

# Community-based sentencing orders, imprisonment and parole options

Final report

July 2019



**Queensland Sentencing  
Advisory Council**  
*Inform. Engage. Advise.*

## **Community-based orders, imprisonment and parole options: Final report**

Published by Queensland Sentencing Advisory Council, July 2019

© Queensland Sentencing Advisory Council 2019

This report is available for download from the Council's website: [www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)

This report is licensed by Queensland Sentencing Advisory Council under a Creative Commons Attribution (CC BY) 4.0 International licence.

### **CC BY licence summary statement**

In essence, you are free to copy, communicate and adapt this report, as long as you attribute the work to Queensland Sentencing Advisory Council.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0>

Content from this report should be attributed as – Community-based orders, imprisonment and parole options: Final report, Queensland Sentencing Advisory Council, July 2019.

### **Disclaimer**

The content of this final report is for the purpose of promoting discussion only and does not represent Queensland Government policy. While all reasonable care has been taken in the preparation of this report, no responsibility or liability is assumed for any errors or omissions or any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from this publication. This report follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (4th ed., 2018) and reflects the law as at 1 June 2019.

### **Queensland Sentencing Advisory Council**

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

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

### **Further information**

Queensland Sentencing Advisory Council

GPO Box 2360, Brisbane Qld 4001

Tel: (07) 3738 9499

Email: [info@sentencingcouncil.qld.gov.au](mailto:info@sentencingcouncil.qld.gov.au)

31 July 2019

The Honourable Yvette D'Ath  
Attorney-General and Minister for Justice, Leader of the House  
GPO Box 149  
Brisbane Qld 4001

Dear Attorney-General

I am pleased to provide the Queensland Sentencing Advisory Council's, *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report*.

This final report addresses the Terms of Reference you referred to the Council on 26 October 2017.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Robertson', with a long horizontal line extending to the right.

**John Robertson**  
Chair  
Queensland Sentencing Advisory Council

# Contents

|  |             |
|--|-------------|
| <b>List of figures .....</b>   | <b>v</b>    |
| <b>List of tables .....</b>  | <b>x</b>    |
| <b>Contributors .....</b>  | <b>xii</b>  |
| <b>Members of the Queensland Sentencing Advisory Council.....</b>  | <b>xiii</b> |
| <b>Preface .....</b>   | <b>xiv</b>  |
| <b>Acknowledgments .....</b>   | <b>xvi</b>  |
| <b>Abbreviations .....</b>   | <b>xvii</b> |
| <b>Executive summary .....</b>   | <b>xix</b>  |
| <b>List of recommendations .....</b>   | <b>xxvi</b> |
| <b>Chapter 1 Introduction .....</b>  | <b>1</b>    |
| 1.1 Background to the review .....   | 1           |
| 1.2 Terms of Reference.....  | 2           |
| 1.3 Council's approach .....   | 3           |
| 1.4 Terminology .....  | 4           |
| 1.5 Scope .....  | 5           |
| 1.6 Data sources .....   | 5           |
| 1.7 Structure of this report.....  | 6           |
| <b>Chapter 2 Sentencing context in Queensland .....</b>  | <b>8</b>    |
| 2.1 Reforms, reviews and legislative changes.....  | 8           |
| 2.2 Trends in offences.....  | 11          |
| 2.3 Challenges facing Queensland's criminal justice system .....   | 21          |
| <b>Chapter 3 What works in sentencing? .....</b>   | <b>31</b>   |
| 3.1 Sources.....   | 31          |
| 3.2 Community-based order completion in Queensland .....   | 33          |
| 3.3 Evidence of order effectiveness .....  | 40          |
| 3.4 Recidivism in Queensland .....   | 43          |
| 3.5 The effect of prior imprisonment.....  | 47          |
| <b>Chapter 4 Fundamental principles .....</b>  | <b>50</b>   |
| 4.1 Principle 1: Court ordered parole should be retained .....   | 50          |
| 4.2 Principle 2: Suspended sentences should be retained .....  | 51          |
| 4.3 Principle 3: Legislative sentencing anomalies and complexities should be minimised.....  | 51          |
| 4.4 Principle 4: Any changes to existing community-based sentencing orders or new sentencing options<br>should aim to reduce Queensland's prison population, while maintaining community safety .....              | 52          |
| 4.5 Principle 5: Any reforms should aim to reduce the overrepresentation of Aboriginal and Torres Strait<br>Islander people in the criminal justice system.....  | 54          |
| 4.6 Principle 6: Community-based sentencing orders have significant advantages over imprisonment where<br>the offender does not pose a demonstrated risk to the community .....                                    | 56          |
| 4.7 Principle 7: Judicial discretion in the sentencing process is fundamentally important .....  | 57          |
| 4.8 Principle 8: It is important to provide courts with flexible sentencing options that enable the imposition<br>of sentences that accord with the principles and purposes of sentencing set out in the PSA ..... | 58          |
| 4.9 Principle 9: Limited executive power to deal with minor breaches may enhance community-based<br>sentencing order flexibility .....   | 59          |

|                  |   |            |
|------------------|---|------------|
| 4.10             | Principle 10: Community-based sentencing orders, and the services delivered under them, must be adequately funded and properly administered.....  | 59         |
| 4.11             | Principle 11: Sentencing options and their administration should reflect the individual needs of all parties involved, including offenders, victims and the broader community .....   | 60         |
| 4.12             | Principle 12: Public confidence in the criminal justice system should be encouraged and maintained, with sentencing practices considering community expectations and taking into account the impact on victims of crime ..... | 61         |
| 4.13             | Principle 13: Equal justice means sentencing options should, as far as practicable, not vary according to location .....  | 63         |
| 4.14             | Principle 14: Sex offenders serving sentences in the community should have appropriate supervision .....  | 64         |
| 4.15             | Principle 15: Reforms to sentencing and parole should be based on the best available evidence.....  | 64         |
| <b>Chapter 5</b> | <b>Sentencing process and framework.....</b>  | <b>66</b>  |
| 5.1              | Purposes of the <i>Penalties and Sentences Act 1992</i> (Qld) (PSA) .....   | 66         |
| 5.2              | Sentencing purposes .....   | 66         |
| 5.3              | Principle of imprisonment as a sentence of last resort .....  | 67         |
| 5.4              | Sentencing options for state offences .....   | 73         |
| 5.5              | Commonwealth offences and community-based orders in Queensland .....  | 79         |
| 5.6              | Sentencing process.....   | 84         |
| 5.7              | Mandatory sentencing.....   | 86         |
| <b>Chapter 6</b> | <b>Overview of proposed reforms.....</b>  | <b>104</b> |
| 6.1              | Intermediate sentencing and parole orders post the Council's reforms.....   | 104        |
| 6.2              | System reform challenges .....  | 108        |
| <b>Chapter 7</b> | <b>Intensive Correction Orders.....</b>   | <b>110</b> |
| 7.1              | Intensive Correction Orders (ICOs) in Queensland .....  | 110        |
| 7.2              | Community service – widening the scope? .....   | 117        |
| 7.3              | ICO use has declined as court ordered parole has increased .....  | 119        |
| 7.4              | Parole – a different system .....   | 121        |
| 7.5              | Who are ICOs used for? .....  | 123        |
| 7.6              | 2016 Queensland Drug and Specialist Courts Review .....   | 126        |
| 7.7              | Other jurisdictions .....   | 127        |
| 7.8              | Evidence of effectiveness.....  | 134        |
| 7.9              | Consultation and submissions .....  | 135        |
| 7.10             | The Council's view .....  | 137        |
| <b>Chapter 8</b> | <b>Community Correction Orders.....</b>   | <b>141</b> |
| 8.1              | What are CCOs? .....  | 141        |
| 8.2              | The introduction of CCOs and equivalent orders – a chronological summary .....  | 143        |
| 8.3              | Data sources .....  | 147        |
| 8.4              | The potential impact of a Queensland CCO .....  | 148        |
| 8.5              | The Victorian CCO model – Parts 3A and 3C <i>Sentencing Act 1991</i> (Vic) .....  | 151        |
| 8.6              | Evaluations of the Victorian CCO model .....  | 156        |
| 8.7              | National completion rates for supervision orders – <i>Report on Government Services 2019</i> .....  | 162        |
| 8.8              | Community orders in England and Wales.....  | 163        |
| 8.9              | Issues.....   | 165        |
| 8.10             | Introduction of a CCO model for Queensland .....  | 168        |
| 8.11             | Key elements of a Queensland CCO model .....  | 178        |
| 8.12             | 'Reasonable direction' requirement for community-based orders.....  | 201        |

|                   |   |            |
|-------------------|---|------------|
| <b>Chapter 9</b>  | <b>Home detention .....</b>   | <b>207</b> |
| 9.1               | What is home detention?.....  | 207        |
| 9.2               | Availability and use of home detention.....   | 207        |
| 9.3               | Issues.....   | 208        |
| 9.4               | Options Paper proposals.....  | 208        |
| 9.5               | Submissions and consultation .....  | 209        |
| 9.6               | Issues and options .....  | 215        |
| 9.7               | The Council's view .....  | 220        |
| <b>Chapter 10</b> | <b>Suspended sentences .....</b>  | <b>223</b> |
| 10.1              | Historical context.....   | 223        |
| 10.2              | The current legal framework.....  | 224        |
| 10.3              | The approach in other jurisdictions.....  | 227        |
| 10.4              | How often are suspended sentences being used? .....   | 229        |
| 10.5              | Average sentence length for suspended sentences in Queensland .....   | 230        |
| 10.6              | How has the use of suspended sentences changed over time? .....   | 231        |
| 10.7              | How often are suspended sentences being combined with other penalty types? .....  | 241        |
| 10.8              | Who receives a suspended sentence? .....  | 243        |
| 10.9              | Impact of remoteness on use of suspended sentences .....  | 244        |
| 10.10             | Recidivism and breach rates .....   | 245        |
| 10.11             | The role of suspended sentences .....   | 251        |
| 10.12             | A conditional form of suspended sentence .....  | 257        |
| 10.13             | Relationship between the operational period and sentence length .....   | 263        |
| 10.14             | Breach powers.....  | 272        |
| <b>Chapter 11</b> | <b>Court ordered parole .....</b>   | <b>282</b> |
| 11.1              | Historical context.....   | 282        |
| 11.2              | Purpose and benefits of parole .....  | 282        |
| 11.3              | The current legal framework.....  | 284        |
| 11.4              | Queensland Parole System Review recommendations .....   | 286        |
| 11.5              | Extending court ordered parole from a cap of 3-year sentences, to 5-year sentences.....   | 290        |
| 11.6              | Parole reform options .....   | 294        |
| 11.7              | Assessing the effectiveness of parole in Queensland – an unresolved issue.....  | 303        |
| 11.8              | Parole for short sentences of imprisonment .....  | 309        |
| 11.9              | Statutory court ordered parole order cancellation and related legislative complexities.....   | 321        |
| 11.10             | Anomaly identified by the Court of Appeal: <i>R v Sabine</i> [2019] QCA 36 .....  | 330        |
| 11.11             | The relationship between court ordered parole, pre-sentence custody declarations and unexpired portions of existing sentences ..... | 333        |
| 11.12             | Judicial power to order parole conditions for court ordered parole orders.....  | 357        |
| 11.13             | Executive powers regarding parole orders.....   | 358        |
| <b>Chapter 12</b> | <b>Use of custodial orders for sexual offences .....</b>  | <b>373</b> |
| 12.1              | The current legal framework for sentencing sexual offenders .....   | 373        |
| 12.2              | Exclusion of sexual offences from court ordered parole.....   | 375        |
| 12.3              | The approach to court ordered parole for sexual offences in other jurisdictions.....  | 375        |
| 12.4              | How are sexual offences sentenced in Queensland? .....  | 376        |
| 12.5              | Offenders with a sexual offence as the MSO.....   | 379        |
| 12.6              | Multiple offences and penalties combined with probation.....  | 385        |

|  |   |            |
|--|---|------------|
| 12.7   | Sentencing outcomes for certain sexual offences .....   | 387        |
| 12.8   | Sentencing trends and the Parole System Review.....   | 390        |
| 12.9   | If court ordered parole were extended to sexual offences .....  | 392        |
| 12.10  | Challenges with managing sexual offenders in custody and in the community .....   | 394        |
| 12.11  | Issues and proposed reforms.....  | 397        |
| <b>Chapter 13</b>  | <b>Summary of findings from place-based case studies.....</b>   | <b>399</b> |
| 13.1   | Methodology.....  | 399        |
| 13.2   | Research objectives.....  | 399        |
| 13.3   | Summary of findings.....  | 400        |
| 13.4   | Conclusions regarding the future service and support infrastructure for community-based sentence management in Queensland ..... | 417        |
| <b>Chapter 14</b>  | <b>Other issues.....</b>  | <b>419</b> |
| 14.1   | Pre-sentence reports (PSRs) and court advisory service .....  | 419        |
| 14.2   | Administrative mechanisms – section 651 applications, ex officio indictments, section 189 schedules ..                          | 430        |
| 14.3   | Convicted and not further punished .....  | 434        |
| 14.4   | Breaches of community-based orders .....  | 436        |
| 14.5   | High-volume imprisonment in Magistrates Courts: breaches of domestic violence orders and breaches of bail .....                 | 444        |
| 14.6   | Data quality .....  | 446        |
| <b>Chapter 15</b>  | <b>Implementation.....</b>  | <b>448</b> |
| 15.1   | Achieving cultural change – setting the foundations.....  | 448        |
| 15.2   | Establishing an implementation strategy .....   | 450        |
| <b>Appendix 1: Terms of Reference.....</b>   |   | <b>460</b> |
| <b>Appendix 2: Agencies consulted and submissions received.....</b>  |   | <b>462</b> |
| <b>Appendix 3: What works in sentencing – summary tables .....</b>   |   | <b>465</b> |
| <b>Appendix 4: Summary of mandatory sentencing provisions in Queensland.....</b>                               |   | <b>470</b> |
| <b>Appendix 5: Offending behaviour programs for community-based orders .....</b>                               |   | <b>474</b> |
| <b>Appendix 6: Summary of relevant PSA and CSA provisions .....</b>  |   | <b>477</b> |
| <b>Appendix 7: Sexual offences listed in schedule 1 of the <i>Corrective Services Act 2006</i> (Qld) .....</b> |   | <b>479</b> |
| <b>Appendix 8: Queensland sexual offending programs.....</b>   |   | <b>481</b> |
| <b>Glossary .....</b>  |   | <b>483</b> |
| <b>Bibliography .....</b>  |   | <b>487</b> |

## List of figures

|  |    |
|--|----|
| Figure 1-1: Council's approach to review of community-based sentencing orders, imprisonment and parole options                                   | 3  |
| Figure 2-1: Summary of legislative amendments with an impact on sentencing, 2002–2019  | 10 |
| Figure 2-2: Change in offence categories over time (MSO), Magistrates Courts, Queensland, 2005–06 to 2017–18                                     | 13 |
| Figure 2-3: Change in offence categories over time (MSO), higher courts, Queensland, 2005–06 to 2017–18  | 14 |
| Figure 2-4: Offence division (MSO) by gender, 2005–06 to 2017–18   | 15 |
| Figure 2-5: Offence division (MSO) by Indigenous status, 2005–06 to 2017–18  | 16 |
| Figure 2-6: Use of custodial and non-custodial penalties, by court level (MSO), 2005–06 to 2017–18   | 17 |
| Figure 2-7: Custodial penalties imposed on adult offenders by penalty type (MSO), Magistrates Courts, Queensland, 2005–06 to 2017–18             | 18 |
| Figure 2-8: Non-custodial penalties imposed on adult offenders by penalty type (MSO), Magistrates Courts, Queensland, 2005–06 to 2017–18         | 19 |
| Figure 2-9: Custodial penalties imposed on adult offenders by penalty type (MSO), higher courts, Queensland, 2005–06 to 2017–18                  | 20 |
| Figure 2-10: Non-custodial penalties imposed on adult offenders by penalty type (MSO), higher courts, Queensland, 2005–06 to 2017–18             | 21 |
| Figure 2-11: Total number of prisoners, Queensland, 2008 to 2018   | 22 |
| Figure 2-12: Age-standardised imprisonment rate, Aboriginal and Torres Strait Islander vs non-Indigenous, Queensland, 2008 to 2018               | 22 |
| Figure 2-13: Female imprisonment rate per 100,000 in the population, Queensland, 2008–2018   | 23 |
| Figure 2-14: Proportion of sentencing events by court type, 2005–06 to 2017–18   | 24 |
| Figure 2-15: Proportion of backlog cases in the Magistrates Courts, Queensland, 2010–11 to 2017–18   | 24 |
| Figure 2-16: Proportion of backlog cases in the Magistrates Courts, states and territories, 2017–18  | 25 |
| Figure 2-17: Proportion of backlog cases in the in the Supreme and District Courts, Queensland, 2010–11 to 2017–18                               | 25 |
| Figure 2-18: Clearance rate in the Queensland Magistrates Courts, 2010–11 to 2017–18   | 26 |
| Figure 2-19: Clearance rates, Queensland Supreme and District Courts, 2010–11 to 2017–18   | 27 |
| Figure 3-1: Measuring the reoffending of individuals sentenced in 2010–11 and 2011–12  | 33 |
| Figure 3-2: Order completion rates by order type, 2010–11 to 2016–17   | 34 |
| Figure 3-3: Time-series order completion rates by order type   | 35 |
| Figure 3-4: Order completion rates by Aboriginals and Torres Strait Islander status  | 36 |
| Figure 3-5: Order completion rates by gender   | 36 |
| Figure 3-6: Order completion rates by age, 2010–11 to 2016–17  | 37 |
| Figure 3-7: Order completion rates by level of service, 2010–11 to 2016–17   | 38 |
| Figure 3-8: Order completion rates by contravention status   | 39 |
| Figure 3-9: Order completion rates of orders referred back to court  | 39 |
| Figure 3-10: Offenders who reoffended within two years of release by type of penalty   | 43 |
| Figure 3-11: Offenders who reoffended within two years of release by type of penalty – suspended sentences and community-based sentencing orders | 44 |
| Figure 3-12: Offenders who reoffend within two years of release, by offence category   | 44 |
| Figure 3-13: Offenders who reoffend within the same offence category   | 45 |
| Figure 3-14: Reoffenders by seriousness of reoffending and offence category  | 46 |

|  |     |
|--|-----|
| Figure 3-15: Offenders who reoffend by committing more serious or less serious offences by penalty category.   | 46  |
| Figure 3-16: Months taken for offenders to reoffend after release from custody   | 47  |
| Figure 3-17: Methodology used to determine prior offending and reoffending   | 48  |
| Figure 3-18: Prior and subsequent penalties for offenders sentenced to actual imprisonment from 2010–11 to 2011–12                                     | 48  |
| Figure 3-19: Prior and subsequent penalties for offenders sentenced to actual imprisonment for the first time from 2010–11 to 2011–12                  | 49  |
| Figure 5-1: Penalty type for evasion offence (MSO), where offence committed on or after 17 October 2013  | 94  |
| Figure 5-2: Penalty type for mandatory minimum weapons offences (MSO) (where offence occurred on or after 1 February 2013)                             | 95  |
| Figure 5-3: Graffiti offences sentenced by type of offence, 2014–15 to 2017–18   | 96  |
| Figure 5-4: Proportion of cases in which a graffiti offence was the most serious offence, 2014–15 to 2017–18   | 97  |
| Figure 5-5: Top 10 most serious non-graffiti offences sentenced alongside a graffiti offence, 2014–15 to 2017–18                                       | 97  |
| Figure 5-6: Most serious penalty for non-graffiti offences sentenced alongside a graffiti offence (MSO), 2014–15 to 2017–18                            | 98  |
| Figure 5-7: Penalty outcome for graffiti offences, 2014–15 to 2017–18  | 98  |
| Figure 5-8: Penalties issued in place of graffiti removal orders, 2014–15 to 2017–18   | 99  |
| Figure 6-1: Existing and new sentencing framework under proposed Queensland Sentencing Advisory Council reforms  | 109 |
| Figure 7-1: Change in the number of sentencing events involving an ICO, 2005–06 to 2016–17   | 112 |
| Figure 7-2: Risk of reoffending scores (Probation and Parole version) for ICOs and court ordered parole, 2016–17 to 2017–18                            | 113 |
| Figure 7-3: Successful completion rates — intensive correction orders  | 116 |
| Figure 7-4: Contraventions of ICOs by the final court result outcome, 2006–07 to 2016–17   | 116 |
| Figure 7-5: Number of distinct offenders on probation and intensive correction orders (as most serious order), January 2000 to August 2016, Queensland | 120 |
| Figure 7-6: ICOs compared with periods of imprisonment of 12 months or less by offence division, 2005–06 to 2016–17                                    | 121 |
| Figure 7-7: Proportion of sentences resulting in an ICO, compared with terms of imprisonment of 12 months or less, 2005–06 to 2016–17                  | 123 |
| Figure 7-8: The most serious penalty imposed before and after an ICO sentencing event, 2005–06 to 2016–17  | 123 |
| Figure 7-9: The most serious offence committed before and after an ICO sentencing event, 2005–06 to 2016–17  | 124 |
| Figure 7-10: ICO pathways, showing penalties imposed two years prior and two years subsequent to an ICO sentencing event, 2005–06 to 2016–17           | 125 |
| Figure 7-11: ICOs by remoteness area, compared to periods of imprisonment of 12 months or less, 2005–06 to 2016–17                                     | 126 |
| Figure 8-1: Composition of community-based orders (MSO), 2005–06 to 2017–18  | 148 |
| Figure 8-2: Composition of community-based orders (MSO) by court type, 2005–06 to 2017–18  | 149 |
| Figure 8-3: Breakdown of sentencing orders in the higher courts (MSO), 2005–06 to 2017–18  | 150 |
| Figure 8-4: Breakdown of sentencing orders in Magistrates Courts (MSO), 2005–06 to 2017–18   | 151 |
| Figure 8-5: Sentencing outcomes in Victoria's higher courts, 2004–05 to 2017–18  | 153 |
| Figure 8-6: Sentencing outcomes in Victoria's Magistrates' Court, 2004–05 to 2017–18   | 153 |

|   |     |
|---|-----|
| Figure 8-7: Duration of community correction orders in Victorian courts, 2012–2015  | 154 |
| Figure 8-8: Number of people who received a CCO from 16 January 2012 to 30 June 2018, by financial year and whether the person had previously received a CCO  | 157 |
| Figure 8-9: Compliance with community correction orders in Victoria, July 2012 to June 2013   | 159 |
| Figure 8-10: Time to offending by offenders on a community correction order in Victoria, July 2012 to June 2013   | 159 |
| Figure 8-11: Number of people sentenced for a serious offence committed while serving a CCO, by financial year  | 161 |
| Figure 8-12: Estimated percentage of CCO contravention by serious offending, by financial year of sentence for serious offence  | 161 |
| Figure 8-13: Number of sentenced charges of a serious offence committed while serving a CCO for the 10 most common serious offences sentenced in 2017–18 by type of serious offence and financial year        | 162 |
| Figure 8-14: Completion of community corrections orders (supervision orders), 2017–18   | 162 |
| Figure 8-15: Completion of community corrections orders (supervision orders), 2016–17 to 2017–18  | 163 |
| Figure 8-16: Community sentences as a proportion of all sentences in England and Wales, 2007–08 to 2016–17  | 164 |
| Figure 8-17: Sentencing outcomes in England and Wales, 2007–08 to 2017–18   | 164 |
| Figure 10-1: Custodial penalty type by most serious offence (MSO), Magistrates Courts, 2005–06 to 2017–18   | 232 |
| Figure 10-2: Offence type (MSO) for offences attracting a wholly suspended sentence, Magistrates Courts, 2005–06 to 2017–18   | 233 |
| Figure 10-3: Offence type (MSO) for offences attracting a partially suspended sentence, Magistrates Courts, 2005–06 to 2017–18  | 234 |
| Figure 10-4: Offence type (MSO) for offences attracting imprisonment, Magistrates Courts, 2005–06 to 2017–18  | 235 |
| Figure 10-5: Proportion of penalties given in Magistrates Courts by offence type (MSO), 2005–06 to 2017–18  | 236 |
| Figure 10-6: Custodial penalty type for most serious offence (MSO), higher courts, 2005–06 to 2017–18   | 237 |
| Figure 10-7: Offence type (MSO) for offences receiving a wholly suspended sentence, higher courts, 2005–06 to 2017–18   | 238 |
| Figure 10-8: Proportion of penalties given in higher courts by offence type (MSO), 2005–06 to 2017–18   | 239 |
| Figure 10-9: Offence type (MSO) for offences receiving a partially suspended sentence, higher courts, 2005–06 to 2017–18  | 240 |
| Figure 10-10: Offence type (MSO) for offences receiving imprisonment, higher courts, 2005–06 to 2017–18   | 241 |
| Figure 10-11: Proportion of sentences resulting in suspended sentences compared with terms of imprisonment 5 years or less, by gender and Aboriginal and Torres Strait Islander status, 2005–06 to 2017–18    | 244 |
| Figure 10-12: Type of imprisonment sentence by remoteness area, 2005–06 to 2017–18  | 244 |
| Figure 10-13: Proportion of offenders that were sentenced for an offence committed during the operational period of the suspended sentence (MSO) between 2005–06 and 2011–12                                  | 246 |
| Figure 10-14: Type of offences committed during the operational period of suspended sentences, 2005–06 to 2017–18   | 247 |
| Figure 10-15: Percentage of offenders that commit an offence during the operational period of a partially suspended sentence (MSO), by head sentence length and operational period length, 2005–06 to 2011–12 | 248 |

