Correctional Centre	High
Brisbane Women's Correctional Centre	High
Capricornia Correctional Centre	High and Low
Helana Jones Centre	Low
Lotus Glen Correctional Centre	High and Low
Maryborough Correctional Centre	High
Numinbah Correctional Centre	Low
Palen Creek Correctional Centre	Low
Southern Queensland Correctional Centre	High
Townsville Correctional Centre	High and Low
Wolston Correctional Centre	High
Woodford Correctional Centre	High

Source: The Queensland Government –www.qld.gov.au/law/sentencing-prisons-and-probation/prisons-and-detention-centres/prison-locations

Appendix 3: Schedule 1 offences and their maximum penalties

This table sets out the current offences in Schedule 1, and subject to the SVO scheme. It includes details of the offence and the maximum penalties that apply. Where details do not correspond to a maximum penalty, this is greyed out in the right-hand column, and where a maximum is not subject to the scheme this has been greyed out. Where subsections of an offence are excluded from the scheme, this is noted in the left-hand column. Only details relevant to what the offence involves, and its maximum penalties are included.

Criminal Code (current)

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
Riot	s 61(1)	If— (a) 12 or more persons who are present together (*assembled persons*) use or threaten to use unlawful violence to a person or property for a common purpose; and (b) the conduct of them taken together would cause a person in the vicinity to reasonably fear for the person's personal safety; each of the assembled persons commits the crime of taking part in a riot.	
	s 61(1)(a)	If the offender causes grievous bodily harm to a person, causes an explosive substance to explode or destroys or starts to destroy a building, vehicle or machinery	Life imprisonment
	s 61(1)(b)	i. If the offender is armed with a dangerous or offensive weapon, instrument or explosive substance; or ii. If property is damaged, whether by the offender or another of the assembled persons	7 years
	s 61(1)(c)	Otherwise	3 years
Threatening Violence	s 75(1) (s75(1) is not part of the SVO scheme)	-Any person who— (a) with intent to intimidate or annoy any person, by words or conduct threatens to enter or damage a dwelling or other premises; or (b) with intent to alarm any person, discharges loaded firearms or does any other act that is likely to cause any person in the vicinity to fear bodily harm to any person or damage to property;	2 years
	s 75(2)	If the offence is committed in the night the offender is guilty of a crime	5 years
Escape by persons in lawful custody	s 142	A person who escapes from lawful custody is guilty of a crime.	7 years
Indecent treatment of children under 16	s 210(1)	Any person who— (a) unlawfully and indecently deals with a child under the age of 16 years; or (b) unlawfully procures a child under the age of 16 years to commit an indecent act; or (c) unlawfully permits himself or herself to be indecently dealt with by a child under the age of 16 years; or (d) wilfully and unlawfully exposes a child under the age of 16 years to an indecent act by the offender or any other person; or (e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or (f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years; is guilty of an indictable offence.	
	s 210(2)	If the child is of or above the age of 12 years	14 years
	s 210(3)	If the child is under the age of 12 years	20 years
	s 210(4)	If the child is, to the knowledge of the offender, his or her lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his or her care	20 years
	s 210(5)	If the child is a person with an impairment of the mind	20 years