|  |     |
|--|-----|
| Figure 10-16: Percentage of offenders that commit an offence during the operational period of a wholly suspended sentence (MSO), by head sentence length and operational period length, 2005–06 to 2011–12 | 248 |
| Figure 10-17: Operational periods and head sentences of suspended sentences (MSO), 2005–06 to 2017–18  | 265 |
| Figure 10-18: Wholly suspended sentences (MSO), operational periods and head sentences, 2005–06 to 2017–18   | 267 |
| Figure 10-19: Partially suspended sentences (MSO), operational periods and head sentences, 2005–06 to 2017–18  | 267 |
| Figure 11-1: Offenders sentenced to an actual term of imprisonment (any length) (or a partially suspended sentence) who were potentially eligible for court ordered parole, 2015–16 to 2016–17             | 288 |
| Figure 11-2: Offenders who would have been eligible for court ordered parole if Recommendation 3 had been adopted, 2015–16 to 2016–17  | 289 |
| Figure 11-3: Offenders who would have been eligible for court ordered parole if Recommendation 3 had been adopted, adding relevant sexual offence sentences 2015–16 to 2016–17                             | 290 |
| Figure 11-4: Offenders who would have been eligible for court ordered parole if discretion was extended to head sentence of 5 years or less, still excluding sexual offences, 2015–16 to 2016–17           | 293 |
| Figure 11-5: Offenders who would have been eligible for court ordered parole if discretion was extended to head sentences of 5 years or less, including sexual offences, 2015–16 to 2016–17                | 294 |
| Figure 11-6: Short sentences of imprisonment since the introduction of court ordered parole  | 298 |
| Figure 11-7: Aggregated sentence length of imprisonment sentences 3 years or less (MSO), 2005–06 to 2017–18  | 313 |
| Figure 11-8: Number of imprisonment sentences 6 months or less (MSO) by year of sentence, 2005–06 to 2017–18   | 314 |
| Figure 11-9: Gender and Aboriginal and Torres Strait Islander status of offenders sentenced to imprisonment 6 months or less, 2005–06 to 2017–18   | 314 |
| Figure 11-10: Number of imprisonment sentences 6 months or less (MSO) by year of sentence, and gender and Aboriginal and Torres Strait Islander status, 2005–06 to 2017–18                                 | 315 |
| Figure 11-11: Number of imprisonment sentences 6 months or less (MSO) by offence type and year of sentence, 2005–06 to 2017–18   | 315 |
| Figure 11-12: Proportion within each offence type (MSO) that received a short imprisonment sentence by year of sentence, 2005–06 to 2017–18  | 316 |
| Figure 11-13: Top five offences (MSO) sentenced to imprisonment 6 months or less by gender and Aboriginal and Torres Strait Islander status, 2005–06 to 2017–18  | 317 |
| Figure 11-14: Proportion of people in Queensland Corrective Services custody that were on remand as at 30 June 2009–2018.  | 341 |
| Figure 11-15: All prison sentences (imprisonment and partially suspended), by pre-sentence declaration and year of sentence, 2011–12 to 2017–18  | 345 |
| Figure 11-16: Proportion of declared pre-sentence by penalty type (MSO), 2011–12 to 2017–18  | 345 |
| Figure 11-17: Proportion of cases (MSO) with declared pre-sentence custody by penalty type and year of sentence, 2011–12 to 2017–18  | 346 |
| Figure 11-18: Median declared pre-sentence custody length by penalty type (MSO) and year of sentence, 2011–12 to 2017–18   | 346 |
| Figure 11-19: Imprisonment sentence length by pre-sentence custody declared, 2011–12 to 2017–18  | 347 |
| Figure 11-20: Offence types by declared pre-sentence custody for imprisonment sentences, 2011–12 to 2017–18  | 348 |

|  |     |
|--|-----|
| Figure 11-21: Average imprisonment sentence length by offence category and pre-sentence custody, 2011–12 to 2017–18  | 349 |
| Figure 12-1: Number of sentencing events involving sexual offence, 2005–06 to 2017–18  | 379 |
| Figure 12-2: The proportion of historical sexual offences sentenced 2005–06 to 2017–18   | 381 |
| Figure 12-3: Type of custodial penalty for sexual offences (MSO), 2005–06 to 2017–18   | 384 |
| Figure 12-4: Sentence length as a proportion of penalty type for sexual offenders (MSO) who received a custodial penalty, 2005–06 to 2017–18                                       | 384 |
| Figure 12-5: Proportion of cases that received additional penalties within a court event as a suspended sentence (MSO) of 5 years or less, by offence type, 2005–06 to 2017–18     | 386 |
| Figure 12-6: Proportion of cases that received a probation order within the same court event as a suspended sentence of 5 years or less, by offence type (MSO), 2005–06 to 2017–18 | 386 |
| Figure 12-7: Penalty type for top five sexual offences that received a custodial sentence (MSO), 2005–06 to 2017–18  | 387 |
| Figure 12-8: Custodial penalty type for top five sexual offences that received 3 years or less (MSO), 2005–06 to 2017–18   | 388 |
| Figure 12-9: Custodial penalty type sentenced to 3 years or less for sexual offence (MSO) and non-sexual offences (MSO), 2005–06 to 2017–18  | 389 |
| Figure 12-10: Top five sexual offences (MSO) that received a custodial sentence greater than 3 years and up to 5 years, 2005–06 to 2017–18   | 389 |
| Figure 12-11: Custodial penalty type sentence greater than 3 years and up to 5 years for sexual offences (MSO) and non-sexual offences (MSO), 2005–06 to 2017–18                   | 390 |
| Figure 12-12: Offenders who could receive court ordered parole if extended to sexual offences, 2015–16 to 2016–17  | 393 |
| Figure 14-1: ‘Justice and government’ category offences that attracted an imprisonment sentence, Magistrates Courts, Queensland, 2005–06 to 2017–18                                | 445 |

## List of tables

|  |     |
|--|-----|
| Table 2-1: Major reviews and reform programs   | 8   |
| Table 2-2: Count of elements, by court level, Queensland 2005–06 to 2017–18  | 11  |
| Table 2-3: Offenders and court events by offence division, Magistrates Courts, Queensland, 2005–06 to 2017–18                              | 12  |
| Table 2-4: Offenders and court events by offence division, higher courts, Queensland, 2005–06 to 2017–18                                   | 14  |
| Table 2-5: Offenders and court events by penalty, Magistrates Courts, Queensland, 2005–06 to 2017–18                                       | 18  |
| Table 2-6: Offenders and court events by penalty, higher courts, Queensland, 2005–06 to 2017–18  | 20  |
| Table 2-7: Estimated resident population by remoteness, 2017–18  | 27  |
| Table 4-1: Imprisonment rate per 100,000 adult population, sentenced prisoners 2016–2018   | 52  |
| Table 6-1: Imprisonment and community-based sentencing orders in Queensland: current and proposed  | 105 |
| Table 7-1: Most common sentencing orders issued at the same court event as an ICO, 2005–06 to 2016–17                                      | 114 |
| Table 7-2: Successful completion rates — intensive correction orders   | 115 |
| Table 7-3: Proportion of ICOs by offenders, events, offences and penalties, 2005–06 to 2016–17   | 119 |
| Table 7-4: Length and count of ICO penalties, 2005–06 to 2016–17   | 120 |
| Table 7-5: Change in ICOs over time, 2005–06 to 2016–17  | 120 |
| Table 8-1: Five most common principal offence categories for Victorian CCOs  | 156 |
| Table 8-2: Sentencing Advisory Council (Victoria), <i>Contravention of Community Correction Orders</i> (2017) — outcomes of contraventions | 160 |
| Table 10-1: Use of wholly suspended sentences by principal sentence (selected offences), Australia, 2017–18                                | 229 |
| Table 10-2: Proportion of suspended sentences by offenders, events, offences and penalties, 2005–06 to 2016–17                             | 230 |
| Table 10-3: Change in suspended sentences over time, 2005–06 to 2017–18  | 230 |
| Table 10-4: Length and count of wholly suspended sentences (MSO), 2005–06 to 2017–18   | 230 |
| Table 10-5: Length and count of partially suspended sentences (MSO), 2005–06 to 2017–18  | 231 |
| Table 10-6: Penalties sentenced in the same court event as a wholly suspended sentence (MSO), Queensland, 2005–06 to 2017–18               | 242 |
| Table 10-7: Penalties sentenced in the same court event as a partially suspended sentence (MSO), Queensland, 2005–06 to 2017–18            | 243 |
| Table 10-8: Offences committed during the operational period of suspended sentences (MSO) by court type, 2005–06 to 2017–18                | 246 |
| Table 10-9: Suspended sentences that have offences committed during the operational period by seriousness of offending, 2005–06 to 2017–18 | 247 |
| Table 10-10: Relationship between head sentences and operational periods (months) (MSO), 2005–06 to 2017–18                                | 266 |
| Table 10-11: Operational periods as a ratio to head sentence (MSO), 2005–06 to 2017–18   | 268 |
| Table 11-1: Number of offenders supervised on parole any time during 2017–18   | 284 |
| Table 11-2: Pre-sentence custody of imprisonment sentences (MSO) by penalty type, 2011–12 to 2017–18                                       | 344 |
| Table 11-3: Declared pre-sentence custody length for imprisonment sentences (MSO) by penalty type, 2011–12 to 2017–18                      | 344 |
| Table 11-4: Declared pre-sentence custody length by penalty type (MSO), 2011–12 to 2017–18   | 344 |

|  |     |
|--|-----|
| Table 11-5: Imprisonment sentence lengths, by pre-sentence custody declared,<br>2011–12 to 2017–18                                   | 347 |
| Table 12-1: Sexual offences sentenced in Queensland, 2005–06 to 2016–17  | 378 |
| Table 12-2: Change in sentenced sexual offences over time, 2005–06 to 2017–18  | 379 |
| Table 12-3: Offence type for sentenced sexual offences by gender (MSO), 2005–06 to 2017–18   | 380 |
| Table 12-4: Offence type for Aboriginal and Torres Strait Islander people sentenced for sexual<br>offences (MSO), 2005–06 to 2017–18 | 380 |
| Table 12-5: Historical offences sentenced by offence type (MSO) 2005–06 to 2017–18   | 381 |
| Table 12-6: Type of penalties given for sexual offences (MSO), 2005–06 to 2017–18  | 382 |
| Table 12-7: Custodial penalty sentence length for all sexual offences (MSO), 2005–06 to 2017–18                                      | 385 |
| Table 13-1: Consultation as part of the place-based case studies   | 399 |
| Table 13-2: Key themes about barriers and enablers to access to services and support for offenders<br>on supervised orders           | 417 |
| Table 15-1: Timeline for phased implementation   | 458 |

## Contributors

### *Authors*

Vinton Pedley  
Lauren Banning  
Anne Edwards  
Kirsten MacGregor  
Katrina McMiddlin  
Victoria Moore  
Mark Pathé  
Alison Robinson  
Rebecca Roebuck

### *Data analysts*

Laura Hilderley  
Samuel Jeffs

### *Project board*

Helen Watkins  
John Allen QC (to 18 December 2018)  
Anne Edwards  
Debbie Kilroy OAM  
Vicki Loury (from 1 June to 18 December 2018)  
Kathleen Payne (from January 2019)  
John Robertson (from 1 June 2018)

### *Project assurance*

Jo Bryant  
Dan Rogers

## Members of the Queensland Sentencing Advisory Council

### *Chair*

John Robertson (from 1 June 2018)

### *Deputy chair*

Professor Elena Marchetti (acting chair until 1 June 2018)

### *Council members*

John Allen QC (to 18 December 2018)

Jo Bryant (from 1 June 2018)

Bevan Costello (from 1 June 2018)

Debbie Kilroy OAM

Tracy Linford APM (until 14 May 2018)

Vicki Lory QC (from 1 June to 18 December 2018)

Kathleen Payne

Dan Rogers

Cheryl Scanlon APM (from 1 June 2018)

Warren Strange

Helen Watkins

### *Director*

Anne Edwards

## Preface

This report contains the findings and recommendations of the Council's review of community-based sentencing orders, imprisonment and parole options.

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

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

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

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

The development of the reform proposals was informed by significant contributions made by a number of people and organisations, and extensive research. The Council spoke with a range of legal and criminal justice stakeholders about what works and what doesn't and has exhaustively looked at Queensland sentencing data and what is in place elsewhere, to make sure any reform we recommend will improve and expand the tools judges and magistrates have to punish offenders 'in a way that is just in all the circumstances'.

The Council's Aboriginal and Torres Strait Islander Advisory Panel advised the Council about the particular challenges faced by Aboriginal and Torres Strait Islander offenders in the criminal justice system, the importance of cultural advice to inform sentencing, and the need for more tailored and culturally appropriate responses.

The Council has also had the benefit of work undertaken by the Queensland Government Statistician's Office on what factors contribute to successful order completion, and data compiled by Queensland Corrective Services and the Parole Board Queensland on the operation of parole.

What we offer in this report is a comprehensive package of sentencing reforms to improve the flexibility of the current sentencing framework, and the range of options available to courts in sentencing. The Council's reform package includes the establishment of a new, more flexible community-based sentencing order, and expanded opportunities to combine orders when sentencing for a single offence to meet the various purposes of sentencing. The intention is that the reforms will lead to better tailored orders which take into account the individual circumstances of the offence and the offender and provide a legislative framework that supports the use of evidence-based practices to reduce risks of reoffending.

In some cases we have recommended that further work be undertaken to better understand the implications of particular reform proposals, before government reaches a final position. This approach reflects the Council's concern that any reforms should be informed by proper research and evidence. For reasons identified in the report, some issues require more research and more evidence to enable the Council to properly formulate recommendations, but time constraints and limited resources did not permit us to undertake or commission this research. The reforms falling into this category include the extension to court

ordered parole beyond its current three-year limit, the removal of parole as an option for short sentences of imprisonment, and the introduction of home detention.

Implementation of the Council's sentencing reform package will not only require a commitment by government, criminal justice stakeholders and the courts to embrace change, but also the resourcing required to support effective service delivery and to reduce reoffending. If accepted by government, it will require the development of a centrally coordinated implementation strategy, supported by strong governance arrangements and mechanisms for ongoing consultation and opportunities for input.

The Council's expectation is that any reforms will be introduced incrementally, given the significant pressures already being experienced across the criminal justice system. It is important for changes to be introduced in a way that ensures they can be properly planned for and funded prior to implementation so that they operate as intended. Ongoing assessment and monitoring of these reforms will also be important to ensure the reforms do not have any unintended consequences.

Most importantly, the Council supports ongoing open engagement and dialogue with the community, all our stakeholders, and the courts about the type of sentencing system the Queensland community wants, and how sentencing can both meet community expectation for crimes to have consequences, and address the underlying causes of offending.

The Council looks forward to continuing to engage with the community in open discussion about these issues and working with criminal justice stakeholders and the research community to improve the current evidence base for sentencing.



John Robertson  
**Chair**

## Acknowledgments

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

The Council would like to acknowledge the contributions of all those who made submissions, attended meetings to discuss issues relating to the review, and provided information and data to inform the preparation of the final report. While not exhaustive, those who have contributed to the review include representatives of: the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, the Bar Association of Queensland, Court Services Queensland, Department of Corrections (New Zealand), Fighters Against Child Abuse Australia, Legal Aid Queensland, the Office of the Commonwealth Director of Public Prosecutions, the Office of the Director of Public Prosecutions, the Parole Board Queensland, the Prisoners' Legal Service, Queensland Corrective Services, the Queensland Council for Civil Liberties, the Queensland Law Society, the Queensland Network of Alcohol and Other Drug Agencies, the Queensland Police Service, the Queensland Police Union of Employees, Sisters Inside, and other local and interstate criminal justice agencies, academic researchers and victims of crime organisations.

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

In addition to hosting individual meetings, the Council convened three roundtables on 27 February, 26 March and 14 May 2019 to discuss the development of options and issues relevant to the review. The Council wishes to acknowledge the assistance provided by those who attended these roundtables in sharing their expertise and views on potential options for reform.

A clear focus under the Terms of Reference was to consider alternative forms of community-based sentencing orders operating in other jurisdictions, with specific reference to the community correction orders (CCOs) operating in Victoria and since introduced in both NSW and Tasmania. It was important to the Council to understand the impetus for the introduction of the CCO in those jurisdictions where this order has been introduced, as well as issues associated with its operation.

The Council was greatly assisted by staff of Corrective Services NSW, Corrective Services Tasmania and Corrections Victoria in gaining a richer understanding of the legislative frameworks and administrative arrangements supporting the use of CCOs, as well as operational matters relevant to the management of people on these orders. Staff of these agencies were also instrumental in identifying the practical challenges of implementing large-scale sentencing reforms, as well as providing practical advice about what elements are necessary to successfully introduce and embed reforms of this nature.

A valuable practitioner perspective of the interstate sentencing reforms was also shared with the Council by staff of the Legal Aid offices in NSW, Tasmania and Victoria. These agencies provided the project team with advice not only about their experiences with CCOs, but also about the operation of other intermediate sentencing orders either undergoing significant reform (such as intensive correction orders in NSW) or recently introduced (such as home detention in Tasmania, and community correction orders in NSW).

The Council is particularly grateful for the assistance of key Victorian stakeholders who agreed to face-to-face meetings at very short notice. The Council wishes to thank the following organisations and individuals: the Law Institute of Victoria, Aboriginal Legal Service, Office of Public Prosecutions, Legal Aid Victoria, Victorian Federation of Community Legal Centres, the Chief Judge and other Judges of the Victorian County Court, and the Chief Magistrate of Victoria, who all gave generously of their time.

It is the Council's practice to establish a Project Board for every inquiry. The Council acknowledges the significant contributions of Project Board members, in particular Helen Watkins (Project Sponsor), John Allen QC (to 18 December 2018), Debbie Kilroy OAM, Vicki Lory QC (from 1 June to 18 December 2018), Kathleen Payne and John Robertson; and we thank Board members for giving so generously of their time throughout all stages of the review. The Council would also like to acknowledge the contributions of Jo Bryant and Dan Rogers in a Project Assurance role for reference-related publications.

## Abbreviations

|        |   |
|--------|---|
| ABS    | Australian Bureau of Statistics                               |
| ACT    | Australian Capital Territory                                  |
| AIHW   | Australian Institute of Health and Welfare                    |
| ALRC   | Australian Law Reform Commission                              |
| APM    | Australian Police Medal                                       |
| ASOC   | Australian Standard Offence Classification scheme             |
| ATSILS | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd |
| CCO    | community correction order                                    |
| CDO    | community detention order                                     |
| CDPP   | Commonwealth Director of Public Prosecutions                  |
| CEM    | child exploitation material                                   |
| CJG    | Community Justice Group                                       |
| CSA    | <i>Corrective Services Act 2006</i> (Qld)                     |
| CSI    | conditional suspended imprisonment                            |
| DJAG   | Department of Justice and Attorney-General                    |
| DPP    | Director of Public Prosecutions                               |
| EM     | electronic monitoring   |
| FACAA  | Fighters Against Child Abuse Australia                        |
| HOPE   | Hawaii Opportunity Probation with Enforcement program         |
| ICO    | intensive correction order                                    |
| IOMS   | Integrated Offender Management System                         |
| LAQ    | Legal Aid Queensland  |
| LDERG  | Lawful Detention Expert Reference Group                       |
| LOS    | level of service  |
| MSO    | most serious offence  |
| NDIS   | National Disability Insurance Scheme                          |
| NSW    | New South Wales   |
| NSWLRC | NSW Law Reform Commission                                     |
| NT     | Northern Territory  |
| NZ     | New Zealand   |
| OAM    | Medal of the Order of Australia                               |
| ODPP   | Office of the Director of Public Prosecutions (Queensland)    |
| PPRA   | <i>Police Powers and Responsibilities Act 2000</i> (Qld)      |
| PSA    | <i>Penalties and Sentences Act 1992</i> (Qld)                 |

|            |   |
|------------|---|
| PSR        | Pre-sentence report   |
| QAO        | Queensland Audit Office   |
| QAO Report | 2016 Queensland Audit Office report, <i>Criminal Justice System – Prison Sentences, Report 4: 2016–17</i> |
| QASOC      | Queensland (extension to the) Australian Standard Offence Classification scheme                           |
| QC         | Queen's Counsel   |
| QCCL       | Queensland Council for Civil Liberties  |
| QCS        | Queensland Corrective Services  |
| QGSO       | Queensland Government Statistician's Office   |
| QLS        | Queensland Law Society  |
| QMERIT     | Queensland Magistrates Early Referral into Treatment program  |
| QPC        | Queensland Productivity Commission  |
| QPS        | Queensland Police Service   |
| QPU        | Queensland Police Union of Employees  |
| QSI        | Queensland Sentencing Information Service   |
| QUT        | Queensland University of Technology   |
| QWIC       | Queensland Wide Inter-Linked Courts database  |
| RNR        | Risk-Need-Responsivity framework  |
| RoR score  | risk of reoffending score   |
| SA         | South Australia   |
| SPER       | State Penalties Enforcement Register  |
| SVO        | serious violent offence   |
| TSAC       | Tasmanian Sentencing Advisory Council   |
| VLRC       | Victorian Law Reform Commission   |
| VSAC       | Victorian Sentencing Advisory Council   |
| WA         | Western Australia   |
| YJA        | <i>Youth Justice Act 1992</i> (Qld)   |

## Executive summary

This Final Report on the Queensland Sentencing Advisory Council's review of community-based sentencing orders, imprisonment and parole options presents the Council's advice and recommendations on reforms to improve the current range of intermediate sentencing and parole options available to courts in sentencing.

### Background

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

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

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

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

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

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

### **Council's approach**

The Council's approach to the Terms of Reference has incorporated five stages. The release of this Final Report marks the final stage of the Council's work on the reference.

### **Methodology**

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

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

The primary source of data has been the Queensland Courts database. The Council has also drawn on a research report undertaken by the Queensland Government Statistician's Office (QGSO) regarding factors associated with the outcome of community-based orders and on a literature review commissioned by the Council about what works in sentencing.

### **Exclusions**

Excluded from the scope of the Council's review were:

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

The Council did not undertake a detailed analysis of resourcing issues and implementation challenges, although it has highlighted the importance of these matters to ensuring any future reforms are effective in meeting their objectives.

### **Fundamental principles**

In considering reform options, the Council was guided by the following fundamental principles it developed at the early stages of its review under these Terms of Reference. These principles listed below – in no particular order of importance – are:

1. Court ordered parole should be retained.
2. Suspended sentences should be retained.
3. Legislative sentencing anomalies and complexities should be minimised.
4. Any changes to existing community-based sentencing orders or new sentencing options should aim to reduce Queensland's prison population, while maintaining community safety.

5. Any reforms recommended should aim to reduce the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.
6. Community-based sentencing orders have significant advantages over imprisonment where the offender does not pose a demonstrated risk to the community.
7. Judicial discretion in the sentencing process is fundamentally important.
8. It is important to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing set out in the PSA.
9. Limited executive power to deal with minor breaches may enhance the flexibility of community-based sentencing orders.
10. Community-based sentencing orders, and the services delivered under them, must be adequately funded and properly administered.
11. Sentencing options and their administration should reflect the individual needs of all parties involved, including offenders, victims and the broader community.
12. Public confidence in the criminal justice system should be encouraged and maintained, and sentencing practices should consider community expectations and take into account the impact of crime on victims.
13. Equal justice means sentencing options should, as far as practicable, not vary according to location.
14. Sex offenders serving sentences in the community should have appropriate supervision.
15. Reforms to sentencing and parole should be based on the best available evidence.

### **The Council's position on mandatory sentencing**

In Chapter 5, the Council states its position on mandatory sentencing: in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the PSA, or in reducing recidivism. This is because, as a matter of principle, it assumes that every offence and every offender is the same, which is patently not the case. The Council recommends a review of all mandatory sentencing provisions currently in the law of Queensland, as set out in section 5.7 and Appendix 4.

### **The Aboriginal and Torres Strait Islander Advisory Panel**

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

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

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

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

## Reform options

Guided by these fundamental principles, the recommendations put forward by the Council in this report focus on:

- intensive correction orders;
- community correction orders;
- home detention;
- suspended sentences; and
- court ordered parole.

The Council's position and recommendations are outlined, including advantages, the supporting basis, and potential high-level risks and implementation challenges.

### Intensive correction orders (ICOs)

The options relating to ICOs considered by the Council were:

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

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

While Option 2 is still the Council-preferred option, it recommends that ICOs be retained in the short term until such time as the impact of other changes recommended can be properly assessed and monitored. Should a decision be made to retain these forms of orders, the Council also proposes reforms to improve the flexibility of these orders so that they provide for the more effective management of people subject to them.

### Community correction orders (CCOs)

A key area of focus for this reference was to consider the potential merits of introducing more flexible community-based sentencing options in Queensland, with specific reference to the community correction order model operating in Victoria since 2012, and now in Tasmania and NSW.

The Council considered three options for reforming the current range of non-custodial intermediate sentencing orders:

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

Option 3, the Council-preferred model in its Options Paper is still the Council's preferred long-term model for Queensland. A majority of the Council remain of the view that the ability of the CCO to provide for different tailored packages of conditions (built on a foundation of minimal standard conditions) has the potential to improve the ability of such an order to meet the various purposes of sentencing, while also responding to the individual factors contributing to offending.

Ensuring there is sufficient resourcing to support effective service delivery under the new order will be critical to its success. Implementation challenges and issues are discussed in Chapter 15 of this report.

### Home detention orders

In its Options Paper, the Council asked whether home detention (electronic monitoring with an extended curfew) should be available as a condition of a CCO or considered for introduction as a stand-alone sentencing order.

Home detention is currently in operation as a sentencing order in South Australia, the Northern Territory and Tasmania. In NSW, it is a condition of an ICO.

While home detention has high rates of completion, its use has been limited.

The Council suggests while this type of order may be beneficial as an alternative to immediate imprisonment for some types of offenders (such as young offenders with stable accommodation) further work is required to identify the types of offences and offenders that might be targeted by such an order, and likely costs and benefits of its introduction. The Council recommends home detention should be the subject of a separate review before government moves to introduce it.

### Suspended sentences

Unlike NSW and Victoria, which have abolished suspended sentences as sentencing options, in addition to introducing CCOs, the Council supports the retention of suspended sentences in Queensland.

Suspended sentences provide courts with more options in sentencing and provide an alternative to imprisonment.

The Council considered three options for reform of suspended sentences:

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

Option 2 was the Council-preferred option and it also received support from a number of legal stakeholders. The Council recommends this approach be adopted in Queensland to provide courts with the same types of powers as exist in other Australian jurisdictions that have retained suspended sentences, and greater flexibility in ordering conditions where appropriate.

Other reforms recommended by the Council would provide courts with a broader range of options when dealing with a breach of a suspended sentence by reoffending, taking into account the ability of a court to combine this with a community-based order that involves compliance with conditions.

### Court ordered parole

The options considered for court ordered parole were:

- Option 1: No change to the current operation of court ordered parole.
- Option 2: Reform court ordered parole to extend availability — increase the 3-year cap (retaining other criteria, but applying the same principles to sexual offences) by giving courts discretion to set either a parole release or an eligibility date:
  - for sentences over the 3-year cap, if the appropriate release date is no more than 12 months from date of sentence (Parole System Review Report Recommendation 3), or
  - for sentences of over 3 years, and up to 5 years, or
  - for all sentences up to 5 years (aligning with the suspended sentence regime).
- Option 3: Reform court ordered parole to extend availability by removing the cap — remove the cap for the setting of a parole release date altogether, giving courts full discretion to set either a parole release or a parole eligibility date, and extending this discretion to all offences, other than serious violent offences, offences for which a life sentence is imposed, or other offences or circumstances that are expressly excluded (such as through the operation of mandatory sentencing provisions).
- Option 4 (introduced initially as an alternative suggestion in the Options Paper):

- (1) Introducing a dual discretion under section 160B of the PSA that would allow courts to set either a parole release or parole eligibility date for sentences of 3 years or less, but retaining other criteria, including offences to which court ordered parole does not apply;
- (2) Instead of, or in addition to Option 4(1), introducing a dual discretion that allows a court to set either a parole release date or parole eligibility date when sentencing a person for a sexual offence in circumstances where the sentence of imprisonment imposed is 3 years or less.

A reported lack of consensus (based on research evidence) of the relative effectiveness of court-ordered versus Board ordered parole, combined with stakeholder concerns regarding how successful completions of parole orders are counted, has presented challenges for the Council in considering which of these options should be preferred.

The Council's position is that a sentence that enables an offender to be supervised in the community, where it can meet the purposes of sentencing and it is safe to do so, is preferable to one that involves imprisonment. To the extent that court ordered parole is one of a number of available orders that encourage this to occur, its use is supported.

The introduction of a dual discretion to set either a parole release date or parole eligibility date when sentencing a person for a sexual offence — Option 4(2) but excluding the adoption of Option 4(1) — was ultimately the Council's preferred option. It received both support and opposition from stakeholders and will have resource implications. It will see court ordered parole available for sexual offences for the first time, in light of indications that, because of the absence of this sentencing option, some sexual offenders are receiving suspended sentences that carry no supervision, unless used in combination with another form of order such as probation.

### **Implementation — issues and challenges**

The Council's case study research to look at the availability of programs and services to people undertaking community-based orders across Queensland has emphasised the variability of community-based order infrastructure across different locations. It was clear to the Council that supervision of orders is very challenging in rural and remote areas, with access to some programs simply not possible. The research undertaken demonstrates that service delivery is in need to considerable investment to enable equal access to effective community-based orders across Queensland.

These findings have led the Council to consider a range of additional issues related to the successful implementation of any future sentencing reforms. These include resourcing issues and challenges, as well as timeframes for reform to enable an embedding of the cultural change required to achieve successful reform.

The Council acknowledges there are a range of components required to be in place before any reforms can commence. The development of supporting legislation, adequate funding (which may need to be secured across several budget cycles), enhancements to IT systems, and a capable and well-resourced workforce to properly manage any new orders introduced in Queensland are all aspects of implementation that must be properly managed. The Council has provided some suggestions about the oversight mechanisms that could be introduced, and about the importance of appropriate monitoring and evaluation of any reforms introduced to understand their impacts. Finally, and most importantly for the success of any new reforms, is building a strong, professional and targeted service system, so that order conditions can have maximum rehabilitative effect for people on a CCO.

While the Council has not undertaken any detailed analysis of resourcing issues and implementation challenges, it recognises the importance of ensuring adequate resourcing across the system to:

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

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

Above all, the Council's analysis of sentencing reform implementation challenges experienced in other jurisdictions highlights the need to understand and drive cultural change across the criminal justice system so that any reforms to the sentencing framework can achieve their intended outcomes.

**Timeframes for reform**

The Council has examined how other jurisdictions have implemented large-scale sentencing reforms, and the timeframes involved. It has considered what potential reforms might be considered for immediate introduction and what reforms should be delayed until the necessary preparatory work has been completed.

It is clear that sentencing reforms on the scale proposed by the Council should not be rushed. Further, proper governance arrangements need to be put in place to guide the reforms recommended.

## List of recommendations

The Council has made 74 recommendations, which are listed below.

### CHAPTER 5 SENTENCING PROCESS AND FRAMEWORK

#### Sentencing principles under section 9 of the *Penalties and Sentences Act 1992* (Qld)

1. Section 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld) should be amended to insert a new principle to which courts must have regard in sentencing, which provides that a sentence that allows the offender to stay in the community must always be considered (subject to existing legislative exceptions).
2. Section 9 should be reviewed to consider whether the current legislative exceptions to the principles set out in section 9(2)(a), in particular under subsections (2A), (4), (6A) and (7A), are appropriate and should be retained if the Council's recommended reforms to community-based sentencing orders (including the proposed introduction of a new intermediate sanction, a 'community correction order'—CCO) are adopted. Consideration should also be given to whether grounds to depart from current mandatory sentencing provisions should be provided for under the Act, such as in 'special' or 'exceptional' circumstances. Such review might be undertaken by the Department of Justice and Attorney-General in consultation with stakeholders, or by some other appropriate entity.

#### Mandatory sentences

3. The Queensland Government should initiate a review of mandatory sentencing provisions in Queensland (summarised at Appendix 4 to this report) with a view to clarifying the operation of these provisions and considering their modification or repeal, as appropriate, taking into account:
  - (a) the original objectives of these provisions and whether these objectives are being met;
  - (b) the importance of judicial discretion in the sentencing process; and
  - (c) the need to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992* (Qld).

This review should give particular attention to the disproportionate impact of mandatory sentencing provisions on Aboriginal and Torres Strait Islander people, as highlighted by the Australian Law Reform Commission in its 2017 report *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, and other people experiencing disadvantage, as highlighted by stakeholders during this review.

4. Subject to the outcomes of the review of mandatory sentencing provisions as recommended by the Council (Recommendation 3), the mandatory community service order provisions (Part 5, Division 2, Subdivision 2) and graffiti removal order provisions (Part 5A) under the *Penalties and Sentences Act 1992* (Qld) should be repealed with the introduction of CCOs in Queensland.

### CHAPTER 7 INTENSIVE CORRECTION ORDERS

5. Intensive correction orders (ICOs) should be retained as an interim measure, with a view to their repeal, subject to monitoring and analysis of the impact of proposed sentencing and parole reforms (see Recommendation 7).
6. There should be a transitional period of at least 2 years during which time ICOs and any new community correction order (CCO) — including used in combination with a suspended sentence) — should operate concurrently.
7. The use of ICOs should be monitored and assessed within 3 years of the new CCO and other reforms coming into effect including for Queensland and Commonwealth offences, and the demographic profile of those receiving them. This monitoring and analysis should examine the use of ICOs in the context of:
  - the existing sentencing regime;
  - any new CCO;
  - any legislative reforms to allow courts to combine a community-based order (including a CCO if introduced) with a suspended sentence when sentencing an offender for a single offence; and

- any changes made to the parole regime, particularly changes to restrict the availability of parole for short sentences of imprisonment.
8. If retained longer term, ICOs should be reformed to increase their flexibility, drawing on reform models adopted in other jurisdictions, including:
- to reduce the number of mandatory (core) conditions to which a person on the order is subject, in line with the Council's proposed model for CCOs;
  - to provide for a range of conditions that can be ordered as additional conditions;
  - to allow the frequency of reporting (currently a minimum of at least twice in each week that the order is in force) to be determined by Queensland Corrective Services, based on the person's assessed level of risk and need;
  - to allow for any attendance at counselling, appointments and programs to be counted towards satisfying the community service component of the order.

## CHAPTER 8 COMMUNITY CORRECTION ORDERS

### Introduction of CCO

9. A new intermediate sanction — a 'community correction order' (CCO) — should be introduced in Queensland with a maximum term of 3 years.
10. A CCO should be able to be imposed with, or without, a conviction being recorded and should exist as a sentencing order in its own right, rather than as a means of serving a prison sentence.

### Probation and community service

11. Probation (in the form of 'supervision') and community service should be subsumed within the CCO as conditions of a CCO, rather than existing as separate forms of sentencing orders.
12. In terms of transitional provisions, the *Penalties and Sentences Act 1992* (Qld) should be amended to remove the power of a court to make a new probation order or community service order once the CCO has been fully implemented. The provisions under Part 5 of the *Penalties and Sentences Act 1992* (Qld) should be repealed after an appropriate period has passed and transitional arrangements are in place for the management of any probation orders or community service orders that are still active.

### CCO — Implementation

13. The CCO should not be introduced in Queensland until such time as:
- (a) work has been undertaken to identify the packages of conditions to be supported under the new scheme, appropriate service delivery models for services linked to these conditions, and required resourcing and staffing levels;
  - (b) infrastructure needs, including changes to IT systems, have been considered and scoped; and
  - (c) any new funding required has been secured and staff recruited and trained.
14. To allow for the gradual transition to the CCO regime, the Government should consider options for a progressive rollout of the new CCO. For example, to introduce the power of courts under the *Penalties and Sentences Act 1992* (Qld) to order specific packages of conditions as funding and services are enhanced to support their delivery (for example, electronic monitoring conditions, tailored mental health assessment and treatment conditions, and drug and alcohol treatment conditions).

#### Notes:

1. For the Council's recommendations on implementation of its reform package, see recommendations 65 – 74 and Chapter 15 of this report.
2. Recommendation 6 proposes a transitional period of at least two years during which time intensive correction orders and any new CCO (including used in combination with a suspended sentence) should operate concurrently.

### Principles in making a CCO and setting conditions

15. In introducing the new CCO, principles should be included under the *Penalties and Sentences Act 1992* (Qld) that provide:
- (a) a court must not impose a sentence of imprisonment (including suspended imprisonment), unless the sentencing court concludes that the purposes of the sentence cannot be achieved by a CCO to which one or more conditions are attached; and
  - (b) the fact a CCO has been imposed previously, including on a breach, does not prevent the further making of a CCO, taking into account the broad range of conditions that can be attached.

16. Legislative guidance should be provided to courts that:

- (a) no more conditions must be ordered than are necessary to meet the purposes of the order, reflecting the principle of proportionality;
- (b) the restrictions on liberty imposed under any conditions should be proportionate to the seriousness of the offence, or offences. In determining restrictions on liberty to be imposed, the court should be permitted to take into account any pre-sentence custody served in relation to that offence or other offences of which that person has been charged;
- (c) in deciding on appropriate additional conditions, the court must consider:
  - (i) the circumstances and any vulnerabilities of the person being sentenced (with respect, for example, to their physical health, age, maturity, the existence of any mental illness or cognitive or intellectual disability, whether they are homeless, or are experiencing domestic and family violence), as well as the particular circumstances of Aboriginal and Torres Strait Islander offenders;
  - (ii) the ability of the person to comply with the proposed conditions of the order, including any geographical constraints in complying, and/or availability of services in that region; and
  - (iii) whether the person consents to the making of the conditions; and
- (d) where two or more conditions are imposed, the conditions must be compatible with each other.

**CCO — Combination orders**

17. A court should be permitted to sentence an offender in respect of one, or more than one, offence to:

- (a) a term of imprisonment — including a sentence that is partially suspended but excluding an intensive correction order (ICO) — with a CCO, provided any period of imprisonment to be served (excluding any time declared as time served) is no more than 12 months from the date of sentence, in which case the requirements of the CCO should commence on the person's release from custody;
- (b) a wholly suspended sentence of any length with a CCO; and
- (c) a fine with a CCO.

18. When combined with an actual term of imprisonment (including a sentence that is partially suspended), both the CCO and the requirements of the CCO should commence on the release of the offender from prison.

19. An ICO should not be able to be ordered at the same time as a CCO. However, the fact the person is subject to an existing ICO should not affect the court's ability to impose a CCO for a new offence.

**CCO — General requirements (core conditions)**

20. The core conditions of a CCO should be limited to those directly associated with the purposes for which the order is made and required for its proper administration. The Council suggests core conditions should be that the offender:

- (a) not commit another offence during the period of the order; and
- (b) appear before the court if called on to do so at any time during the term of the order.

21. Any additional requirements (e.g. to report as directed, or to notify of any changes of contact details or address) that are considered necessary by Queensland Corrective Services or other relevant agency to support the effective management of offenders subject to additional conditions (such as supervision, rehabilitation, treatment or curfew conditions) should be stated as requirements for complying with those specific conditions, rather than included as mandatory conditions that apply to all orders.

**CCO — Additional requirements**

22. When making a CCO, a court should be required to attach at least one additional condition. Additional conditions should include (subject to further development of the appropriate form of these conditions and supporting service delivery model — Recommendation 13):

- to perform unpaid community service in the community (minimum of 40 hours up to 300 hours) (*community service condition*);
- to submit to supervision by an authorised corrective services officer (*supervision condition*);
- to comply with any reasonable directions given by an authorised corrective services officer to attend appointments and/or to participate in activities with a view to promoting the offender's rehabilitation (*rehabilitation condition*);
- to submit to assessment and treatment (including testing) for alcohol or drug abuse or dependency, medical assessment or treatment, mental health assessment and treatment, or other treatment, as directed by an authorised corrective services officer (*treatment condition*);

- to abstain from consuming alcohol, or not to consume alcohol so as to exceed a specified level of alcohol and submit to monitoring (where alcohol consumption is an element of the offence, or has contributed to the commission of the offence and the person is not alcohol dependent) (*alcohol abstinence and monitoring condition*);
- to abstain from drugs, except those prescribed for the person by a medical practitioner (*drug abstinence condition*);
- not to contact or associate with a person specified in the order, or a particular class of persons specified (for the period of the order or lesser period) (*non-association condition*);
- to live at a place specified in the order, or not at a place specified (for the period of the order or lesser period) (*residence restriction and exclusion condition*);
- not to enter or remain in a specified place or area (for the period of the order or lesser period) (*place or area exclusion condition*);
- to remain at a specified place between specified hours of each day (with ability to specify different places or periods for different days) (for limited number of hours and period) (*curfew condition*);
- to pay an amount of money as a bond, whole or part of which is subject to be forfeited for non-compliance (*bond condition*);
- to reappear at a time or times directed before the court for a review of compliance with the order (for the period of the order or lesser period) (*judicial monitoring condition*);
- to be subject to electronic monitoring for the purpose of monitoring compliance with curfew and/or a place or area exclusion condition (for the period of that condition or lesser period) (*electronic monitoring condition*); and
- any other condition the court considers is necessary.

#### **CCO – Community service condition**

23. If community service is the sole condition, the CCO should expire when the hours have been satisfactorily completed.
24. If the order has both unpaid community service and treatment and/or rehabilitation conditions, the court should be permitted to determine that some or all hours are to be counted towards the community service hours (otherwise, there should be a legislative presumption that all hours are to be counted towards community service hours).

#### **CCO – Compliance period**

25. A court should be permitted to limit the period during which an additional condition attached to a CCO is in force. After this time, the person should be required to comply with the core requirements of the order only.

#### **CCO – Pre-sentence reports and assessments**

26. While desirable to facilitate the appropriate targeting of conditions attached to the order to address factors associated with offending, a pre-sentence report should not be mandatory if a court is considering imposing a CCO. Instead, courts should retain the discretion to request a pre-sentence report in circumstances where this is considered appropriate in accordance with section 15 of the *Penalties and Sentences Act 1992* (Qld) and section 344 of the *Corrective Services Act 2006* (Qld).
27. A suitability assessment report should be required prior to the making of specific conditions that may require particular suitability and other checks of the person's residence to be undertaken – for example, for an electronic monitoring condition to monitor a curfew or place or area exclusion condition.

#### **CCO – Amendment and revocation**

28. A court should be provided with the power, on application by the offender, an authorised corrective services officer, the director of public prosecutions, or by the court on its own initiative (for example, where a judicial monitoring condition is in place), to:
  - (a) amend the order;
  - (b) revoke the order and deal with the offender in any way in which the court could deal with the offender had he or she just been convicted of the offence or offences;
  - (c) revoke the order and make no further order in respect of the offence or offences for which the order was originally made, including on the basis that the offender is making good progress or responding satisfactorily to supervision or treatment;
  - (d) in relation to a condition of the order, cancel, suspend, vary or reduce the condition (e.g. number of hours under a community service condition);

(e) attach a new condition on the order.

29. The grounds for seeking an amendment or revocation should reflect those in section 120(1) of the *Penalties and Sentences Act 1992* (Qld) but with new criteria that allows the court to vary or revoke the order if the court is satisfied:

- (a) the rehabilitation and reintegration of the offender would be advanced by making the decision to deal with the order; or
- (b) the continuation of the sentence is no longer necessary in the interests of the community or the offender; or
- (c) it is otherwise appropriate to do so.

30. Consistent with the current provisions relating to the amendment or revocation of a community-based order under Part 7, Division 1 of the *Penalties and Sentences Act 1992* (Qld), the court should be required to consider the extent to which the offender has complied with the order in deciding the appropriate action to take.

#### **CCO – Breach powers**

31. On finding an offender has breached a CCO without reasonable excuse, a court should have equivalent powers to those which currently exist under Part 7, Division 2 of the *Penalties and Sentences Act 1992* (Qld) including:

- (a) revoking the order and resentencing the offender (taking into account prior compliance with order);
- (b) varying or revoking additional conditions;
- (c) imposing additional conditions, including attendance at programs under a new rehabilitation condition;
- (d) varying the order (including extending the term of the order);
- (e) taking no action (admonish and discharge the offender).

#### **CCO – Recording of sentence**

32. The provisions governing the making of a CCO should provide that on the making of the order (whether or not a conviction is recorded), its duration and any conditions imposed must be entered in the offender's criminal history.

#### **Reasonable directions**

33. The reasonable directions powers to be exercised by Queensland Corrective Services should be defined with reference to the specific types of directions necessary to properly administer individual conditions of the order, rather than be defined broadly (e.g. a requirement to comply with 'any reasonable directions' given by an authorised corrective services officer). Further consultation on the scope of reasonable directions powers should occur with courts and criminal justice stakeholders, including those agencies that have contributed to the Council's review, prior to their introduction.

### **CHAPTER 9 HOME DETENTION**

34. Prior to consideration by the Government of the potential introduction of home detention in Queensland as a sentencing option, as recommended by the Queensland Productivity Commission in its *Draft Report: Inquiry into Imprisonment and Recidivism* (2019), a review should be undertaken, either within government or led by an appropriate research or policy body, to assess:

- whether there is broad community support for home detention as an alternative to immediate imprisonment;
- which offenders home detention is likely to be available for if capped at either 12 months or 2 years, including offence types and proportion of those offenders who might otherwise be eligible but who are homeless or have insecure accommodation;
- how any potential exclusions might restrict the cohort of offenders who are otherwise eligible;
- with reference to those who might be eligible for such an order, how many days in custody (post-sentence) might be avoided under the proposed approach, when considered against any costs involved in establishing and maintaining arrangements for the monitoring of offenders, including electronic monitoring costs, and supervision;
- the most effective means of monitoring compliance with home detention orders, and potential monitoring and compliance arrangements; and

- how any of the risks identified for people experiencing disadvantage and circumstances of vulnerability, including women, Aboriginal and Torres Strait Islander people, people with caring responsibilities, and people affected by domestic and family violence, can best be minimised or avoided.

## CHAPTER 10 SUSPENDED SENTENCES

35. The power to suspend a prison sentence in Queensland should be retained with no changes made either to the maximum term that can be suspended or to the maximum operational period.

### Data on breach of suspended sentences

36. Court Services Queensland should review administrative data captured for orders made under Part 8 of the *Penalties and Sentences Act 1992* (Qld) to ensure that:

- information about the number of suspended sentences breached through reoffending by commission of a new offence punishable by imprisonment is available;
- orders made on breach are accurately captured; and
- breach data can be extracted in a format that can be analysed without resort to extensive manual coding.

### Combined suspended sentence and community-based order for a single offence

37. Until such time as the community correction order (CCO) is fully operational, courts should be provided with a power under the *Penalties and Sentences Act 1992* (Qld) to sentence an offender to a wholly suspended sentence or a partially suspended sentence in combination with a probation order or community service order when sentencing an offender for a single offence. An equivalent power should be introduced to allow a court to combine a suspended sentence with a CCO when sentencing for a single offence at such time as this new order is introduced.

38. The maximum term of imprisonment to be served in custody prior to the remainder of the sentence being suspended under a partially suspended sentence when combined with probation, community service or a CCO should be 12 months, consistent with the current approach of combined prison and probation orders under section 92(1)(b) of the *Penalties and Sentences Act 1992* (Qld), but excluding any time declared as time served (see Recommendation 17).

39. In preparation for the introduction of the proposed reforms, Court Services Queensland should consider how the new form of order or orders might be recorded or 'flagged' in a way that allows the use of this combination of sentences to be monitored over time.

### Suspended sentences — operational periods

40. No additional guidance should be included in section 144(6) of the *Penalties and Sentences Act 1992* (Qld) regarding the setting of the operational period for a suspended sentence.

41. Courts should ensure that relevant sentencing appeal decisions continue to be made available to judicial officers to guide the proper exercise of their sentencing discretion in fixing appropriate operational periods.

42. When making a combined suspended sentence and community-based sentencing order for a single offence, courts should have full discretion to set what they consider is an appropriate operational period, within the confines of section 144(6) of the *Penalties and Sentences Act 1992* (Qld). This would allow:

- a community-based sentencing order of shorter duration to be ordered alongside a suspended sentence with a longer operational period;
- a community-based sentencing order to be ordered alongside a suspended sentence with the same operational period as the length of the community-based sentencing order;
- a community-based sentencing order to be ordered that extends beyond the operational period of the suspended sentence imposed.

### Suspended sentences — breach provisions

43. Breach of the conditions of probation, a community service order or a CCO made alongside a suspended sentence, other than involving commission of a new offence punishable by imprisonment, should be dealt with under equivalent provisions to those provided for under Part 7 of the *Penalties and Sentences Act 1992* (Qld). In particular, technical violations of conditions should not give rise to a breach of the suspended sentence. (See further Recommendation 31.)

44. As specialist packages of treatment and rehabilitation conditions are developed under the new CCO, the Department of Justice and Attorney-General, in partnership with stakeholder agencies, should investigate whether there may be benefit in providing courts with additional powers on breach of a CCO where combined with a suspended sentence, such as a power to activate a limited number of days of imprisonment due to non-compliance – similar to the power that exists under section 151W of the *Penalties and Sentences Act 1992* (Qld), i.e. the court may order an offender who has failed to comply with the rehabilitation part of their drug and alcohol treatment order to serve up to 7 consecutive days of the sentence of imprisonment suspended.
45. Magistrates Courts should be provided with a legislative discretion when sentencing for an offence committed during the operational period of a suspended sentence imposed by a higher court to either:
  - (a) commit the offender to custody to be brought, or grant bail to the offender conditioned to appear, before the original sentencing court to be dealt with, which is the existing approach under section 146 of the *Penalties and Sentences Act 1992* (Qld); or
  - (b) ensure written notice of the sentence order is given to the higher court and the Director of Public Prosecutions in order to consider whether breach action should be initiated.
46. The courts' powers on breach of a suspended sentence by commission of an offence punishable by imprisonment under section 147 of the *Penalties and Sentences Act 1992* (Qld) should be amended to:
  - (a) provide under section 147(2) that a court must either make an order under subsection (1)(b) (existing requirement) or subsection (1)(c) (new option to order the offender to serve part of the suspended sentence only), unless of the opinion it would be unjust to do so;
  - (b) omit subsection (3), which sets out what matters a court must have regard to in making a determination under subsection (2) as to whether it would be unjust to order the person to serve the whole (or part, under the Council's recommended reforms) of the suspended imprisonment on breach, and require instead that the court consider 'all the circumstances that have arisen, or have become known, since the suspended imprisonment was imposed';
  - (c) provide the court with additional powers on breach to:
    - (i) impose a fine of 10 penalty units;
    - (ii) make no order with respect to the breach of the suspended sentence.

## CHAPTER 11 COURT ORDERED PAROLE

### Extending the court ordered parole scheme to sexual offences

47. Part 9, Division 3 of the *Penalties and Sentences Act 1992* (Qld) should be amended to create a dual discretion allowing courts to select between fixing a parole release date or a parole eligibility date when imposing sentences of imprisonment of 3 years or less for sexual offences.
48. Part 9, Division 3 of the *Penalties and Sentences Act 1992* (Qld) should be amended to create legislative guidance for courts in determining whether, when sentencing a person to a term of imprisonment of 3 years or less for a sexual offence, it should set a parole release date or a parole eligibility date.