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
Owner etc. permitting abuse of children on premises	s 213(1)	Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control of any premises, induces or knowingly permits any child under the age of 16 years to be in or upon the premises for the purpose of any person, whether a particular person or not, doing an act in relation to the child (a *proscribed act*) defined to constitute an offence in section 210 or 215 is guilty of an indictable offence.	
	s 213(2)	If the child is of or above the age of 12 years	10 years
	s 213(3)(a)	If the child is under the age of 12 years and the prescribed act constituted s 215 (Carnal knowledge)	Life imprisonment
	s 213(3)(b)	Any other case where the child is under the age of 12 years	14 years
Carnal knowledge with or of children under 16	s 215(1)	Any person who has or attempts to have unlawful carnal knowledge with or of a child under the age of 16 years is guilty of an indictable offence.	
	s 215(2)	If the child is of or above the age of 12 years	14 years
	s 215(3)	If the child is under the age of 12 years	Life imprisonment
	s 215(3)	If the child is under the age of 12 years and it was attempted carnal knowledge	14 years
	s 215(4)	If the child is not the lineal descendant of the offender but the offender is the child's guardian or, for the time being, has the child under the offender's care	Life imprisonment
	s 215(4)	If the child is not the lineal descendant of the offender but the offender is the child's guardian or, for the time being, has the child under the offender's care and it was attempted carnal knowledge	14 years
	s 215(4A)	If the child is a person with an impairment of the mind	Life imprisonment
Abuse of persons with an impairment of the mind	s 216(1)	Any person who has or attempts to have unlawful carnal knowledge with or of a person with an impairment of the mind (excepting s216(3)(a) and (b))	14 years
	s 216(2)	Any person who (excepting s216(3)(a) and (b))— • unlawfully and indecently deals with a person with an impairment of the mind; or • unlawfully procures a person with an impairment of the mind to commit an indecent act; or • unlawfully permits himself or herself to be indecently dealt with by a person with an impairment of the mind; or • wilfully and unlawfully exposes a person with an impairment of the mind to an indecent act by the offender or any other person; or • without legitimate reason, wilfully exposes a person with an impairment of the mind to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or • without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a person with an impairment of the mind;	10 years
	s 216(3)(a)	If the person with an impairment of the mind is not the lineal descendant of the offender but the offender is the guardian of that person or, for the time being, has that person under the offender's care and it involves unlawful carnal knowledge	Life imprisonment
	s 216(3)(b)	If the person with an impairment of the mind is not the lineal descendant of the offender but the offender is the guardian of that person or, for the time being, has that person under the offender's care and it involves attempted unlawful carnal knowledge	Life imprisonment
	s 216(3)(c)	If the person with an impairment of the mind is not the lineal descendant of the offender but the offender is the guardian of that person or, for the time being, has that person under the offender's care and it involves an offence defined in s 216(2)	14 years
	s 216(3A)	In the case of an offence defined in subsection (2), if the person with an impairment of the mind is, to the knowledge of the offender, the offender's lineal descendant	14 years
Procuring a young person etc. for carnal knowledge	s 217(1)	A person who procures a person who is not an adult or is a person with an impairment of the mind to engage in carnal knowledge (either in Queensland or elsewhere) commits a crime.	14 years