### Evaluation of effectiveness of parole

49. Further evaluation and research should be conducted by an appropriate body regarding the effectiveness of court ordered parole and Board ordered parole in Queensland, including assessment of statistics in relation to recidivism and completion rates. Such a review could also include the breadth of Queensland Corrective Services' power to make lawful instructions under section 200 of the *Corrective Services Act 2006* (Qld) and the effectiveness and compatibility of provisions relating to the powers of a court where there is further offending while an offender is on court ordered parole, such as sections 209, 211 and 215 of the *Corrective Services Act 2006* (Qld) and section 160B of the *Penalties and Sentences Act 1992* (Qld) (as amended, if Recommendation 52 [regarding section 209 of the *Corrective Services Act 2006* (Qld) and section 160B(2) of the *Penalties and Sentences Act 1992* (Qld)] is accepted).
50. Powers regarding parole release and parole eligibility dates as they relate to sentences of over 3 years, should not be changed until such time as the effectiveness of the scheme has been further evaluated.

### Removing parole for short sentences

51. Subject to the implementation of the Council's proposed reforms to community-based sentencing orders and parole, and the outcomes of a review of the effectiveness of parole, Part 9, Division 3 of the *Penalties and Sentences Act 1992* (Qld) should be amended to remove any form of parole being applicable to sentences of imprisonment of 6 months or less for any offence. Such sentences would instead be served in full, as wholly or partially suspended sentences (with, or without, a community-based order also being made), or by way of intensive correction in the community under an intensive correction order (ICO). Recommendation 37 would allow suspended sentences to be imposed along with community-based orders on the same charge and this would be the mechanism to ensure supervision for short sentences of imprisonment.

Court ordered and Board ordered parole should still be available for:

- activation of suspended sentences, in whole or in part;
- sentences of imprisonment imposed for offences committed on Board ordered or court ordered parole.

This reform should not be progressed until recommendations are implemented, relating to:

- the assessment of intensive correction orders (Recommendation 7);
- the combination of suspended sentences with community-based orders (Recommendation 37);
- the creation of community correction orders (Recommendation 9);
- the change to parole powers allowing a dual discretion for fixing parole eligibility and release dates for sexual offences with sentences of 3 years or less (Recommendation 47);
- the creation of a dual parole release and eligibility date discretion regarding resentencing in section 160B(2) of the *Penalties and Sentences Act 1992* (Qld) and section 209 of the *Corrective Services Act 2006* (Qld) (Recommendation 52); and
- a review of the effectiveness of parole (Recommendation 49).

The Council acknowledges that the Government should be guided by the future findings and outcomes of Recommendations 7 and 49 regarding ICO use and parole effectiveness.

### Court powers where offence committed on parole – section 209 of the *Corrective Services Act 2006* (Qld)

52. Section 160B(2) of the *Penalties and Sentences Act 1992* (Qld) should be amended so that if an offender's court ordered parole order has been automatically cancelled by a new sentence of imprisonment under section 209 of the *Corrective Services Act 2006* (Qld), the sentencing court can still choose between setting a parole release date and setting a parole eligibility date. The requirement for a parole eligibility date in the context of the Parole Board's discretionary cancellation of an order under section 205 of the *Corrective Services Act 2006* (Qld), as required by section 160B(2) of the *Penalties and Sentences Act 1992* (Qld), should remain unchanged.

### Correcting the anomaly in *R v Sabine* [2019] QCA 36

53. The anomaly identified by the Court of Appeal in *R v Sabine* [2019] QCA 36 should be corrected by specifying that a subsequent court that is sentencing an offender to a lesser period of imprisonment than an existing sentence is not required to set a parole release date. The same amendment should be made regarding parole eligibility dates.

### Pre-sentence custody – day of sentence

54. Section 159A of the *Penalties and Sentences Act 1992* (Qld) should be amended to clarify that the day of sentence is not to be taken to be imprisonment already served under the sentence for the purpose of a pre-sentence custody declaration.

### Time spent in pre-sentence custody that is declarable (PSA, s 159A)

55. *Penalties and Sentences Act 1992* (Qld) sections 159A(1) and 159A(4)(b) should be amended by removing the words 'for no other reason' to grant the court an ability to declare pre-sentence custody in circumstances where this is currently not permitted.

56. The words 'unless the sentencing court otherwise orders', currently in section 159A(1) of the *Penalties and Sentences Act 1992* (Qld), should be added to section 159A(4)(b).

## CHAPTER 14 OTHER ISSUES

### Administrative mechanisms

57. Section 652(2) of the *Criminal Code* (Qld) should be amended to allow either the person charged or his or her legal representative to sign the application to transmit a summary charge or charges from a Magistrates Court to a higher court registry.
58. Section 652(3)(a) of the *Criminal Code* (Qld) should be omitted, so that a declaration is no longer required for an application, regardless of who signs it.
59. Subject to further consultation with the Office of the Director of Public Prosecutions (Qld) and the judiciary, section 651(2)(c) of the *Criminal Code* (Qld) should be amended to remove the requirement for consent of the Crown. Instead, there should be a requirement that the Crown is provided with the application material, including copies of the QP9 form/s and bench charge sheets, within a timeframe set by the legislation.

### Convict and not further punish

60. A sentencing option, 'convict and not further punish' should be added to the *Penalties and Sentences Act 1992* (Qld). Judicial discretion to record or not record a conviction under section 12 of the *Penalties and Sentences Act 1992* (Qld) should remain in relation to these orders.

### Higher-court dealing with breach of lower-court orders

61. Section 126 of the *Penalties and Sentences Act 1992* (Qld) should be amended to give the District and Supreme Courts discretion to deal with a breach of any Magistrates Court community-based order where: the offender is before either of these higher courts, the higher court is satisfied the offender committed an offence against section 123(1) and the defence and prosecution consent to the higher court dealing with the breach of the order.
62. Section 651 of the *Criminal Code* (Qld) should be amended to clarify that an offence under section 123 of the *Penalties and Sentences Act 1992* (Qld) before a Magistrates Court is a summary offence for the purpose of section 651.

### Lower court dealing with breach of higher-court orders

63. Magistrates Courts and the District Court should not have a new discretionary power to deal with breach of a community-based order imposed by a higher court.

### Magistrates Courts' power to deal with a breach of their own community-based order on their own initiative

64. Section 124 of the *Penalties and Sentences Act 1992* (Qld) should be amended to allow a Magistrates Court to deal with a breach, by reoffending, of a community-based order imposed by a Magistrates Court, without proceedings first having to be instituted under section 123. To give certainty to offenders, to ensure totality issues are considered, and to ensure that breaches are dealt with in a timely way, this power should be confined to the court sentencing for the breaching offence during that hearing (including adjournment of that hearing).

## CHAPTER 15 IMPLEMENTATION

### Implementation timeframe

65. The implementation of a new sentencing framework for Queensland should allow adequate time for a phased approach to enable key contingent matters to be designed and implemented first before the introduction of the new orders, with milestones mapped according to budget availability.

### Implementation strategy

66. An implementation strategy, which includes a formal communication strategy, should be developed that enables the phased introduction of the new framework over the full implementation period. The implementation strategy should cover infrastructure issues, planning and oversight, monitoring and evaluation, and ensure an appropriate community-based service system is available to support the new orders.

### **Change strategy**

67. A change strategy should be developed that sets out the program of change across all relevant agencies, monitoring change risk and change performance across the entire program of work over the full course of the implementation timeframe.
68. A dedicated Change Manager should be appointed to deliver the change strategy.

### **Monitoring and evaluation of reforms**

69. An evaluation framework should be designed and implemented alongside the reforms to enable agencies to monitor the impact of the new sentencing orders, and to evaluate the success of the reforms in relation to their intended objects.
70. Agencies should improve systems to capture data required for effective monitoring and evaluation of sentencing orders, including the linkage of offender-level data across agency datasets.

### **Implementation governance**

71. A high-level body with senior decision-makers (Deputy Director-General level) representing key agencies should be established to oversee and report to the Premier on the implementation of the new sentencing framework.
72. A cross-agency working group should also be established to work through operational issues, to ensure communication is strong and focused between agencies, to ensure blockages are addressed and to prioritise matters needing more senior guidance across the life of the implementation.
73. A stakeholder reference group should be established to ensure the ongoing input and communication with key legal and other stakeholders.
74. A dedicated full-time project team should be established for the duration of the program of work, which is responsible for delivering on the implementation strategy. This work will include:
  - achieving the legislative changes required to the *Penalties and Sentences Act 1992* (Qld) and *Corrective Services Act 2006* (Qld) and any associated legislation;
  - working with Queensland Treasury to secure the funding required to implement the new model;
  - delivering both the change and the implementation strategies;
  - working with agencies to design the information technology architecture required to enable the new orders to be administered and monitored appropriately;
  - designing the workforce strategy to underpin the new framework;
  - designing the service system required to operationalise the full range of community correction order conditions;
  - working with Queensland Courts to develop benchbooks, practice directions and other judicial guidance to support the introduction of the new sentencing orders;
  - designing the various training and information tools required for different audiences in the criminal justice system; and
  - designing and embedding the monitoring and evaluation framework.

# Chapter 1 Introduction

## 1.1 Background to the review

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

The Council's review followed two earlier reviews that highlighted issues with the operation of the parole system in Queensland, the use of imprisonment as a sentencing option and the administration of prison sentences:

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

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

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

While the legal framework for sentencing — in particular, that which supports the use of community-based sentencing orders — has been the main focus of the Council's review, the Council has recognised that appropriate funding of services and supports to address issues associated with offenders' risks of reoffending is central to the effective administration of sentences in Queensland, and to ensuring that those sentences meet their intended objectives.

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

The Council's review of the current sentencing framework for community-based sentencing orders in Queensland follows similar reviews that have led to significant sentencing reform in other Australian jurisdictions — most recently in the Australian Capital Territory (ACT), New South Wales (NSW), South Australia (SA), Tasmania and Victoria. A number of these reviews have resulted in the introduction of a new form of community order — a community correction order (CCO) — a single, flexible form of order intended to replace, to a greater or lesser extent, other forms of intermediate orders. The Council was asked to consider the CCO model as a potential model for introduction in Queensland as part of its current inquiry. The Council's position is to support the introduction of the CCO model, subject to appropriate funding and allowing sufficient time for implementation.

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

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

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

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

## 1.2 Terms of Reference

The Terms of Reference asked the Council to:

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

The Council was requested initially to report to the Attorney-General by 30 April 2019. The Attorney-General granted an extension in October 2018, extending the Council's reporting date to 31 July 2019.<sup>1</sup>

---

<sup>1</sup> Letter from Attorney-General and Minister for Justice, Yvette D'Ath, to John Robertson, Chair, Queensland Sentencing Advisory Council, 15 October 2018.

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

- the importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the PSA;
- 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, which is to allow an offender to serve part of their period of imprisonment in the community in order to successfully reintegrate a prisoner into the community and minimise the likelihood of an offender reoffending;
- the need to further encourage and maintain public confidence in the criminal justice system and ensure that sentencing practices meet the community's expectations; and
- the impact of any recommendation the Council may make on the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.

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

The Terms of Reference are set out at Appendix 1.

### 1.3 Council's approach

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

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



#### Stage 1 – Project initiation

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

#### Stage 2 – Research and preliminary consultation

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

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

Over stage 3 of the review, the Council:

- released a series of Policy Issues Papers seeking submissions and feedback from key stakeholders;

- conducted quantitative and qualitative research, including analysing administrative data to produce two Sentencing Spotlights on sentencing trends in the Queensland higher and lower courts (released in August 2018);
- hosted roundtables and meetings with content experts in the area of community-based sentencing orders, imprisonment and parole, including legal and support and advocacy services;
- consulted with other domestic and international jurisdictions on their approach to community-based sentencing orders, imprisonment and parole; and
- engaged the Queensland University of Technology (QUT) to conduct a literature review on the effectiveness of community-based sentencing orders.

#### **Stage 4 – Testing the draft reform framework**

The release of the Council's Options Paper during this stage provided an opportunity for the Council to test its reform proposals and identify additional areas to be addressed in the Council's final report.

Alongside this work, the Council undertook more detailed case studies in three de-identified locations across Queensland to illustrate differences in service accessibility and availability across Queensland and how this may impact on the sentencing practices of the courts.

#### **Stage 5 – Development of final report**

The final stage of the review involved a call for submissions, a final round of consultation, and the development and delivery of the Council's final report.

A list of stakeholders consulted and who provided submissions during this final stage of the reference is at Appendix 2.

## **1.4 Terminology**

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

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

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

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

'substitutional sanctions', which empower a court on imposing a term of imprisonment to alter the form of imprisonment (such as suspended sentence orders); and

'alternative sanctions', which are not dependent on a term of imprisonment being imposed, but rather exist as sentencing orders in their own right (such as [community-based orders]).<sup>2</sup>

The distinction between 'substitutional sanctions' and 'alternative sanctions' is important. While both forms of sanctions can be used in place of immediate imprisonment, in the case of substitutional sanctions, such as suspended sentences and intensive correction orders, a court must first impose a term of imprisonment before deciding whether it is appropriate to either suspend the order or make the order. In both cases, a conviction must be recorded and if the person does not comply with the terms of the order, the court may

<sup>2</sup> Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (1999) 108 as cited in Sentencing Advisory Council (Victoria), *Suspended Sentences and Intermediate Sentencing Orders — Suspended Sentences Final Report Part 2* (2008) 49.

(or in some cases, must) order the person to serve the whole or part of the sentence remaining at the time of the breach or the period suspended in prison.

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

## 1.5 Scope

The Council's review has involved:

- analysing current Queensland sentencing trends by high-level offence type (at QASOC Level 1) to understand the current use of intermediate sentencing orders (community service, probation, imprisonment with probation, intensive correction orders, partially suspended sentences, wholly suspended sentences, imprisonment with court ordered parole, imprisonment with Board ordered parole) and how use of these orders has changed over time;
- researching and evaluating interstate and international sentencing options;
- developing a draft reform framework and recommendations throughout the consultation process based on initial views received, consultation with stakeholders (through meetings, written questions, targeted policy issues papers and stakeholder roundtables) and background research;
- undertaking a series of interviews as the basis for illustrative case studies of service delivery challenges in three Queensland locations.

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

Excluded from the project scope were:

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

Also outside of scope was a detailed analysis of resourcing issues and challenges. As discussed above, the Queensland Productivity Commission was asked to consider this issue as part of a separate review. Place-based case studies were also developed by the Council to illustrate some of the existing system challenges.

## 1.6 Data sources

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

In most cases in this report, these data are reported in accordance with the Australian Standard Offence Classification (ASOC) scheme and Queensland extension to this scheme (QASOC). This classification scheme aims to provide 'a uniform national statistical framework for classifying offences used by criminal justice

agencies in Australia’ and was developed by the Australian Bureau of Statistics in consultation with criminal justice agencies.<sup>3</sup>

The Council has also drawn on research undertaken by the QGSO into the factors associated with the outcome of community-based orders, as reported on in Chapter 3 of this report.<sup>4</sup> This work was led by the QGSO and included a qualitative and quantitative analysis of factors impacting on successful completion of orders.

## 1.7 Structure of this report

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

**Chapter 3** provides an overview of findings of research on ‘what works’ in reducing risks of reoffending, an analysis of recidivism of Queensland offenders based on Queensland courts data, and findings of the QGSO’s research on factors affecting successful completion of supervised community-based orders. It also considers the potential impact on future sentencing outcomes of being sentenced to imprisonment.

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

**Chapter 5** describes the sentencing process and framework in Queensland, with a focus on community-based sentencing orders. It considers a range of factors that guide and, in some cases, limit the exercise of a court’s sentencing discretion.

**Chapter 6** provides a high-level summary of the changes proposed by the Council to the current range and mix of intermediate sentencing orders, and to the powers of courts to set a parole release or eligibility date.

**Chapter 7** considers the operation of intensive correction orders in Queensland and presents the Council’s recommendations to progressively phase out the use of this order as other recommended reforms are implemented.

**Chapter 8** discusses the range of other community orders available in Queensland, and the proposed introduction of community correction orders in Queensland to replace these orders and give courts a broader range of more flexible options.

**Chapter 9** considers the potential introduction of home detention in Queensland, and the Council’s recommendations for further research and investigation into the potential use of this option in Queensland.

**Chapter 10** explores the operation and use of suspended sentences in Queensland and improvements, including to enable conditions to be ordered where appropriate and to respond to breaches of orders.

**Chapter 11** considers the current legal framework for court ordered parole in Queensland. In particular, it discusses changes recommended by the Queensland Parole System Review to extend its availability to sexual offences and to allow a release date to be set for sentences of over 3 years where a court considers that the appropriate period to be served in custody is not more than 12 months from the date of sentence; and gives the Council’s recommendations.

**Chapter 12** examines sentencing practices for sexual offences, with a particular focus on the use of custodial orders. It considers specific issues relevant to the extension of court ordered parole to sexual offences and options for reform.

**Chapter 13** presents the Council’s findings on service delivery challenges, as illustrated by three place-based case studies focusing on a metropolitan region, a regional location and a remote area of the State. It

<sup>3</sup> Queensland Government, Office of Economic and Statistical Research, *Australian Standard Offence Classification (Queensland Extension) (QASOC)* (2008) 1.

<sup>4</sup> Queensland Government Statistician’s Office, *Factors Associated with the Outcome of Community Based Orders* (2019, in press).

highlights key challenges and service delivery gaps that may need to be addressed prior to rollout of the Council's recommended sentencing reforms.

**Chapter 14** considers other issues raised by stakeholders, including the powers of courts to vary, amend or revoke community-based orders and to convict and not further punish, the operation of section 189 of the PSA, which allows courts to take outstanding offences into account in sentencing, and section 651 of the *Criminal Code* (Qld), which relates to the ability of a court to hear and decide summary offences where charged on indictment.

**Chapter 15** discusses implementation issues, and current resourcing challenges. It considers a suggested model to support successful implementation of the Council's proposed reforms, including phased implementation and establishment of an appropriate project management and governance structure.

## Chapter 2 Sentencing context in Queensland

Understanding the current sentencing context in Queensland, including key legislative changes and sentencing trends, has provided the Council with a valuable framework within which to consider potential reforms to Queensland's sentencing and parole laws.

This chapter describes the current sentencing context in Queensland. It outlines major reviews and reforms that have shaped Queensland's current sentencing options. It provides a description of offences dealt with by Queensland's criminal courts, and how the overall profile of offences dealt with by the courts has changed over time based on data for the period 2015–16 to 2017–18. The chapter also identifies some of the key challenges facing our current criminal justice system including: rising prisoner numbers, demands on the court system, and the challenge of delivering services to a dispersed population.

### 2.1 Reforms, reviews and legislative changes

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

**Table 2-1: Major reviews and reform programs**

| Review   | Year | Description   |
|--|------|---|
| Review of the civil and criminal justice system in Queensland <sup>5</sup> (Moynihan review) | 2008 | A review of the civil and criminal justice system with the aim of identifying improvements to resolve cases more quickly and fairly. The Moynihan reforms resulted in significant expansion of the Magistrates Courts' jurisdiction to determine indictable offences in the <i>Criminal Code</i> (Qld) and <i>Drugs Misuse Act 1986</i> (Qld), resulting in many matters previously dealt with in the District Court being dealt with instead in a Magistrates Court.   |
| Inquiry on strategies to prevent and reduce criminal activity in Queensland <sup>6</sup>     | 2014 | An inquiry on strategies to prevent and reduce criminal activity, by examining: the trends and type of criminal activity in Queensland; the social and economic contributors to crime; the impacts of this criminal activity on the community and individuals, including social and economic impacts; the effectiveness of crime prevention strategies, including imprisonment, justice reinvestment, early intervention, alternative dispute resolution, and other models used in national and international jurisdictions; the experiences of Queenslanders of the criminal justice system; and possible strategies to increase collaboration and cooperation between various participants in the criminal justice system.  |
| Special Taskforce on Domestic and Family Violence in Queensland <sup>7</sup>                 | 2015 | An independent review of Queensland's domestic and family violence support systems to make recommendations about how the system could be improved. The review led to a number of reforms impacting on sentencing practices, including the establishment of specialist Domestic and Family Violence Courts (commencing with a trial in Southport), an increase in the maximum penalties for first-time and subsequent breaches of domestic violence orders (increased to 3 and 5 years' imprisonment, respectively), and increases in maximum penalties for breaches of police protection notices and release conditions to 3 years' imprisonment, introduction of a notation scheme to help ensure that patterns of behaviour of those who commit acts of domestic and family violence are clearly evident to police officers and courts, and to make domestic and family violence an aggravating factor on sentencing for criminal offences under the PSA. |

<sup>5</sup> Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2009).

<sup>6</sup> Queensland Parliament, Legal Affairs and Community Safety Committee, *Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland* (Report No. 82, 2014).

<sup>7</sup> Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

| Review   | Year | Description  |
|--|------|--|
| Queensland Organised Crime Commission of Inquiry <sup>8</sup>                | 2015 | An independent review of the extent and nature of organised crime in Queensland and the economic and societal impacts of such activity. The Commission's recommendations included the introduction of new offences and circumstances of aggravation carrying higher maximum penalties targeting organised criminal activity.   |
| Taskforce on Organised Crime Legislation <sup>9</sup>                        | 2016 | A review of legislation introduced in 2013 to combat organised crime, in particular, outlaw motorcycle gangs. The Taskforce report made 60 recommendations, including the introduction of a serious organised crime circumstance of aggravation.   |
| Queensland Parole System Review <sup>10</sup>                                | 2016 | An independent review of the parole system that made 91 recommendations in relation to the legislative framework and sentencing, assessment and management of offenders, rehabilitation programs, re-entry services, the Parole Board and the management of offenders in the community. The Queensland Government supported 89 of the recommendations (6 in principle). <sup>11</sup>  |
| Inquiry into imprisonment and recidivism, Queensland Productivity Commission | 2019 | In September 2018, the Queensland Government asked the Queensland Productivity Commission (QPC) to undertake an inquiry on imprisonment and recidivism, to understand how government resources and policies can best be used to improve outcomes for the community. The QPC released its draft report in February 2019. <sup>12</sup> The QPC's final report is due to be submitted to the Queensland Government on 1 August 2019. |

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

<sup>8</sup> Queensland Organised Crime Commission of Inquiry, *Final Report* (2015).

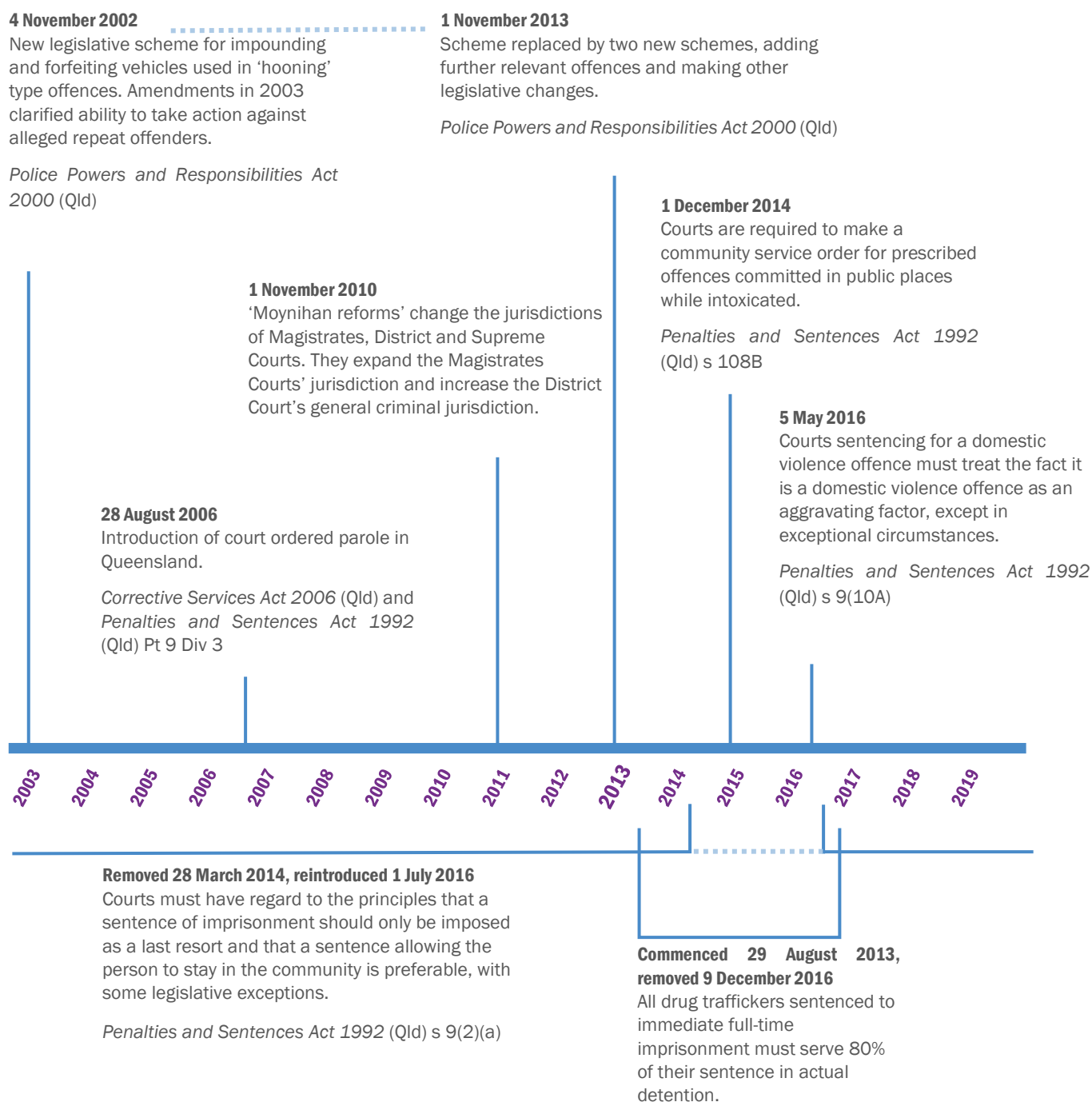
<sup>9</sup> Queensland, Taskforce on Organised Crime Legislation, *Report of the Taskforce on Organised Crime Legislation* (2016).