The '80 per cent rule': The serious violent offences scheme

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
Procuring sexual acts by coercion etc.	s 218(1)	A person who— (a) by threats or intimidation of any kind, procures a person to engage in a sexual act, either in Queensland or elsewhere; or (b) by a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere; or (c) administers to a person, or causes a person to take, a drug or other thing with intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person;	14 years
Taking a child for immoral purposes	s 219(1)	Any person who takes or entices away, or detains a child who is under the age of 16 years and is not the husband or wife of that person for the purpose of any person, whether a particular person or not, doing an act in relation to the child (a *proscribed act*) defined to constitute an offence in section 210 or 215 is guilty of a crime.	
	s 219(2)	If the child is of or above the age of 12 years	10 years
	s 219(3)(a)	If the child is under the age of 12 years and commits carnal knowledge	Life imprisonment
	s 219(3)(b)	Any other case and the child is under the age of 12 years	14 years
Incest	s 222(1)	Any person who— (a) has carnal knowledge with or of the person's offspring or other lineal descendant, or sibling, parent, grandparent, uncle, aunt, nephew or niece; and (b) knows that the other person bears that relationship to him or her, or some relationship of that type to him or her;	Life imprisonment
	s 222(2)	Any person who attempts to commit the crime of incest	10 years
Maintaining a relationship with a child	s 229B	Any adult who maintains an unlawful sexual relationship with a child under the age of 16 years commits a crime. (An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.)	Life imprisonment
Procuring engagement in prostitution	s 229G(1) This section is not part of SVO scheme. Only s 229G(2) is.	A person who— (a) procures another person to engage in prostitution, either in Queensland or elsewhere; or (b) procures another person— i. to leave Queensland for the purpose of engaging in prostitution elsewhere; or ii. to come to Queensland for the purpose of engaging in prostitution; or iii. to leave the other person's usual place of residence in Queensland for the purpose of engaging in prostitution, either in Queensland or elsewhere; commits a crime.	7 years
	s 229G(2)	If the procured person is not an adult or is a person with an impairment of the mind.	20 years
Misconduct with regard to corpses	s 236(2)	A person who, without lawful justification or excuse, the proof of which lies on the person, improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not, is guilty of a crime.	5 years
Manslaughter	ss 303(1) and 310	A person who unlawfully kills another under such circumstances as not to constitute murder.	Life imprisonment
Attempt to murder	s 306	Any person who— (a) attempts unlawfully to kill another; or (b) with intent unlawfully to kill another does any act, or omits to do any act which it is the person's duty to do, such act or omission being of such a nature as to be likely to endanger human life; is guilty of a crime.	Life imprisonment
Conspiring to murder	S 309	Any person who conspires with any other person to kill any person, whether such person is in Queensland or elsewhere, is guilty of a crime.	14 years
Killing unborn child	S 313(1)	Any person who, when a female is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, the person would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life.	Life imprisonment
	S 313(2)	Any person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to, or transmits a serious disease to, the child before its birth, commits a crime.	Life imprisonment

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
Disabling in order to commit indictable offence	S 315	Any person who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of a crime	Life imprisonment
Stupefying in order to commit indictable offence	S 316	Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer, any stupefying or overpowering drug or thing to any person, is guilty of a crime,	Life imprisonment
Acts intended to cause GBH and other malicious acts	S 317	Any person who, with intent— (a) to maim, disfigure or disable, any person; or (b) to do some grievous bodily harm or transmit a serious disease to any person; or (c) to resist or prevent the lawful arrest or detention of any person; or (d) to resist or prevent a public officer from acting in accordance with lawful authority— either— (e) in any way unlawfully wounds, does grievous bodily harm, or transmits a serious disease to, any person; or (f) unlawfully strikes, or attempts in any way to strike, any person with any kind of projectile or anything else capable of achieving the intention; or (g) unlawfully causes any explosive substance to explode; or (h) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or (i) causes any such substance or thing to be taken or received by any person; or (j) puts any corrosive fluid or any destructive or explosive substance in any place; or (k) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person; is guilty of a crime.	Life imprisonment
Carrying or sending dangerous goods in vehicle	S 317A(1)	Any person who— (a) carries or places dangerous goods in or on a vehicle; or (b) delivers dangerous goods to another person for the purpose of such goods being placed in or on a vehicle; or (c) has dangerous goods in his or her possession in or on a vehicle; is guilty of a crime	14 years
Obstructing rescue or escape from unsafe premises	s 318	Any person who unlawfully obstructs anyone in the other person's efforts to save the life of someone who is in, or escaping from, dangerous, destroyed or other unsafe premises commits a crime.	Life imprisonment
Endangering the safety of a person in a vehicle with intent	s 319	A person who does anything that endangers, or is likely to endanger, the safe use of a vehicle, with intent to injure or endanger the safety of any person in the vehicle, whether a particular person or not, commits a crime.	Life imprisonment
Grievous bodily harm	s 320	Any person who unlawfully does grievous bodily harm to another is guilty of a crime	14 years
Torture	s 320A	A person who tortures another person commits a crime.	14 years
Attempting to injure by explosive or noxious substances	s 321	Any person who unlawfully, and with intent to do any bodily harm to another, puts any explosive or noxious substance in any place whatever, is guilty of a crime.	14 years
Bomb hoaxes	s 321A(1)	Any person who— (a) places an article or substance in any place; or (b) sends an article or substance in any way; with the intention of inducing in another person a belief that the article or substance is likely to explode, ignite, or discharge a dangerous or noxious substance, commits a crime.	7 years
	s 321A(2)	Any person who, in Queensland or elsewhere, makes a statement or conveys information to another person that he or she knows or believes to be false, with the intention of inducing in that person or another person a belief that an explosive or noxious substance, acid or other thing of a dangerous or destructive nature is present in a place in Queensland, commits a crime.	5 years

The '80 per cent rule': The serious violent offences scheme

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
Administering poison with intent to harm	s 322	A person who unlawfully, and with intent to injure or annoy another person, causes a poison or another noxious thing to be administered to, or taken by, any person commits a crime.	
	s 322(a)	if the poison or other noxious thing endangers the life of, or does grievous bodily harm to, the person to whom it is administered or by whom it is taken	14 years
	s 322(b)	Otherwise	7 years
Wounding	s 323	A person who unlawfully wounds anyone else commits a misdemeanour.	7 years
Failure to supply necessaries	s 324	Any person who, being charged with the duty of providing for another the necessaries of life, without lawful excuse fails to do so, whereby the life of that other person is or is likely to be endangered or the other person's health is or is likely to be permanently injured, is guilty of a crime.	7 years
Endangering life of children by exposure	s 326	Any person who unlawfully abandons or exposes a child under the age of 7 years, whereby the life of such child is or is likely to be endangered, or the child's health is or is likely to be permanently injured, commits a crime.	7 years
Dangerous operation of a vehicle	s 328A(1)	A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place commits a misdemeanour.	3 years
	s 328A(2)	If the offender— (a) at the time of committing the offence is adversely affected by an intoxicating substance; or (b) at the time of committing the offence is excessively speeding or taking part in an unlawful race or unlawful speed trial; or (c) has been previously convicted either upon indictment or summarily of an offence against this section; the person commits a crime.	5 years
	s 328A(3)	If the offender has been— (a) previously convicted either upon indictment or summarily of an offence against this section committed while the offender was adversely affected by an intoxicating substance; or (b) twice previously convicted either upon indictment or summarily (or once upon indictment and once summarily) of the same prescribed offence or different prescribed offences; the court or justices shall, upon conviction, impose as the whole or part of the punishment, imprisonment.	
	s 328A(4)(a)	A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of or grievous bodily harm to another person commits a crime and is liable on conviction on indictment— (a) to imprisonment for 10 years, if neither paragraph (b) nor (c) applies; or	10 years
	s 328A(4)(b)	(b) at the time of committing the offence, the offender is— i. adversely affected by an intoxicating substance; or ii. excessively speeding; or iii. taking part in an unlawful race or unlawful speed trial; or (c) if the offender knows, or ought reasonably know, the other person has been killed or injured, and the offender leaves the scene of the incident, other than to obtain medical or other help for the other person, before a police officer arrives.	14 years