<sup>10</sup> Queensland Parole System Review, *Queensland Parole System Review Final Report* (2016).

<sup>11</sup> Queensland Government, *Response to Queensland Parole System Review Recommendations* (2016).

<sup>12</sup> Queensland Productivity Commission, *Draft Report – Inquiry into Imprisonment and Recidivism* (2019).

**Figure 2-1: Summary of legislative amendments with an impact on sentencing, 2002–2019<sup>13</sup>**



<sup>13</sup> Amending legislation in accordance with timeline: 4 November 2002: *Police Powers and Responsibilities and Another Act Amendment Act 2002 (Qld)*; 28 August 2006: *Corrective Services Act 2006 (Qld)*; 1 November 2010: *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 (Qld)*; 29 August 2013: *Justice and Other Legislation Amendment Act 2013 (Qld)*; 1 November 2013: *Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Act 2013 (Qld)*; 28 March 2014: *Youth Justice and Other Legislation Amendment Act 2014 (Qld)*; 1 December 2014: *Safe Night Out Legislation Amendment Act 2014 (Qld)*; 5 May 2016: *Criminal Law (Domestic Violence) Amendment Act 2016 (Qld)*; 1 July 2016: *Youth Justice and Other Legislation Amendment Act (No. 1) 2016 (Qld)*; 9 December 2016: *Serious and Organised Crime Legislation Amendment Act 2016 (Qld)*.

## 2.2 Trends in offences

### 2.2.1 Changing patterns of offences sentenced in Queensland

#### The current context: Changing patterns of offending

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

This section provides an overview of Queensland Courts Services data (sourced from the QGSO) about sentencing in Queensland over the period 2005–06 to 2017–18. Overall in Queensland, there have been 4,010,731 penalty outcomes in the criminal courts (see Table 2-2), the majority of which have been decided in the Magistrates Courts. Given the very different profile of offences heard in each of the higher and lower court jurisdictions, information in this section is presented separately for the Magistrates Courts and the higher courts (District and Supreme Courts). For each level of court, data relating to the offence profiles and penalty outcomes (including by offence and over time) are presented.

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

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

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) † Percentages will not add to 100% as some offenders may appear in multiple courts during the reporting period.
- 2) Counts of offenders are only available to 31 December 2017.
- 3) ‡ A unique count of penalties is available from 2011–12; prior to this a penalty could be counted multiple times if it was imposed for multiple offences.

#### Offences sentenced in the Magistrates Courts

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

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

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

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

**Table 2-3: Offenders and court events by offence division, Magistrates Courts, Queensland, 2005–06 to 2017–18**

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

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

Notes:

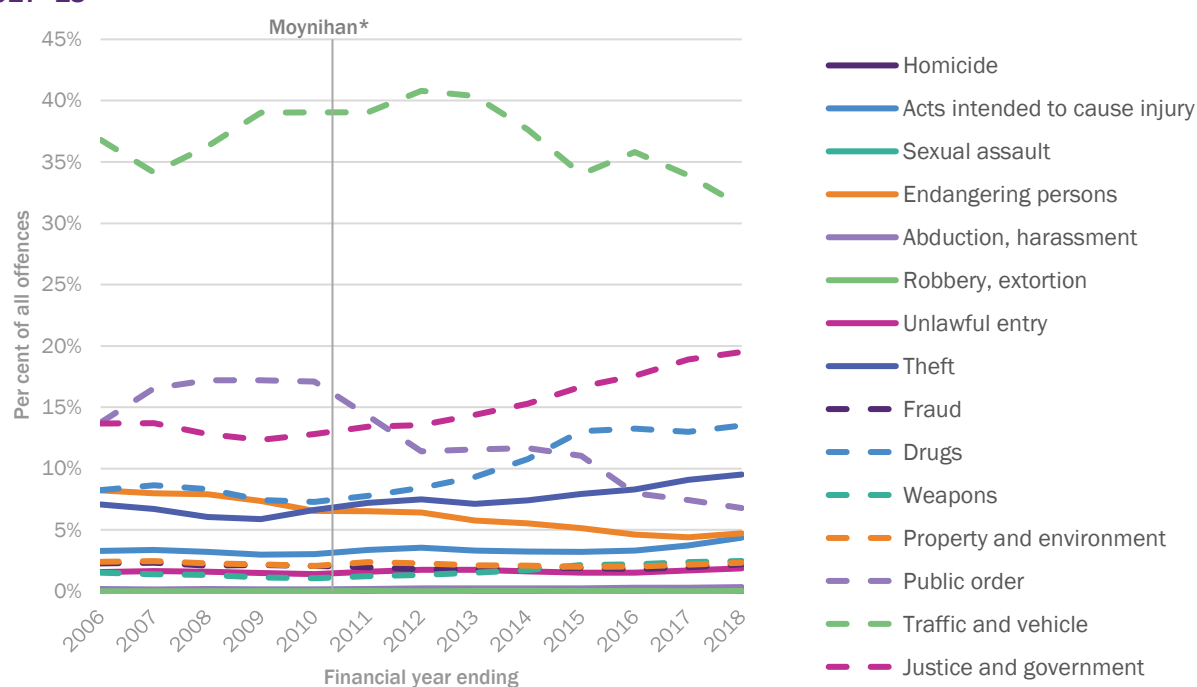
- 1) † Totals do not add to 100% as some offenders may be sentenced for multiple types of offences.
- 2) ‡ Totals do not add to 100% as some events may involve multiple types of offences.
- 3) \* Caution – small sample sizes. The data are skewed by an increase from 3 cases in 2009–10 to 15 cases in 2010–11 (a 400% increase).

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

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

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

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



Source: QGS0, Queensland Treasury — Courts Database, extracted September 2018.

Note: \* The vertical line depicts reforms that could affect the data. The 'Moynihan reforms' commenced 1 November 2010 and changed the jurisdiction of the Magistrates, District and Supreme Courts. See Figure 2-1 for more details.

### Offences sentenced in the higher courts

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

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

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

**Table 2-4: Offenders and court events by offence division, higher courts, Queensland, 2005–06 to 2017–18**

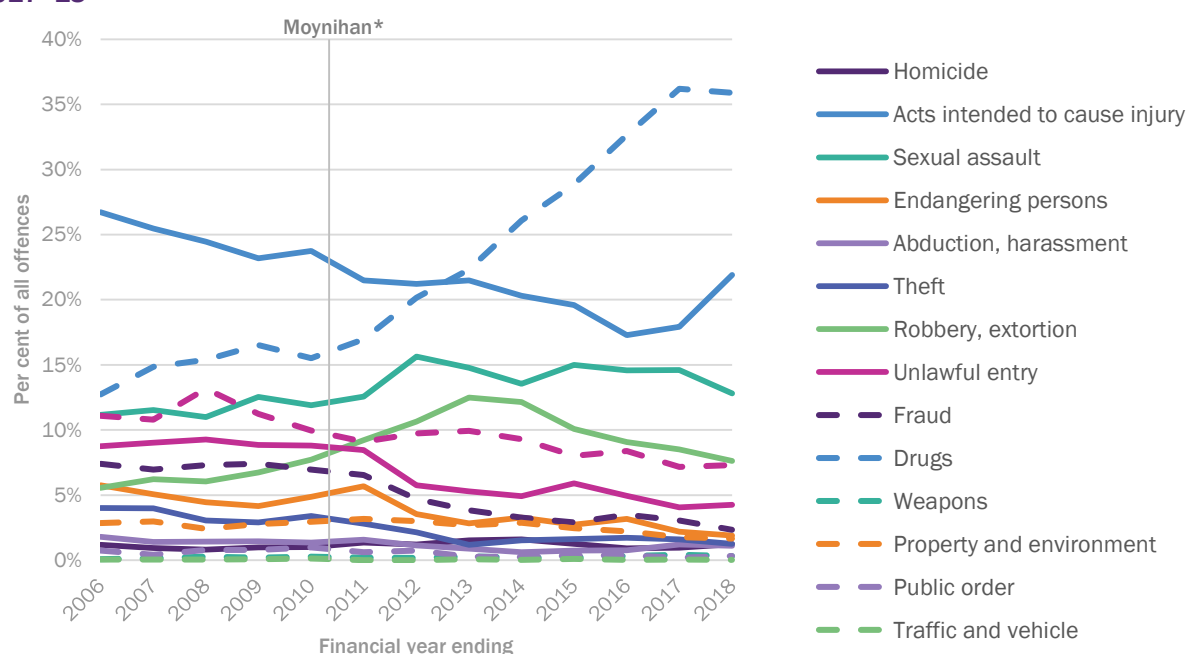
| Offence (ASOC Division)       | Offenders†     | Sentencing events‡ | Average annual percentage change in sentencing events |
|-------------------------------|----------------|--------------------|---|
| Homicide                      | 631 (1.4%)     | 678 (1.1%)         | 2.9% ▲  |
| Acts intended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

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

Notes:

- 1) Percentages for each column may add to slightly less than 100%, as the offence types 'miscellaneous' and 'cannot be assigned' have been excluded.
- 2) † Percentages may add to more than 100% as some offenders may be sentenced for multiple types of offences. Counts of offenders are only available to 31 December 2017.
- 3) ‡ Percentages may add to more than 100% as some events may involve multiple types of offences.

**Figure 2-3: Change in offence categories over time (MSO), higher courts, Queensland, 2005–06 to 2017–18**



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

Note: \* The vertical line depicts reforms that could affect the data. The 'Moynihan reforms' commenced 1 November 2010 and changed the jurisdiction of the Magistrates, District and Supreme Courts. See Figure 2-1 for more details.

## 2.2.2 Offences sentenced for specific demographic cohorts

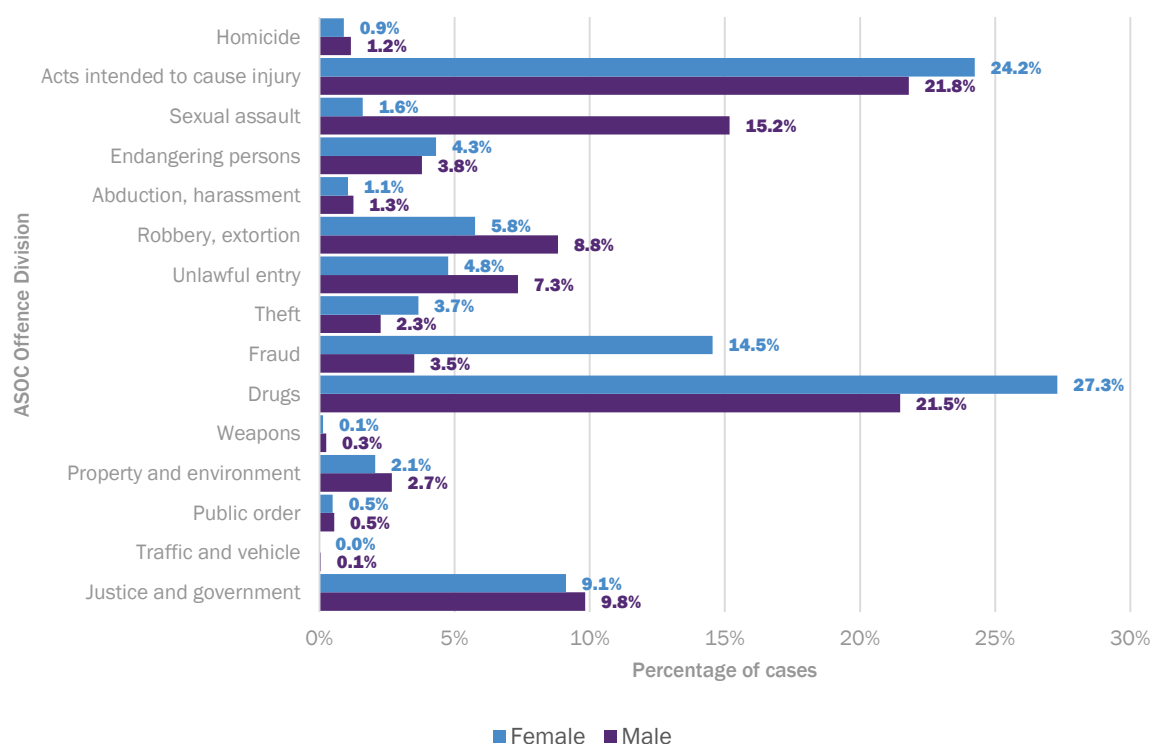
### The current context: Patterns of offending for specific demographic cohorts

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

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

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

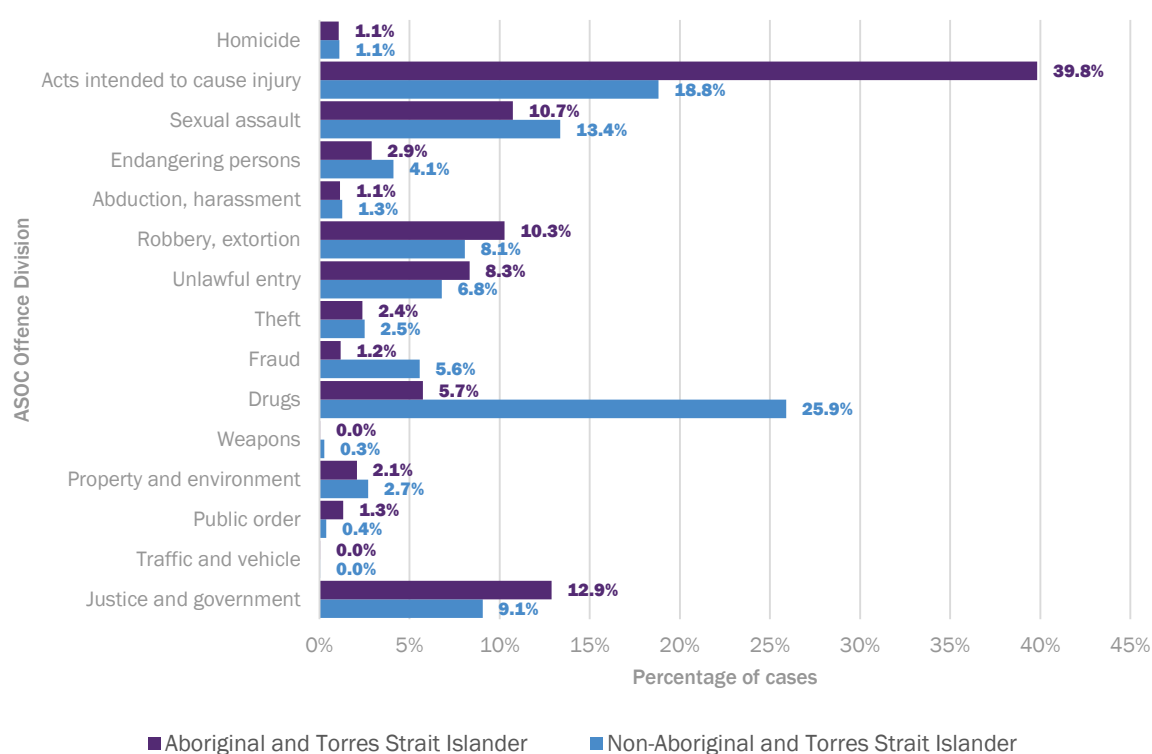
Figure 2-4: Offence division (MSO) by gender, 2005–06 to 2017–18



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

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

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



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

## 2.2.3 Trends in sentences imposed

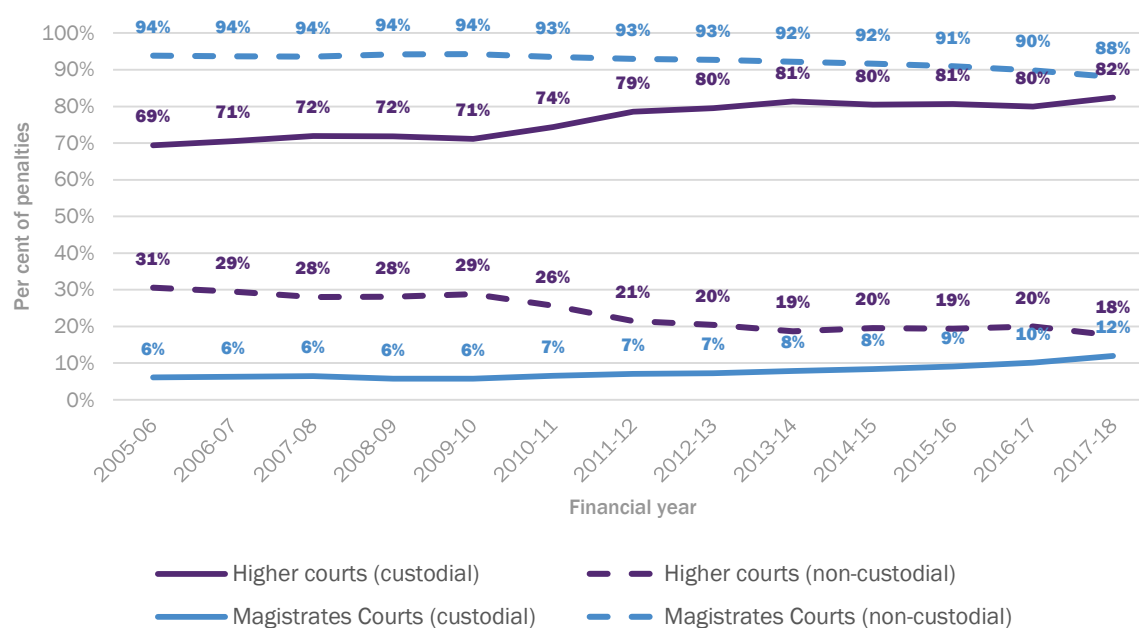
### Trends in sentencing: Penalty types

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

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

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

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



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

### Penalties imposed in the Magistrates Courts

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

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

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

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

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

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

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

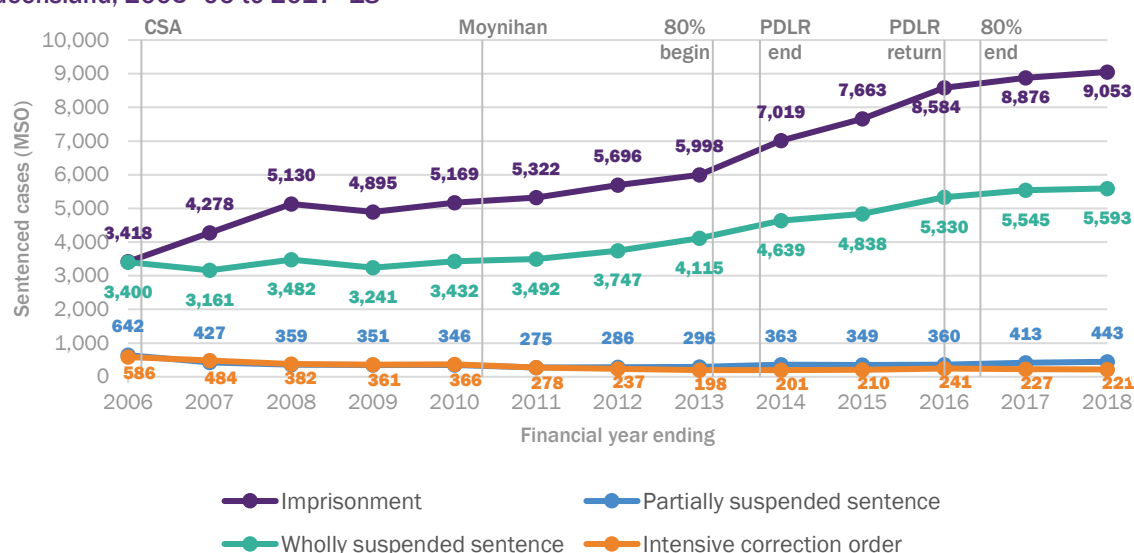
Notes:

- 1) Ancillary penalties such as compensation, restitution or licence disqualification have been excluded; rising of the court has also been excluded.
- 2) † Percentages may add to more than 100% as some offenders may be sentenced for multiple types of offences. Counts of offenders are only available to 31 December 2017.
- 3) ‡ Percentages may add to more than 100% as some events may involve multiple types of offences.
- 4) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### Custodial sentences — Magistrates Courts

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

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



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

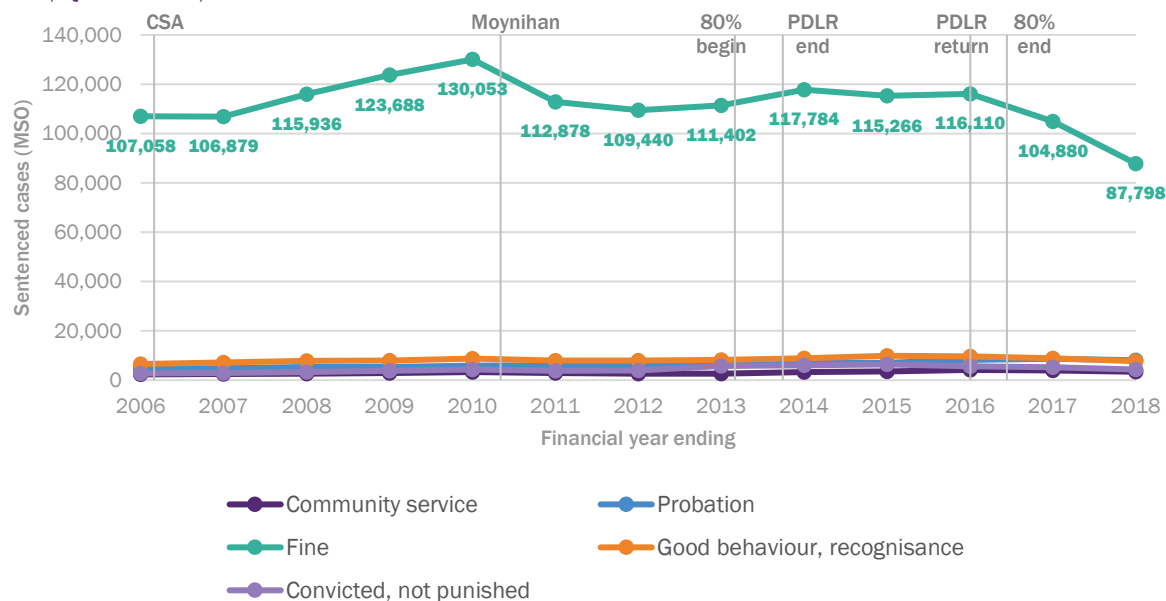
Notes:

- 1) For an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### Non-custodial sentences — Magistrates Courts

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

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



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: For an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.