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
Assaults occasioning bodily harm	s 339(1)	Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime.	7 years
	s 339(2)	If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument or is in company with 1 or more other person or persons	10 years
Serious assaults	s 340(1)	Any person who— (a) assaults another with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person; or (b) assaults, resists, or wilfully obstructs, a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting; or (c) unlawfully assaults any person while the person is performing a duty imposed on the person by law; or (d) assaults any person because the person has performed a duty imposed on the person by law; or (e) assaults any person in pursuance of any unlawful conspiracy respecting any manufacture, trade, business, or occupation, or respecting any person or persons concerned or employed in any manufacture, trade, business, or occupation, or the wages of any such person or persons; or (f) unlawfully assaults any person who is 60 years or more; or (g) unlawfully assaults any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device; is guilty of a crime.	
	s 340(1)(a)	for subsection (1)(b), if the offender assaults a police officer in any of the following circumstances— i. the offender bites or spits on the police officer or throws at, or in any way applies to, the police officer a bodily fluid or faeces; ii. the offender causes bodily harm to the police officer; iii. the offender is, or pretends to be, armed with a dangerous or offensive weapon or instrument	14 years
	s 340(1)(b)	Otherwise	7 years
	s 340(2)	A prisoner who unlawfully assaults a working corrective services officer commits a crime.	
	s 340(2)(a)	if the prisoner assaults a working corrective services officer in any of the following circumstances— i. the prisoner bites or spits on the corrective services officer or throws at, or in any way applies to, the corrective services officer a bodily fluid or faeces; ii. the prisoner causes bodily harm to the corrective services officer; iii. the prisoner is, or pretends to be, armed with a dangerous or offensive weapon or instrument	14 years
	s 340(2)(b)	Otherwise	7 years
Serious assaults	s 340(2AA)	A person who— (a) unlawfully assaults, or resists or wilfully obstructs, a public officer while the officer is performing a function of the officer's office; or A person who— (b) unlawfully assaults, or resists or wilfully obstructs, a public officer while the officer is performing a function of the officer's office; or	
	s 340(2AA)(a)	if the offender assaults a public officer in any of the following circumstances— i. the offender bites or spits on the public officer or throws at, or in any way applies to, the public officer a bodily fluid or faeces; ii. the offender causes bodily harm to the public officer; iii. the offender is, or pretends to be, armed with a dangerous or offensive weapon or instrument	14 years
	s 340(2AA)(b)	Otherwise	7 years
Rape	s 349	Any person who rapes another person is guilty of a crime.	Life imprisonment
Attempt to commit rape	s 350	Any person who attempts to commit the crime of rape is guilty of a crime.	14 years
Assault with intent to commit rape	s 351	Any person who assaults another with intent to commit rape is guilty of a crime.	14 years

The '80 per cent rule': The serious violent offences scheme

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
Sexual assaults	s 352(1)	Any person who— (a) unlawfully and indecently assaults another person; or (b) procures another person, without the person's consent— i. to commit an act of gross indecency; or ii. to witness an act of gross indecency by the person or any other person; is guilty of a crime.	10 years
	s 352(2)	However, for an offence defined in subsection (1)(a) or (1)(b)(i) if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.	14 years
	s 352(3)	Further if— (a) immediately before, during, or immediately after, the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with any other person; or (b) for an offence defined in subsection (1)(a), the indecent assault includes the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis; or (c) for an offence defined in subsection (1)(b)(i), the act of gross indecency includes the person who is procured by the offender penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the body of the person who is procured that is not a penis.	Life imprisonment
Kidnapping	s 354(1)	Any person who kidnaps another person is guilty of a crime. [s 354(2)A person kidnaps another person if the person unlawfully and forcibly takes or detains the other person with intent to gain anything from any person or to procure anything to be done or omitted to be done by any person.]	7 years
Kidnapping for ransom	s 354A(1)	Any person who— (a) with intent to extort or gain anything from or procure anything to be done or omitted to be done by any person by a demand containing threats of detriment of any kind to be caused to any person, either by the offender or any other person, if the demand is not complied with, takes or entices away, or detains, the person in respect of whom the threats are made; or (b) receives or harbours the said person in respect of whom the threats are made, knowing such person to have been so taken or enticed away, or detained; is guilty of a crime which is called kidnapping for ransom.	
	s 354A(2)	Any person who commits the crime of kidnapping for ransom	14 years
	s 354A(3)	If the person kidnapped has been unconditionally set at liberty without such person having suffered any grievous bodily harm	10 years
	s 354A(4)	Any person who attempts to commit the crime of kidnapping for ransom is guilty of a crime	7 years
Cruelty to children under 16	s 364	A person who, having the lawful care or charge of a child under 16 years, causes harm to the child by any prescribed conduct that the person knew or ought reasonably to have known would be likely to cause harm to the child commits a crime.	7 years
Punishment of robbery	s 411(1)	Any person who commits the crime of robbery	14 years
	s 411(2)	If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with 1 or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, the offender wounds or uses any other personal violence to any person	Life imprisonment
Attempted robbery	s 411(1)	Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a crime	7 years
	s 411(2)	If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with 1 or more other person or persons,	14 years
	s 411(3)	If the offender is armed with any dangerous or offensive weapon, instrument or noxious substance, and at or immediately before or immediately after the time of the assault the offender wounds, or uses other personal violence to, any person by the weapon, instrument or noxious substance	Life imprisonment
Taking control of aircraft	s 417A(1)	Any person who unlawfully either directly or indirectly takes or exercises control of any aircraft is guilty of a crime	7 years
	s 417A(2)	If another person not being an accomplice of the offender is on board the aircraft	14 years