### Penalties imposed in the higher courts

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

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

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

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

Table 2-6: Offenders and court events by penalty, higher courts, Queensland, 2005–06 to 2017–18

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

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

Notes:

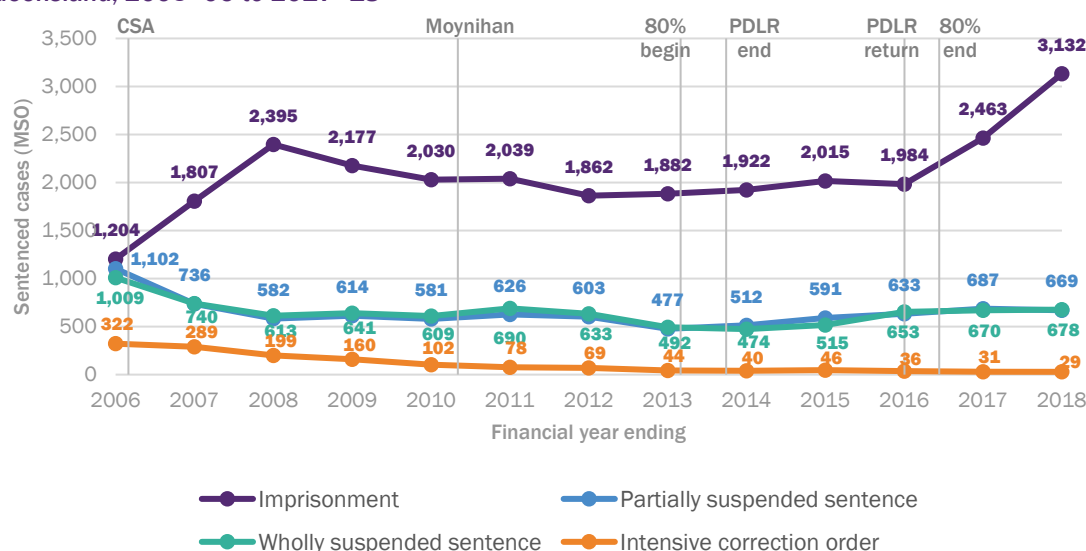
- 1) Ancillary penalties such as compensation, restitution or licence disqualification have been excluded; rising of the court has also been excluded.
- 2) † Percentages may add to more than 100% as some offenders may be sentenced for multiple types of offences. Counts of offenders are only available to 31 December 2017.
- 3) ‡ Percentages may add to more than 100% as some events may involve multiple types of offences.
- 4) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### Custodial sentences – higher courts

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

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

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



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

Notes:

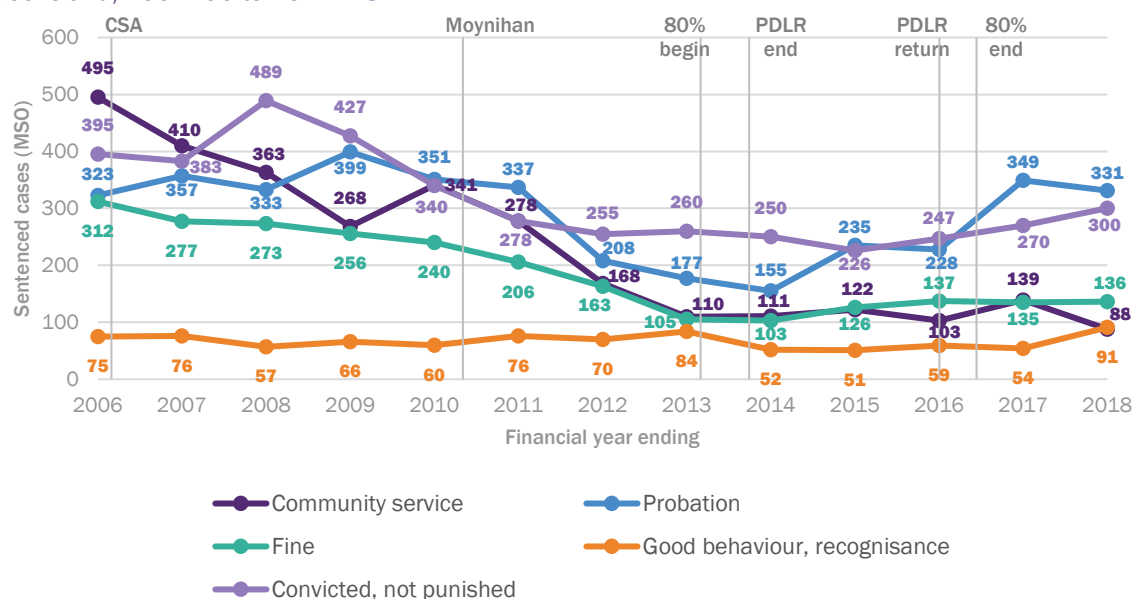
- 1) For an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### Non-custodial sentences — higher courts

Figure 2-10 shows that most non-custodial penalties (MSO) saw a steady decrease from 2005–06 to 2012–13, including orders of community service, probation, fines and offenders who were convicted but not further punished. From 2012–13 to 2017–18, probation orders saw an increase from 155 to 331 MSO penalties. Fines and community service orders (MSO) have remained relatively stable from 2012–13 to 2017–18, ending the period with 136 and 88 MSO penalties, respectively.

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

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



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: For an explanation of the vertical lines representing key legislative reforms, see Figure 2-1 above.

## 2.3 Challenges facing Queensland's criminal justice system

### 2.3.1 Rising prisoner numbers

#### The current context: Rising prisoner numbers

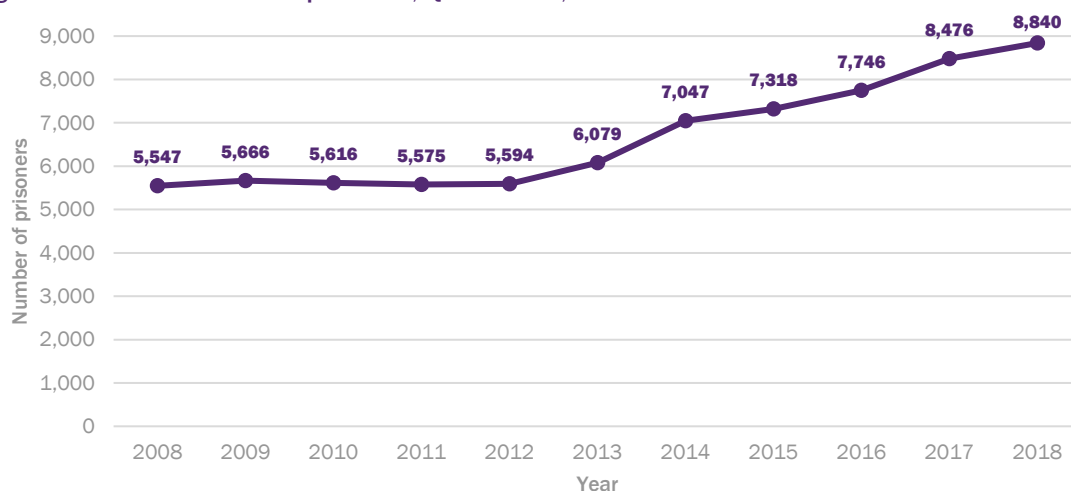
- After remaining relatively steady between 2008 and 2012, prisoner numbers in Queensland increased substantially between 2012 and 2018.
- The Aboriginal and Torres Strait Islander imprisonment rate also rose substantially over this time but decreased slightly between 2017 and 2018.
- The age-standardised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

Growing prisoner numbers combined with prison capacity is a major challenge facing the criminal justice system. As the Queensland Productivity Commission notes in its draft report into imprisonment and recidivism, the current rate of imprisonment is higher than at any other time since 1900.<sup>14</sup>

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

<sup>14</sup> Queensland Productivity Commission (n 12) 37.

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

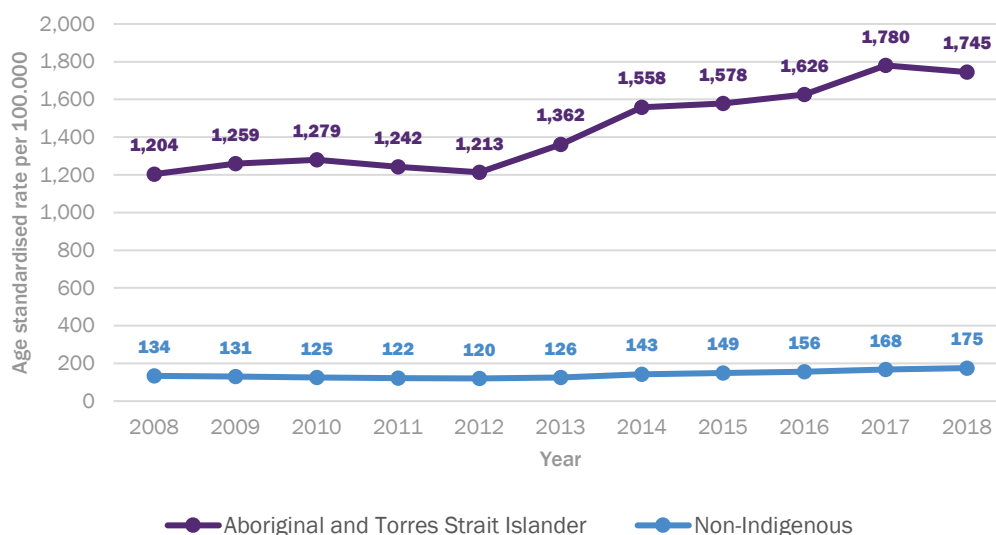


Source: Australian Bureau of Statistics, *Prisoners in Australia, 2018*, Cat No. 4517.0, Table 15.

In Queensland, Aboriginal and Torres Strait Islander people accounted for 31.1 per cent of the total prison population in 2018.<sup>15</sup> Their imprisonment rate has increased considerably since 2012, rising from 1,213 per 100,000 Aboriginal and Torres Strait Islander population and peaking at 1,780 per 100,000 in 2017 before decreasing slightly in 2018 (to 1,745 per 100,000 Aboriginal and Torres Strait Islander population).

The imprisonment rate for non-Indigenous Queenslanders also rose during this period, but much less drastically, from 120 per 100,000 adult non-Indigenous population in 2012 to 175 per 100,000 in 2018 (see Figure 2-12). In 2018, the age-standardised imprisonment rate for Aboriginal and Torres Strait Islander people was 10 times more than the non-Indigenous rate.<sup>16</sup>

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



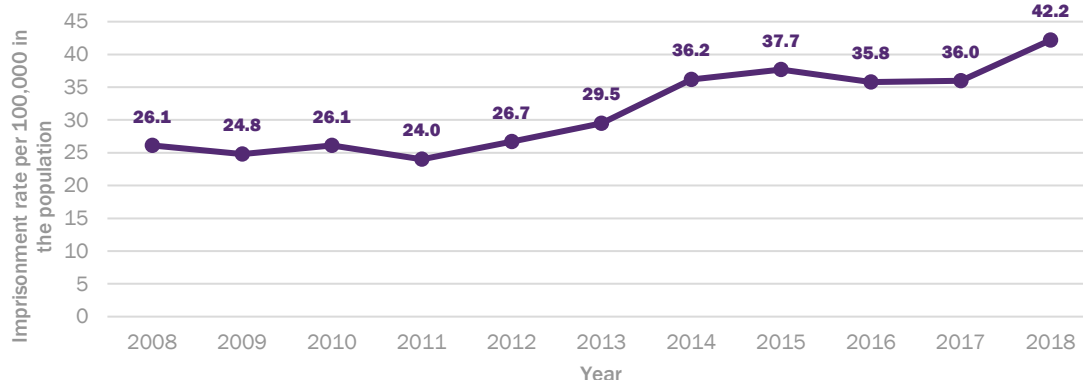
Source: Australian Bureau of Statistics, *Prisoners in Australia, 2018*, Cat No. 4517.0, Table 18.

<sup>15</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2018* (Catalogue No. 4517.0, 6 December 2018).

<sup>16</sup> Ibid. For an explanation of age standardisation, see explanatory notes 65–71. In summary: There are differences in the age distributions between Australia's Aboriginal and Torres Strait Islander and non-Indigenous populations with the former having a much younger population. Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations.

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

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



Source: Australian Bureau of Statistics, *Prisoners in Australia, 2018*, Cat No. 4517.0, Table 15.

### 2.3.2 Demand facing the court system

#### The current context: Demand facing the court system

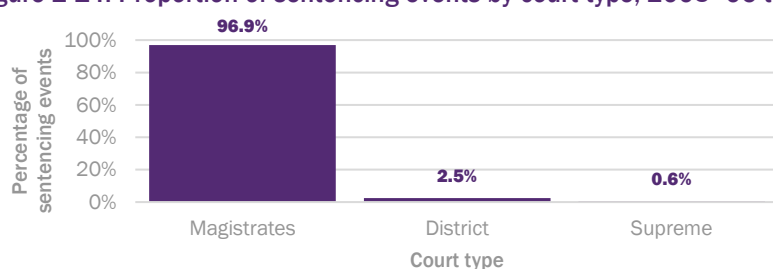
- The Magistrates Courts deal with the vast majority of sentencing events in the court system.
- Backlog indicators and clearance rates are one way of understanding the demand facing the court system.
- In the Magistrates Courts, backlog (proportion of pending cases older than 6 months and 12 months from the date of lodgement) has increased each year since the 2012–13 financial year.
- In 2016–17, the Magistrates Courts had the highest proportion of pending cases older than 6 and 12 months of any Australian jurisdiction.
- Backlog indicators in the higher courts show a different pattern, which varies between the Supreme and District Courts.
- In the Magistrates Courts the clearance rate (cases finalised compared to cases lodged) declined steadily between 2010–11 and 2013–14, before climbing each year to reach 101.3 per cent in 2016–17.

A second challenge facing the criminal justice system is demand on the court system. The pressure placed on the court system can be examined by looking at indicators used for the *Report on Government Services*,<sup>17</sup> particularly those relating to timeliness and delay. This is measured by several indicators, including backlog and clearance rates.

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

<sup>17</sup> These reports are produced by the Productivity Commission on an annual basis. See <<https://www.pc.gov.au/research/ongoing/report-on-government-services>>.

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



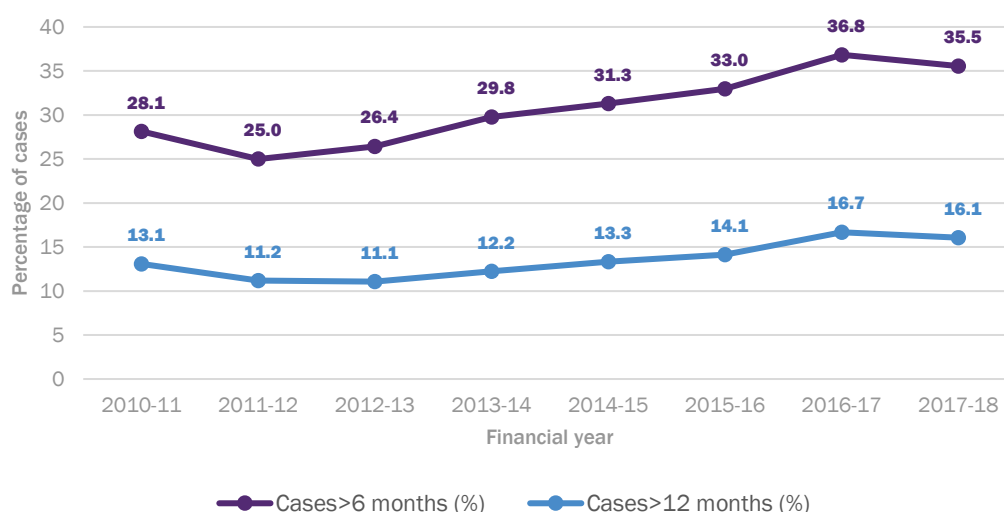
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

### Backlog

Backlog is a measure of the age of a court's active pending caseload, defined as the number of cases in the age category (e.g. more than 12 months old) as a percentage of the total pending caseload.<sup>18</sup>

In the Magistrates Courts, the proportion of cases pending completion that are more than 6 months old increased each year between the 2011–12 and 2016–17 financial years, growing 11.8 per cent over this period (see Figure 2-15). Following a similar trend, the proportion of cases pending completion that are more than 12 months old increased from 11.2 per cent in 2011–12 to 16.7 per cent in 2016–17. Both backlog indicators showed a decrease between the 2010–11 and 2011–12 financial years and a slight decrease between the 2016–17 and 2017–18 financial years.

**Figure 2-15: Proportion of backlog cases in the Magistrates Courts, Queensland, 2010–11 to 2017–18**



Source: Australian Government, Productivity Commission, *Report on Government Services 2018*, Table 7A.17;

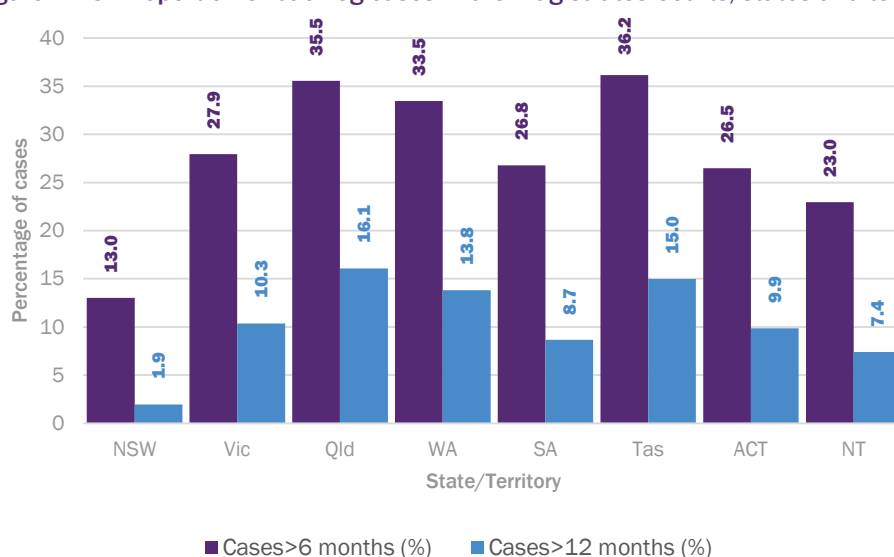
Australian Government, Productivity Commission, *Report on Government Services 2019*, Table 7A.17.

Note: Backlog indicator applies to criminal cases in the Magistrates Courts (excluding the Childrens Court).

During the 2017–18 financial year, the Magistrates Courts in Queensland had the second highest proportion of pending cases more than 6 months old from date of lodgement (35.5%) and the highest proportion of pending cases more than 12 months old from date of lodgement (16.1%) of any Australian jurisdiction (see Figure 2-16).

<sup>18</sup> Although backlog is used as an indicator of a court's ability to process matters expeditiously, the time taken to process cases is not necessarily due to court delay and is affected by factors outside the workload of the court.

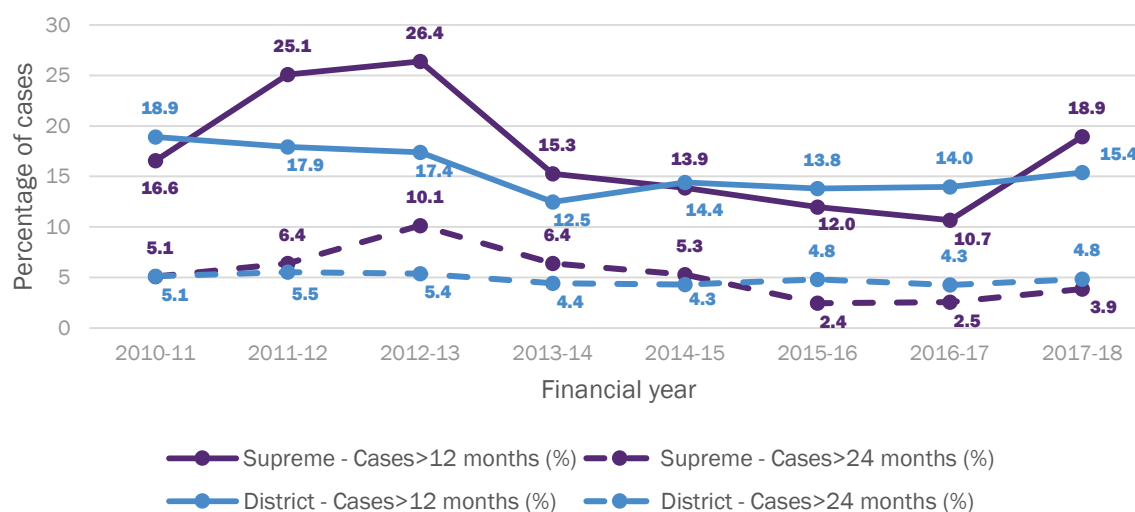
Figure 2-16: Proportion of backlog cases in the Magistrates Courts, states and territories, 2017–18



Source: Australian Government, Productivity Commission, *Report on Government Services 2018*, Table 7A.17; Australian Government, Productivity Commission, *Report on Government Services 2019*, Table 7A.17.  
 Note: Backlog indicator applies to criminal cases in the Magistrates Courts (excluding the Childrens Court).

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

Figure 2-17: Proportion of backlog cases in the in the Supreme and District Courts, Queensland, 2010–11 to 2017–18



Source: Australian Government, Productivity Commission, *Report on Government Services 2018*, Table 7A.17; Australian Government, Productivity Commission, *Report on Government Services 2019*, Table 7A.17.  
 Note: Backlog indicator applies to criminal cases in the Supreme and District Courts (excluding appeals).

In the Supreme Court, backlog peaked in 2012–13 (26.4% of pending cases more than 12 months old from date of lodgement and 10.1% of pending cases more than 24 months old from date of lodgement). Between the 2012–13 and 2013–14 financial years the proportion of backlog cases more than 12 months old dropped sharply and then continued to decrease until the 2015–16 financial year.

The proportion of pending cases more than 12 months old from the date of lodgement in the District Court remained relatively steady between 2010–11 and 2012–13 (between 17.4% and 18.9%), dropping in the 2013–14 financial year to 12.5 per cent. From that point, the proportion of backlog cases more than 12 months old increased to 15.4 per cent in 2017–18.

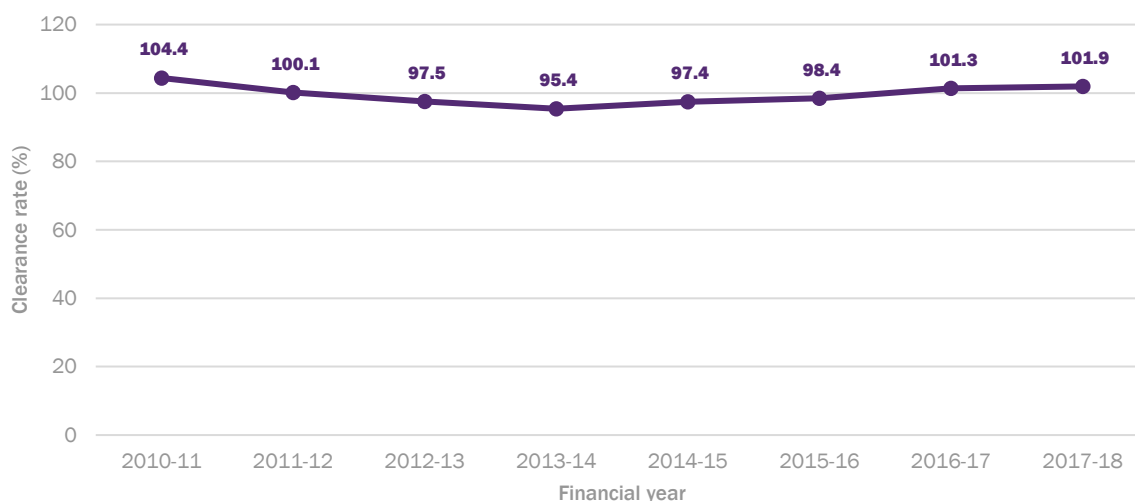
There was less fluctuation in the proportion of pending cases more than 24 months old from the date of lodgement, which remained fairly steady, between 4.3 per cent and 5.5 per cent across the data period, peaking at 5.5 per cent in 2011–12.

### Clearance rates

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

In the Magistrates Courts the clearance rate declined steadily from 104.4 per cent in 2010–11 to 95.4 per cent in 2013–14, before climbing each year to reach 101.9 per cent in 2017–18 (see Figure 2-18).

**Figure 2-18: Clearance rate in the Queensland Magistrates Courts, 2010–11 to 2017–18**



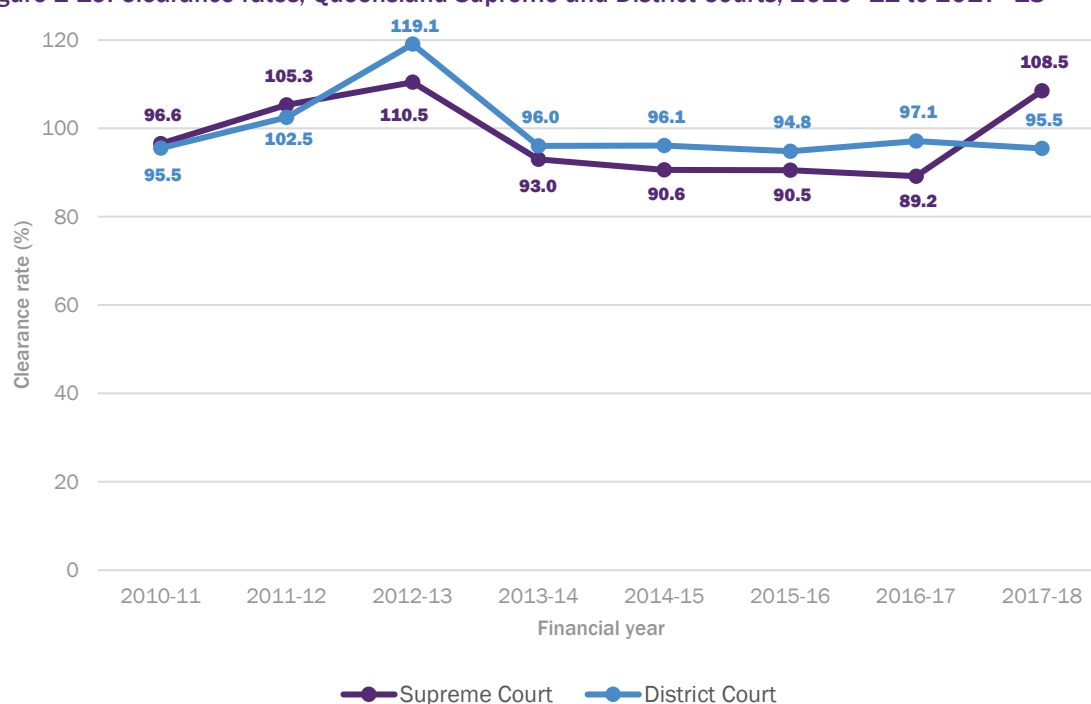
Source: Australian Government, Productivity Commission, *Report on Government Services 2018*, Table 7A.22;

Australian Government, Productivity Commission, *Report on Government Services 2019*, Table 7A.22.

Note: Backlog indicator applies to criminal cases in the Magistrates Courts (excluding the Childrens Court).

As Figure 2-19 shows, clearance rates for the higher courts show a different pattern, with both the Supreme and District Court clearance rates increasing between the 2010–11 and 2012–13 financial years. Both courts displayed a drop in clearance rates between the 2012–13 and 2013–14 financial years (from 119.1% to 96.0% in the District Court and from 110.5% to 93.0% in the Supreme Court). From this point onward, up to the 2017–18 financial year, clearance rates in the District Court have fluctuated slightly (ranging between 94.8% and 97.1%). In the Supreme Court clearance rates have decreased slightly (from 93.0% in 2013–14 to 89.2% in 2016–17), followed by a sharp increase in 2017–18 (to 108.5%).