Offence Name	Section	Details relevant to the maximum penalty	Maximum Penalty
	s 417A(3)	If the offender at or immediately before or immediately after the time of taking or exercising such control uses or threatens to use actual violence to any person or property in order to take or exercise control of the aircraft or to prevent or overcome resistance to such control being taken or exercised or is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons or takes or exercises such control by any fraudulent representation trick device or other means	Life imprisonment
Burglary	s 419(1) [s 419(1) is not part of SVO scheme)	Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits a crime.	14 years
	s 419(3)(b)(i)	If the offender uses or threatens to use actual violence	Life imprisonment
	s 419(3)(b)(ii)	If the offender is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance	Life imprisonment

Criminal Code (repealed by *Criminal Law Amendment Act 1997* and *Health and Other Legislation Amendment Act 2016*)

Offence name	Section	Details relevant to the maximum penalty	Maximum penalty
Unlawful anal intercourse	s 208	Any person who – (1) Has carnal knowledge of any person against the order of nature; or (2) Has carnal knowledge of an animal; or (3) Permits a male person to have carnal knowledge of him or her against the order of nature Is guilty of a crime.	14 years hard labour
Unlawful sodomy	s 208(1)	Any person who— (a) sodomises a person under 18 years; or (b) permits a male person under 18 years to sodomise him or her; or (c) sodomises an intellectually impaired person; or (d) permits an intellectually impaired person to sodomise him or her; commits a crime.	14 years
	s 208(2)	If the offence is committed in respect of— (a) a child under 12 years; or (b) a child, or an intellectually impaired person, who is to the knowledge of the offender— i. his or her lineal descendant; or ii. under his or her guardianship or care.	Life imprisonment
Attempted sodomy1	s 209(1)	Any person who attempts to sodomise a person	7 years
	s 209(2)	If the offence is committed in respect of— a child under 12 years; or a child, or an intellectually impaired person, who is to the knowledge of the offender— his or her lineal descendant; or under his or her guardianship or care.	14 years
Conspiracy to defile	s 221	Any person who conspires with another to induce any person, by any false pretence or other fraudulent means, to permit any person to have unlawful carnal knowledge with or of him or her commits a crime.	10 years
Incest by man	s 222(1)	Any person who— (a) has carnal knowledge with or of the person's offspring or other lineal descendant, or sibling, parent, grandparent, uncle, aunt, nephew or niece; and (b) knows that the other person bears that relationship to him or her, or some relationship of that type to him or her; commits a crime	Life imprisonment
	s 222(2)	Any person who attempts to commit the crime of incest	10 years
Incest by adult female	s 223(1)	Any woman or girl of or above the age of 18 years who permits her father or other lineal ancestor, or her brother, or her son, to have carnal knowledge of her, knowing him to be her father or other lineal ancestor, or her brother, or her son, as the case may be, is guilty of a misdemeanour	3 years
Preventing escape from wreck	s 318	Any person who unlawfully (a) prevents or obstructs any person who is on board of or is escaping from a vessel which is in distress or wrecked or cast ashore, in the person's endeavours to save the person's life; or (b) obstructs any person in the person's endeavours to save the life of any person so situated; is guilty of a crime	Life imprisonment

[1] This is not listed in the current PSA Schedule 1, however it was listed in Schedule 1 of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld).