Figure 2-19: Clearance rates, Queensland Supreme and District Courts, 2010–11 to 2017–18



Source: Australian Government, Productivity Commission, *Report on Government Services 2018*, Table 7A.22;

Australian Government, Productivity Commission, *Report on Government Services 2019*, Table 7A.22.

Note: Clearance rate applies to all criminal cases in the Supreme and District Courts.

### 2.3.3 Service delivery in the context of a dispersed population

There is no doubt that service delivery in Queensland is hampered by the geographic challenges faced in this jurisdiction. Table 2-7 shows that, other than the jurisdictions of Tasmania and the Northern Territory (NT), Queensland is the jurisdiction with the largest proportion of the population living outside a major city, with just over 1 per cent of the population living in very remote locations.

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

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

Source: Australian Bureau of Statistics, *Regional Population Growth, Australia, 2017–18*, Cat No. 3218.0.

Notes:

- 1) The measure of remoteness is based on the Accessibility and Remoteness Index of Australia, which measures the remoteness of a point based on the physical road distance to the nearest urban centre.
- 2) Due to rounding error, percentages may not sum to 100%.

The proportion of Aboriginal and Torres Strait Islander people living in rural and remote areas is considerable, with about one in five Aboriginal and Torres Strait Islander Queenslanders living in remote or discrete communities — about 40,000 people.<sup>19</sup> Given the substantial overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, and therefore under the supervision of Queensland Corrective Services, the demand for access to appropriate programs and services while being supervised on community-based orders is likely to be considerable.

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

<sup>19</sup> Queensland Productivity Commission, *Service Delivery in Remote and Discrete Aboriginal and Torres Strait Islander Communities: Final Report* (2018) 11.

- getting transportation to a regional centre to attend appointments or to report to a corrective services officer;
- having suitable programs in all locations throughout the State, to address criminogenic needs such as drug and alcohol issues or domestic and family violence;
- having a place available on a program — even where programs are in place, they are often highly sought after and waiting lists for access may be six months or more;
- the cost of delivering services to remote locations;
- the difficulty in attracting and retaining suitably qualified staff to rural and remote locations; and
- access to some locations during the wet season, when roads may be flooded and travelling by vehicle may not be possible.

These issues are particularly so for discrete Aboriginal and Torres Strait Islander communities. A recent Queensland Productivity Commission report found that the Queensland Government spends about \$1.2 billion a year on services to remote and discrete Aboriginal and Torres Strait Islander communities.<sup>20</sup> Despite this expenditure, Aboriginal and Torres Strait Islander people living in these areas continue to experience very high rates of disadvantage compared to the rest of the Queensland population.

These issues and challenges are discussed further in Chapter 13.

### 2.3.4 Health and support needs of offenders

As recognised by the Australian Law Reform Commission (ALRC) in its 2017 report *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Pathways to Justice)*, imprisonment can have negative consequences that contribute to increased risks of reoffending:

incarceration leads to a disruption in a person's life, including loss of employment, and potentially a loss of housing, relationships and social supports. Release from prison without support to transition into the community can lead to a cycle of re-offending.<sup>21</sup>

The Australian Institute of Health and Welfare (AIHW) report, *The Health of Australia's Prisoners 2018*,<sup>22</sup> highlights the significant health and support needs of Queensland prisoners on their release into the community.

The AIHW surveyed 79 people who were being discharged from a Queensland prison during the two-week research period.<sup>23</sup> Of the 79 respondents, 80 per cent were male and 46 per cent were Aboriginal and/or Torres Strait Islander, with a median age of 31 years. Over one-quarter (28%) were being released following a prison stay of less than 3 months. The majority (86%) had a prison stay of less than 12 months, with 5 per cent having been in prison for 2 years or more. The AIHW report identified the key support needs of offenders when they are released from prison, primarily housing, alcohol and drug treatment, mental health treatment, and government supports.

The findings below are drawn from the AIHW's report and data tables (for Queensland data), unless otherwise specified.

#### Housing

Finding safe, stable and affordable housing has been recognised as being the greatest challenge faced by prisoners on release and by community organisations working in the area of reintegration and transition.<sup>24</sup>

<sup>20</sup> Ibid 33.

<sup>21</sup> Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No. 133, 2017) 314.

<sup>22</sup> Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (2019).

<sup>23</sup> A prison dischargee is defined as a person aged 18 or over that is in prison full time and expects to be released from prison within four weeks of participating in the study.

<sup>24</sup> See, for example, NSW Council of Social Services, *Submission No. 45 to Australian Law Reform Commission, Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) 2.

The AIHW report found that nearly half (47%) of prisoners being released from prison in Queensland within the two-week research period expected to be homeless; 41 per cent planned to sleep in short-term or emergency accommodation; and 6 per cent did not know where they would sleep. The Australian Housing and Urban Research Institute, in a 2015 study on homelessness, similarly found that ‘the risks of homelessness are significantly greater for those recently incarcerated’,<sup>25</sup> with a suggestion that more effective integration between the justice and homelessness support systems is needed, focusing on building relationships with prisoners prior to their release to support their transition into stable, permanent housing.

### **Alcohol and drug issues**

A high proportion of prisoners had used illicit drugs or had high levels of alcohol use prior to being imprisoned. Two-thirds (66%) of prison dischargees were assessed as being at high risk of alcohol-related harm in the 12 months prior to incarceration and 62 per cent reported using illicit drugs prior to incarceration. However, only 15 per cent reported using illicit drugs while in prison, suggesting most had abstained from drugs during their incarceration and may need support to continue remaining drug free.

Only 8 per cent of dischargees reported accessing an alcohol treatment program while in prison, although this may be because the majority had a prison stay of less than 12 months, and 5 per cent of dischargees reported visiting an alcohol and other drug treatment professional while in prison.

### **Mental health status**

Over one-third (39%) of prison dischargees reported visiting a mental health professional while in prison, with 22 per cent visiting a psychologist, 11 per cent visiting a psychiatrist, and 6 per cent visiting a mental health nurse or team. Thirteen per cent of prison dischargees self-assessed their mental health status as fair or poor, with nearly half (44%) self-assessing it as excellent. Forty per cent of dischargees reported their mental health and wellbeing had improved while in prison.

### **Physical health status**

Nearly two-thirds (63%) of prison dischargees reported improvements to their physical health while in prison; however, many of the health improvements made during their time in prison can quickly erode. As noted by the AIHW in its report: ‘Ensuring continuity of care between prison and community service providers is essential for the health of people leaving prison, as well as for the health of the community’.<sup>26</sup>

### **Government supports**

Of the offenders being released from a Queensland prison within the research period, most (89%) expected to receive government payments upon their release. Of those, 10 per cent expected income support, 33 per cent expected one or more crisis payments, and 46 per cent expected both income support and crisis payments.

Sixty-six per cent reported having a valid Medicare card available from the first day of release; however, 10 per cent did not know whether they had one.

### **Readiness for release**

Release from prison can be a traumatic and emotional time and dischargees are often most vulnerable immediately after release. While almost all dischargees (96%) from a Queensland prison within the research period reported feeling prepared for their release, 44 per cent reported at least some stress about their upcoming release and 43 per cent reported stress related to family or relationships in the community. The majority of dischargees (85%) had contact with family, friends or elders in the four weeks prior to release, suggesting family and community contact and support may be available upon release. However, as phone calls were the most common form of contact (81%), followed by letters (35%) and visits (24%), this suggests that distance may also be a consideration.

<sup>25</sup> Guy Johnson, Rosanna Scutella, Yi-Ping Tseng & Gavin Wood, *Entries and Exits from Homelessness: A Dynamic Analysis of the Relationship between Structural Conditions and Individual Characteristics* (AHURI Final Report No. 248, Australian Housing and Urban Research Institute Limited, Melbourne, 2015) 26.

<sup>26</sup> Australian Institute of Health and Welfare (n 22) 149.

Only a small proportion of dischargees (16%) had organised paid employment that would start within two weeks of release. Nearly half (44%) reported they had a referral or appointment to see a health professional following their release. The most common referral/appointment was to see a medical practitioner (27%) or the Aboriginal Medical Service (11%). Only 5 per cent had a referral to an alcohol or other drug treatment or counselling service.

In the two-week research period, 461 sentenced offenders were released from a Queensland prison. Of those, 86.8 per cent (n=400) had a planned release, while 13.2 per cent (n=61) had an unplanned release. An additional 174 unsentenced offenders were released from remand within the research period (27.4% of offenders released from Queensland prisons).

### **Lack of access to support services**

Australian research by Weatherburn and Trimboli<sup>27</sup> found that offenders are often not able to receive the services needed to support effective rehabilitation, including mental health services, drug and alcohol treatment, disability services, suitable education and training opportunities, and assistance with secure and affordable housing. Also, lack of transport and associated costs hindered accessibility to these services.

Geographic location (in particular, the level of remoteness) may affect the services that people are able to access, particularly for Aboriginal and Torres Strait Islander people. The ALRC's *Pathways to Justice* report highlights that a lack of services in remote areas presents a particular barrier to Aboriginal and Torres Strait Islander people.

The support needs for recently released offenders identified in the research discussed above are consistent with the issues highlighted by stakeholders during the place-based case studies conducted by the Council, which reviewed service delivery and availability in an urban, regional and remote area of Queensland (see Chapter 13).

---

<sup>27</sup> Don Weatherburn and Lily Trimboli, 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (Crime and Justice Bulletin No. 112, NSW Bureau of Crime Statistics and Research, 2008).

## Chapter 3 What works in sentencing?

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

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

1. What are the breach and completion rates for different types of community-based orders in Queensland, and what are the factors that impact on these outcomes? The Queensland Government Statistician's Office (QGSO) has undertaken research on order completion in Queensland, entitled *Factors Associated with the Outcomes of Community-based Orders* (2019 in press), and the Council has drawn on findings in that research to address this first question.
2. What is the evidence about the impact of different penalties on future offending? To assist in answering this second question, the Council commissioned QUT to undertake a literature review focusing on the effectiveness of community-based sentencing orders (2019).<sup>28</sup> The literature review is available on the Council's website.

To inform its approach to the reference, the Council also performed its own analysis of recidivism in Queensland by assessing the proportions of offenders re-appearing in court to be re-sentenced in a two-year window following imprisonment sentenced in 2010–11 and 2011–12 and considered the impact of imprisonment on the future risk of imprisonment based on available data.

### 3.1 Sources

#### 3.1.1 Queensland Government Statistician's Office research

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

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

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

#### 3.1.2 The QUT literature review

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

- imprisonment;

<sup>28</sup> Karen Gelb, Nigel Stobbs and Russell Hogg, *Community Based Sentencing Orders and Parole: Literature Review* (QUT for Queensland Sentencing Advisory Council, 2019).

- imprisonment with probation;
- imprisonment with court ordered and separately with Board ordered parole;
- partially, wholly and conditional suspended sentences;
- intensive correction orders;
- home detention;
- community service orders;
- probation orders;
- community correction orders.

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

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

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

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

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

### 3.1.3 Recidivism data

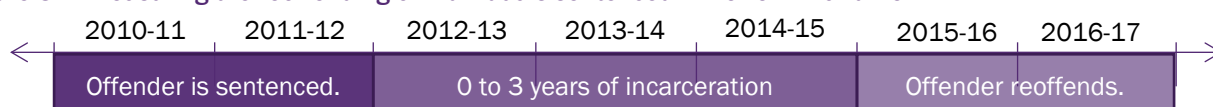
Early in the life of this project, the Council identified the need to understand recidivism as part of its Terms of Reference, particularly to enable the Council to comment on which orders are associated with what levels and quantum of reoffending. Ultimately, all sentencing aims to prevent offenders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

There are considerable challenges in measuring recidivism. For the purposes of the present exercise, the Council operationalised recidivism as any sentencing event that was followed by another sentencing event within two years of an offender's expected release from custody<sup>29</sup> (excluding offences in the ASOC division: offences against justice procedures to remove court proceedings involving breaches of other court orders).

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

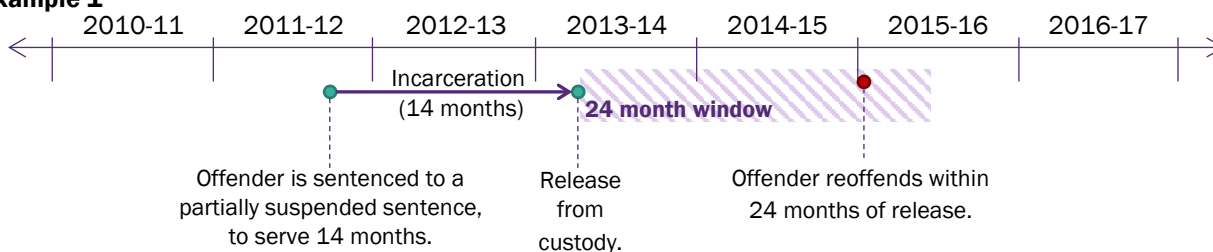
<sup>29</sup> The expected release date is the date the penalty was given for community-based sentencing orders and wholly suspended sentences. For partially suspended sentences, the expected release date is the date of sentence, plus any days of actual imprisonment to be served, less any days of declared pre-sentence custody. For sentences of imprisonment, the expected release date is the date an offender becomes eligible for parole. If no parole date is specified at sentencing, parole eligibility is estimated at 50 per cent of the sentence (less any pre-sentence custody), or 80 per cent for cases where a serious violent offence declaration is made.

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

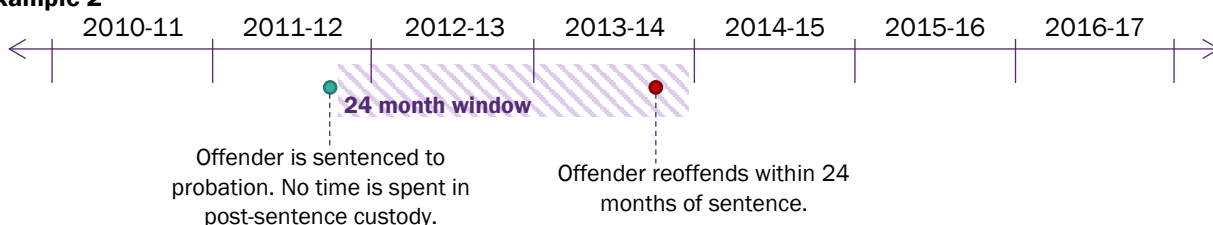


The following diagrams illustrate two examples of how this methodology might be applied:

#### Example 1



#### Example 2



## 3.2 Community-based order completion in Queensland

### Community-based order completion in Queensland

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

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

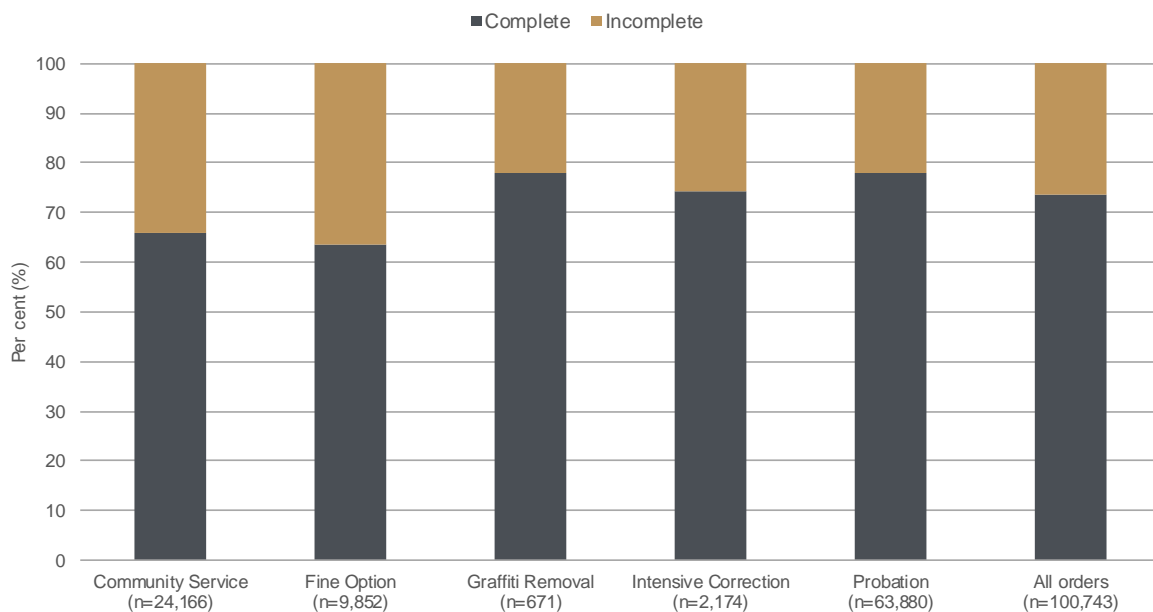
In this context, it is important to understand that different orders vary in average length and in relation to the conditions placed on them. Presumably, orders that take longer to complete, or those that have multiple conditions, will be inherently more challenging for individuals to complete. Another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

extent of the conditions included in the order, and the characteristics of the individuals serving them, rather than anything inherent in the structure or framework of the order itself.

### 3.2.1 Order completion data

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

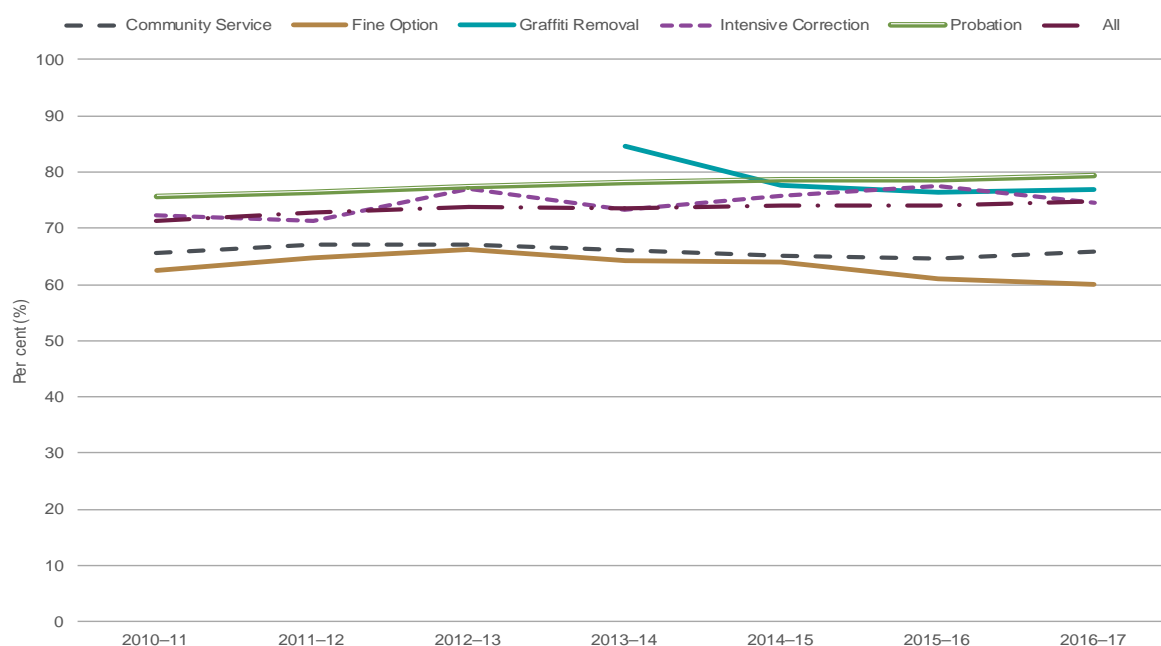
**Figure 3-2: Order completion rates by order type, 2010–11 to 2016–17**



Source: QGSO analysis of QCS administrative data.

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

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



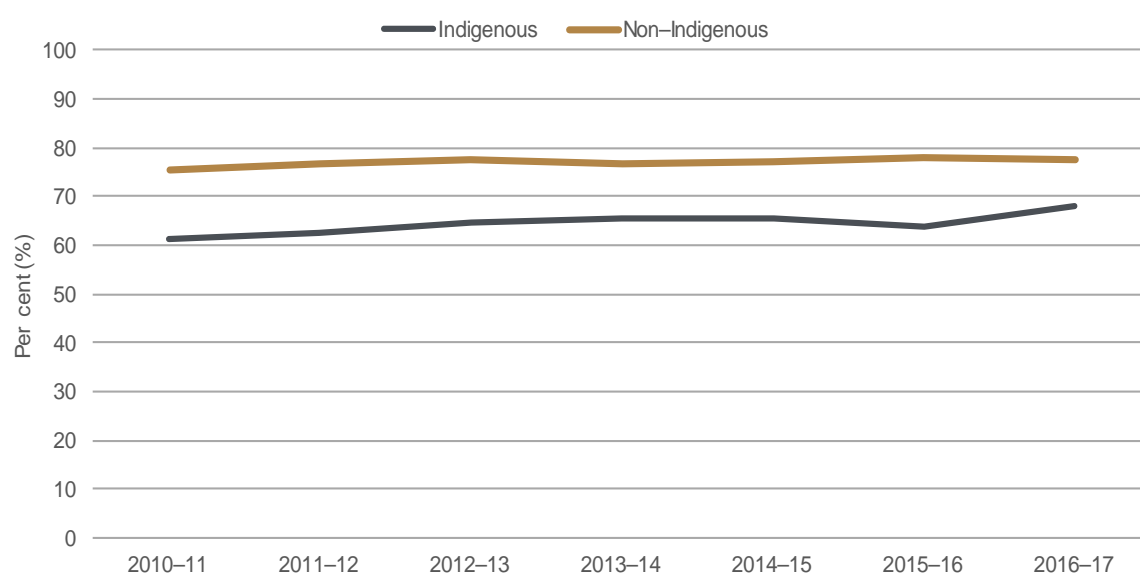
Source: QGSO analysis of QCS administrative data.

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

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

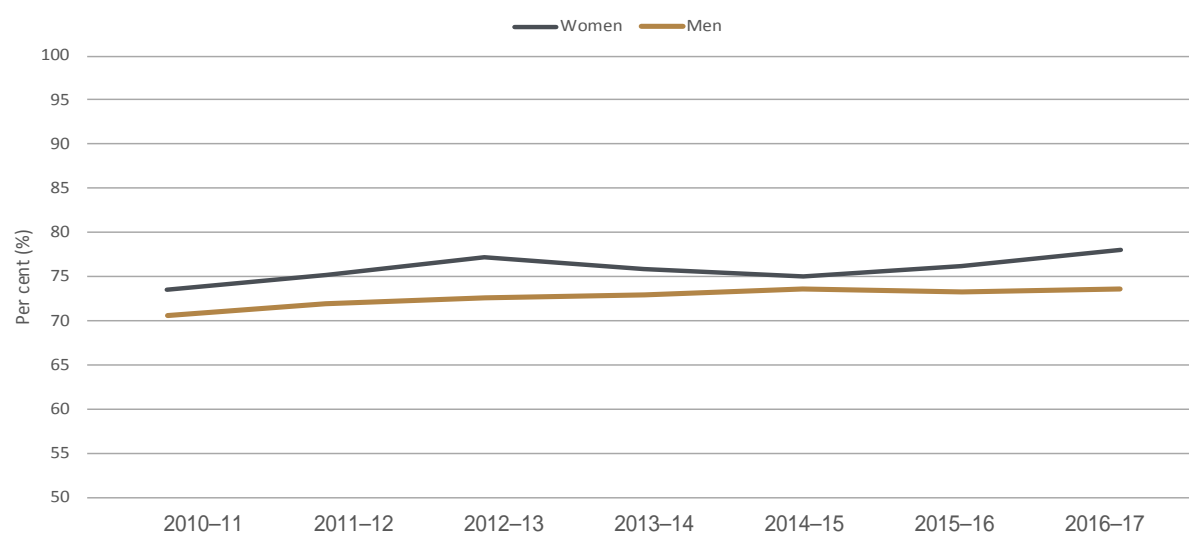
In the accompanying qualitative work undertaken by QGSO, corrective services officers interviewed about their reflections on order completion commented on the lack of support services, programs and community service projects, which they saw as a particular challenge in rural and remote areas. Officers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

**Figure 3-4: Order completion rates by Aboriginals and Torres Strait Islander status**



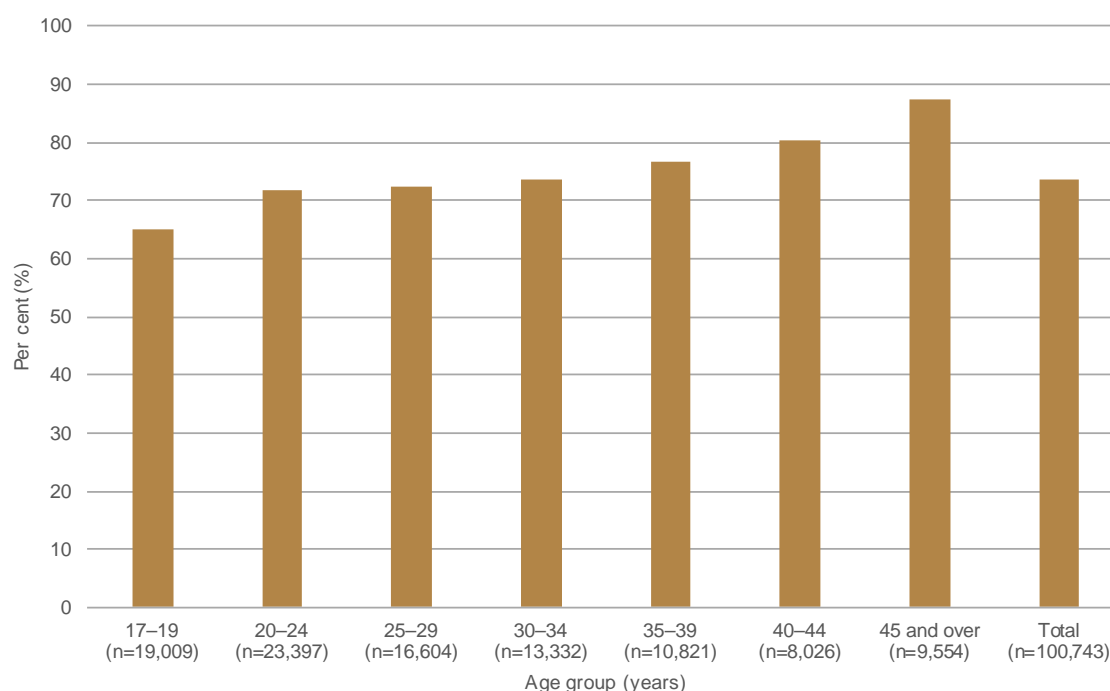
Source: QGSO analysis of QCS administrative data.