Corrective Services Act 2006 (current)

Offence name	Section	Details relevant to the maximum penalty	Maximum penalty
Unlawful assembly, riot and mutiny	s 122(2)	A prisoner must not take part in a riot or mutiny.	
	s 122(2)(a)	if, during the riot or mutiny, the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, property that is part of a corrective services facility and the security of the facility is endangered by the act	Life imprisonment
	s 122(2)(b)	if, during the riot or mutiny, the prisoner demands something be done or not be done with threats of injury or detriment to any person or property	14 years
	s 122(2)(c)	if, during the riot or mutiny, the prisoner escapes or attempts to escape from lawful custody, or helps another prisoner to escape or attempt to escape from lawful custody	14 years
	s 122(2)(d)	if, during the riot or mutiny, the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, any property	10 years
	s 122(2)(e)	Otherwise	6 years
Other offences	s 124(a)	A prisoner must not prepare to escape from lawful custody	2 years

Corrective Services Act 2000 (repealed by the *Corrective Services Act 2006*)

Offence name	Section	Details relevant to the maximum penalty	Maximum penalty
Unlawful assembly, riot and mutiny	s 92(2)	A prisoner must not take part in a riot or mutiny.	
	s 92(2)(a)	if, during the riot or mutiny, the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, property that is part of a corrective services facility and the security of the facility is endangered by the act	Life imprisonment
	s 92(2)(b)	if during the riot or mutiny the prisoner demands that anything be done or not done with threats of injury or detriment to any person or property	14 years
	s 92(2)(c)	if during the riot or mutiny the prisoner escapes or attempts to escape from lawful custody, or helps another prisoner to escape or attempt to escape from lawful custody	14 years
	s 92(2)(d)	if during the riot or mutiny the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, any property	10 years
	s 92(2)(e)	Otherwise	6 years
Other offences	s 94(a)	A prisoner must not prepare to escape from lawful custody	2 years

Drugs Misuse Act 1986

Offence name	Section	Details relevant to the maximum penalty	Maximum penalty
Trafficking in dangerous drugs	s 5	A person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime. **BUT SVO ONLY** if the offender is sentenced for the offence on or after the commencement of the *Serious and Organised Crime Legislation Amendment Act 2016*, section 164, whether the offence or conviction happened before or after that commencement	25 years
Supplying dangerous drugs	s 6(1)	A person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime. **BUT SVO ONLY** if the offence is one of aggravated supply as mentioned in that section	
	s 6(2)	For the purposes of this section, an offence is one of aggravated supply if the offender is an adult and— (a) the person to whom the thing is supplied is a minor under 16 years; or (aa) the person to whom the thing is supplied is a minor who is 16 years or more; or (b) the person to whom the thing is supplied is an intellectually impaired person; or (c) the person to whom the thing is supplied is within an educational institution; or (d) the person to whom the thing is supplied is within a correctional facility; or (e) the person to whom the thing is supplied does not know he or she is being supplied with the thing.	
	s 6(1)(a)	if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the offence is one of aggravated supply under subsection (2)(a)	Life imprisonment
	s 6(1)(b)	if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the offence is one of aggravated supply under subsection (2)(aa), (b), (c), (d) or (e)	25 years
	s 6(1)(d)	if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and the offence is one of aggravated supply under subsection (2)(a)	25 years
	s 6(1)(e)	if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and the offence is one of aggravated supply under subsection (2)(aa), (b), (c), (d) or (e)	20 years
Producing dangerous drugs	s 8(1)	A person who unlawfully produces a dangerous drug is guilty of a crime.	
	s 8(1)(a)	if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 4 in respect of that thing	25 years
	s 8(1)(b)(i)	if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 3 but less than the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 4 in respect of that thing and the person convicted - i. satisfies the judge constituting the court before which the person is convicted that when the person committed the offence the person was a drug dependent person; or	20 years
	s 8(1)(b)(ii)	if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 3 but less than the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 4 in respect of that thing and the person convicted - ii. does not so satisfy the judge constituting the court before which the person is convicted.	25 years

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