**Figure 3-5: Order completion rates by gender**



Source: QGSO analysis of QCS administrative data.

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



Source: QGSO analysis of QCS administrative data.

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

Some corrective services officers interviewed by QGSO spoke about offenders presenting with multiple problems, which increased the complexity of their management, especially among those with untreated mental health conditions who may not have the capacity to understand the requirements of the order imposed on them. The importance of stable accommodation was also raised by corrective services interviewees, who made the link between unstable housing and maintaining employment.<sup>30</sup>

The data show a relation between level of service and order completion.<sup>31</sup> While just over 85 per cent of orders where the offender was assessed at a low level of service were completed, just over half of orders undertaken by offenders assessed at an intensive level of service completed theirs (see Figure 3-7). This may indicate that offenders assessed as having a higher risk of reoffending and a more serious offending profile are less likely to complete their order.<sup>32</sup> Prior research has also shown that increased supervision

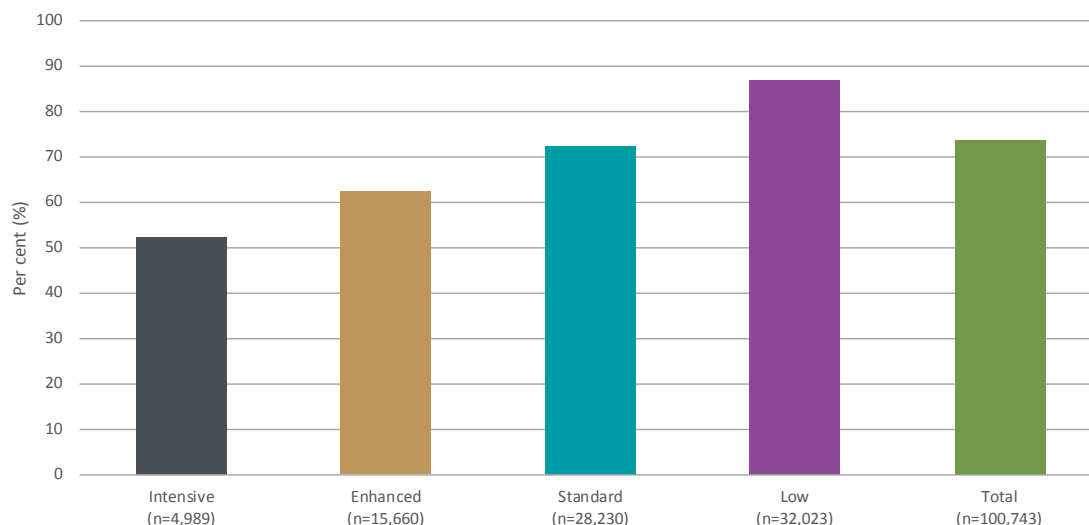
<sup>30</sup> While this was a common factor discussed by research participants, the QGSO notes that the descriptive statistics analysed did not show a relationship between accommodation and order outcome.

<sup>31</sup> The level of service required for an individual offender is assessed by QCS when they come into supervision. A number of factors are considered as part of this assessment, including the offender's risk of reoffending, the type of order they are serving and their offending profile. The level of service assessment informs reporting requirements and level of supervision provided by Probation and Parole.

<sup>32</sup> QCS uses the Risk of Re-offending (Ror-PPV) assessment to determine an offender's risk of general reoffending based on known predictors of reoffending. An offender will be assigned a score of between 1 and 20. Research used to develop the RoR assessment indicates offenders deemed high risk (RoR score between 12 and 20) and assigned an enhanced or intensive level of service will generally reoffend at a rate between 58 per cent and 78 per cent, compared to offenders with a RoR score under 6 who will generally reoffend at rates under 30 per cent (low level of service). The RoR assessment was revalidated in 2015 by Griffith Criminology Institute.

requirements (for example, twice-weekly reporting requirements) are associated with a greater likelihood of revocation due to technical violations.<sup>33</sup>

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

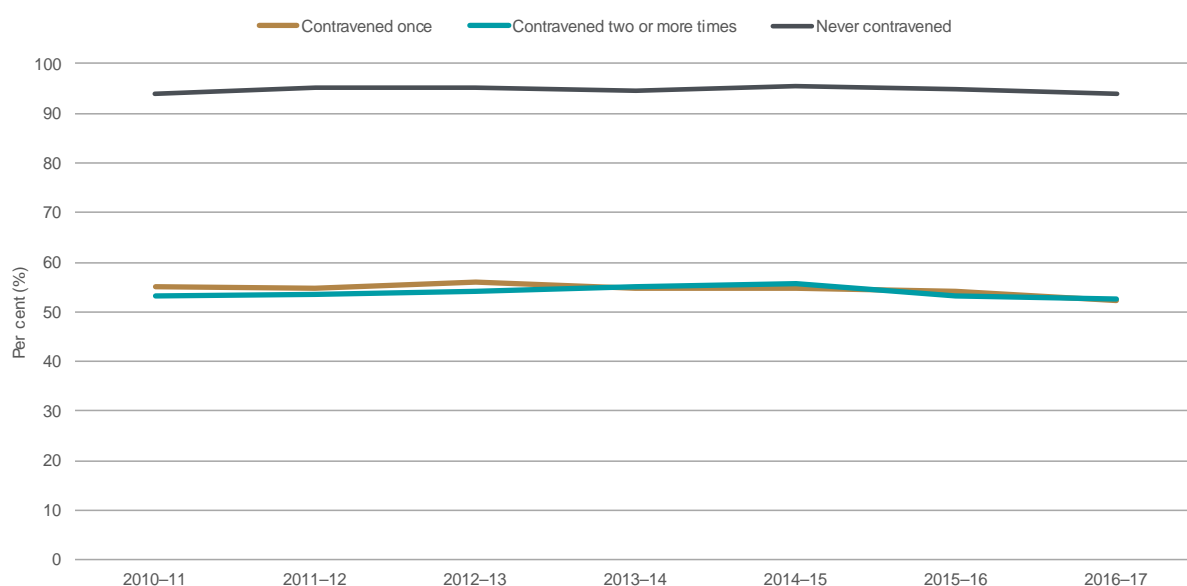


Source: QGSO analysis of QCS administrative data.

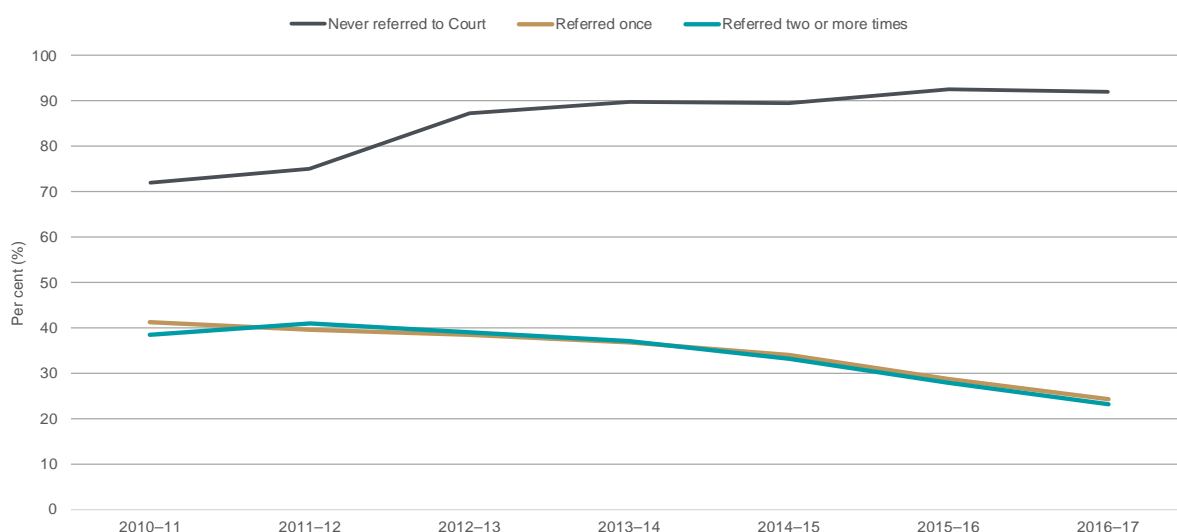
Note: A total of 19.7% of orders (n = 19,841) do not have level-of-service assessment information available (not shown).

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

<sup>33</sup> Charlotte E. Gill, 'The Effects of Sanction Intensity on Criminal Conduct: A Randomized Low-intensity Probation Experiment' (2010), Degree of Doctor of Philosophy thesis, University of Pennsylvania; Charlotte E. Gill, Jordan Hyatt, & Lawrence W. Sherman, *Probation Intensity Effects on Probationers' Criminal Conduct* (Campbell Systematic Reviews, 2009); Jordan M. Hyatt, and Geoffrey C. Barnes, 'An Experimental Evaluation of the Impact of Intensive Supervision on the Recidivism of High-risk Probationers' (2014) 63(1) *Crime and Delinquency* 3; Queensland Parole System Review (n 10); Jennifer L. Schulenberg and Sam Houston, 'Predicting Noncompliant Behavior: Disparities in the Social Locations of Male and Female Probationers' (2007), 9(1) *Justice Research and Policy* 25; Australian Government, Productivity Commission, *Report on Government Services* 2019 (2019).

**Figure 3-8: Order completion rates by contravention status**

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

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

Source: QGSO analysis of QCS administrative data.

### 3.2.2 Factors that may impact on order completion

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

It is noted that the Queensland Parole System Review recommended that corrective services' staffing levels be progressively increased, and publicly available information shows that Queensland officer caseloads have

been consistently higher than those reported for total Australia.<sup>34</sup> For example, in 2017–18, the officer-to-operational staff caseload for Queensland was 29.1 compared with 18.7 for Australia.<sup>35</sup> Interviewees also spoke about the shift towards a more therapeutic approach to supervision of offenders on community-based orders and away from a compliance focus, which facilitates greater professional discretion when responding to the challenges faced by offenders in completing their orders and emphasises the treatment of presenting issues. This was largely viewed as very positive by officers, and it aligns with the evidence about the potential for supervision to deliver effective order outcomes (see section 3.3 below). However, the gaps in community-based support services referred to above were sometimes seen to obstacles to achieving this in practice; and could also create difficulties for those offenders required to undertake a specific program as part of their order.

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

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

### 3.3 Evidence of order effectiveness

#### Evidence of order effectiveness

A review of academic research regarding comparative order effectiveness showed:

- Probation is more effective at reducing recidivism than imprisonment.
- Periods of imprisonment less than 12 months are least effective and sentences under 6 months have the highest reoffending rates.
- Community service orders are more effective at reducing recidivism than a term of imprisonment or a bond (although less successful than a fine).
- There is conflicting evidence about the effectiveness of home detention.
- There is less evidence of the effectiveness of partially and wholly suspended sentences and ICOs.
- The research indicates good evidence for positive impacts on recidivism achieved by electronic monitoring, treatment programs and supervision that focuses on rehabilitation rather than compliance.
- There were positive findings for the use of cognitive behavioural therapy and drug treatment programs, and promising findings about the effectiveness of sex offender programs and violent offender programs.
- There was inconclusive evidence about the effectiveness of domestic violence offender programs.
- There is a lack of research into the effectiveness of orders for vulnerable offender cohorts and this is an area where further investigation would be useful.

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

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

Assessing the evidence about the impact of sentencing outcomes on offending behaviour, therefore, is particularly difficult. It is important to place weight only on the findings of those studies that have used more

<sup>34</sup> Queensland Parole System Review (n 10) Recommendation 62 and 197 [989].

<sup>35</sup> Australian Government, Productivity Commission (n 33) Table 8A.7.

robust methodological approaches. For example, studies that have matched offenders on key characteristics such as offence type, criminal history, age and gender, and then assessed the impact of the penalty on future offending for both groups, will lead to more reliable findings.

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

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

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

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

- **Imprisonment.** Here there are mixed results – some research suggests imprisonment has a marginal impact on recidivism, but other research shows an increased likelihood of reoffending. The research notes the effectiveness of imprisonment in relation to short-term incapacitation of offenders, but also demonstrates that it does not successfully deter offenders, because individual deterrence is based on an assumption that offenders make rational decisions when they commit offences. Research suggests that periods of imprisonment under 12 months are the least effective, with sentences of under 6 months characterised by the highest reoffending rates. The QUT Review points out there are a number of additional negative impacts of imprisonment to consider, including on family members and in particular the impact on children of having an absent parent.
- **Probation.** Evidence suggests that probation is more effective at reducing recidivism than imprisonment, performing particularly well in comparison to short terms of imprisonment. It appears to be particularly successful for female offenders and those with a mental illness, and possibly also for sex offenders. One study found that prior convictions substantially increased the propensity of probationers to be rearrested and to have their probation revoked.<sup>36</sup> The other key risk factor for succeeding on probation relates to drug misuse issues – offenders without a substance misuse problem being much more likely to succeed on probation.<sup>37</sup>
- **Parole.** The literature shows that parole is more successful in reducing reoffending than release without supervision, although the impact appears much less certain for populations such as Aboriginal and Torres Strait Islander offenders, male offenders and those with a mental illness. There is insufficient evidence to distinguish between the effects of Board ordered parole and court ordered parole.

<sup>36</sup> David Olson and Arthur Lurigio, 'Predicting Probation Outcomes: Factors Associated with Probation Rearrest, Revocations, and Technical Violations During Supervision' (2000) 2(1) *Justice Research and Policy* 73.

<sup>37</sup> John Hepburn and Marie Griffin, *An Analysis of Risk Factors Contributing to the Recidivism of Sex Offenders on Probation* (US Department of Justice, 2004).

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

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

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

- **Wholly suspended sentences.** There appears to be a small but statistically significant positive effect on recidivism by offenders serving wholly suspended sentences compared to offenders who serve a period of imprisonment. This is thought to be linked to the fact that offenders on wholly suspended sentences are able to maintain family connections, employment and accommodation.
- **Partially suspended sentences.** Recidivism rates of offenders who served a partially suspended sentence appear to be higher than those who served a wholly suspended sentence, and this is particularly so for young offenders and those with a criminal history.
- **Intensive correction orders.** While there are only two robust studies reviewed in the QUT Review, it appears there is no real difference in effectiveness between ICOs and supervised suspended sentences, but that they are more effective at reducing recidivism than periodic detention and short terms of imprisonment.
- **Conditional suspended sentences, community correction orders.** There is insufficient robust research to make any comment about their impact on recidivism, although time will tell in relation to community correction orders, given they have only been introduced in some Australian jurisdictions in recent years and have not been sufficiently evaluated yet.

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

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

There appear to be common findings relating to demographic profiles across different orders, where older offenders are consistently more successful than younger offenders, and where female offenders succeed when subject to any intervention that is targeted at their specific treatment needs.<sup>38</sup> Again, these findings are consistent with those of the QGSO in their analysis of QCS data.

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

<sup>38</sup> Renée Gobeil, Kelley Blanchette and Lynn Stewart, 'A Meta-Analytic Review of Correctional Interventions for Women Offenders: Gender-Neutral Versus Gender-Informed Approaches' (2016) 43(3) *Criminal Justice and Behavior* 301.

### 3.4 Recidivism in Queensland

#### Recidivism in Queensland

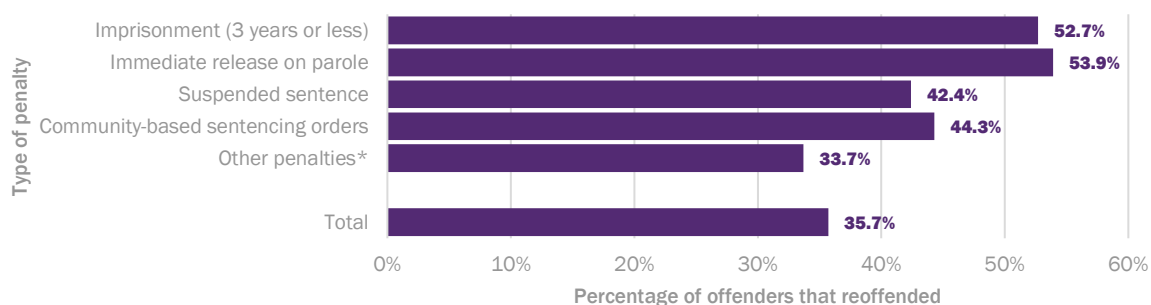
- The Council's review of court data showed that more than half of the offenders who were sentenced to imprisonment reoffended within two years of their release from custody.
- Analysing reoffending by type of order found that offenders sentenced to a suspended sentence with a community-based order were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

This section presents the Council's own analysis of court data on the reoffending of a specific cohort of offenders who were sentenced to a term of imprisonment of up to 3 years in 2010–11 and 2011–12.

#### 3.4.1 Reoffending by penalty type

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

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



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

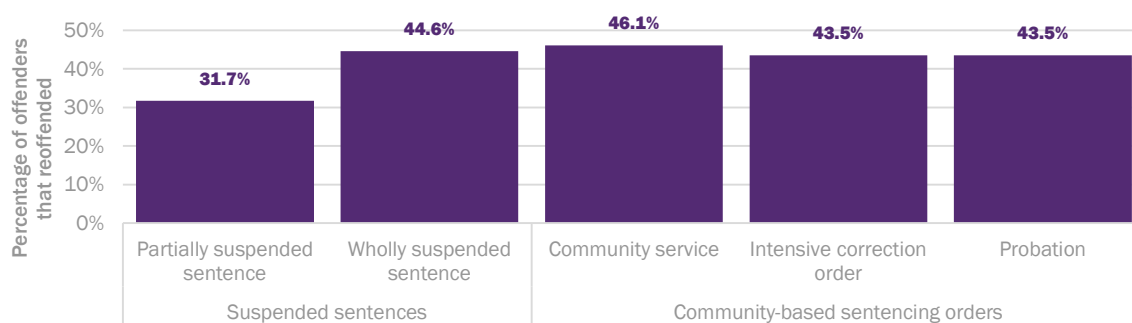
Notes: Includes offenders originally sentenced between 2010–11 and 2011–12 who reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

\* Other penalties comprise fines (88.9%), recognisances (6.4%), convicted, not further punished (3.3%), other monetary (1.0%), licence disqualification (0.3%), and rising of the court (0.05%).

Offenders sentenced to a wholly suspended sentence are more likely to reoffend (44.6%) compared with offenders sentenced to a partially suspended sentence (31.7%) – see Figure 3-11.<sup>39</sup> There is little difference in reoffending between the different types of community-based sentencing orders (community service = 46.1%, ICOs = 43.5%, probation = 43.5%).

<sup>39</sup> Some caution should be exercised in interpreting these findings due to data recording practices. For more information, see section 14.6.

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



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

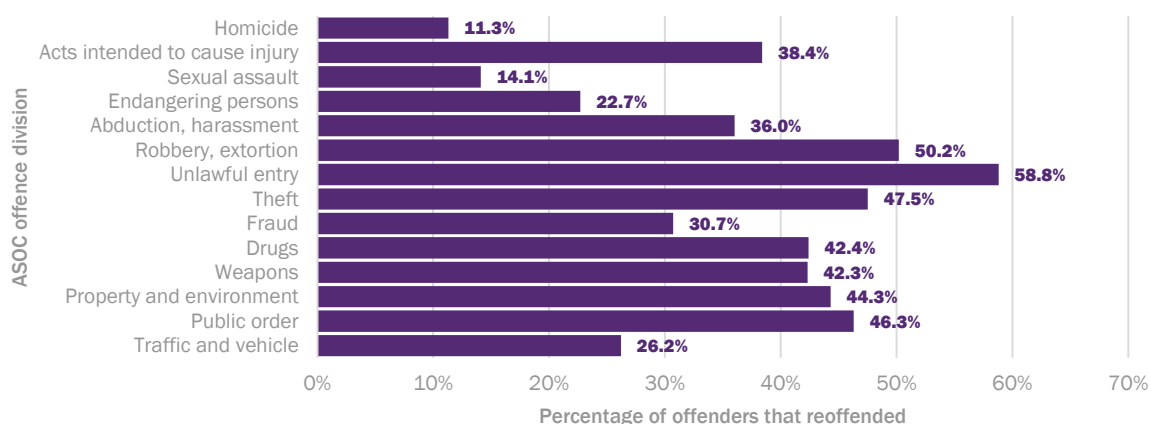
Notes:

- 1) Includes offenders originally sentenced between 2010–11 and 2011–12 who reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 3.4.2 Reoffending by offence type

People sentenced for unlawful entry were the most likely to reoffend, with 58.8 per cent of offenders committing a new offence within 2 years of their release from custody (see Figure 3-12). Robbery and extortion (50.2%) and theft (47.5%) were the second and third most likely offence categories to lead to reoffending. Offenders who committed homicide, sexual assaults, or acts endangering persons were the least likely to reoffend.

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

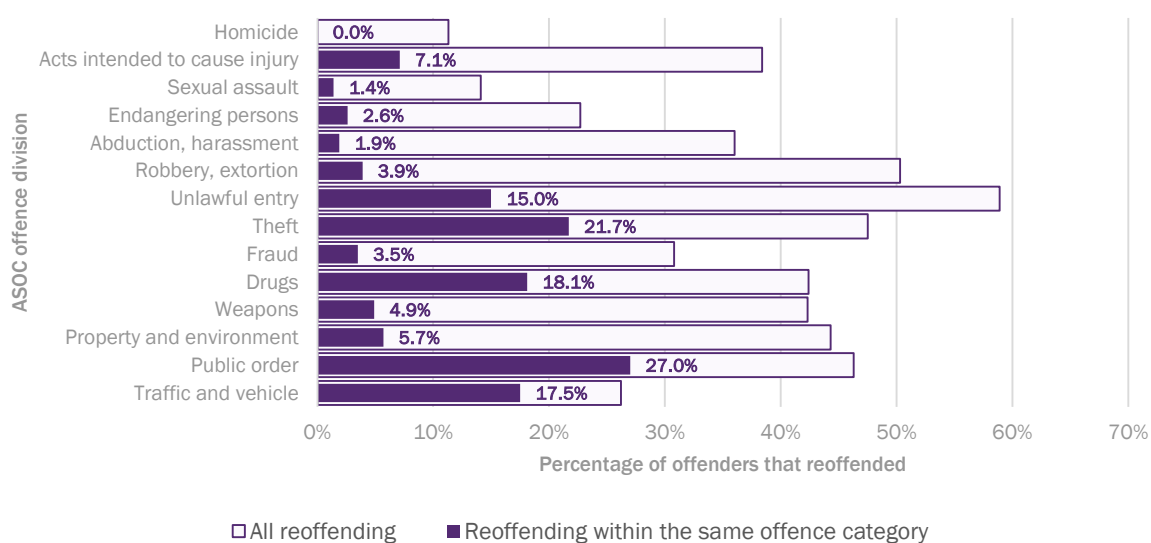


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Includes offenders originally sentenced between 2010–11 and 2011–12 who reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

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

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



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

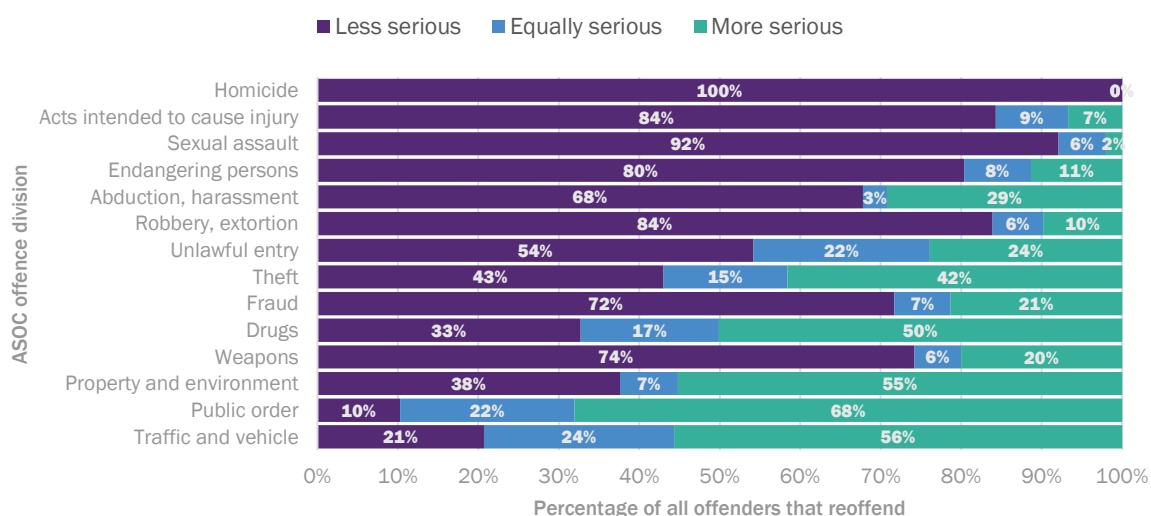
Note: Includes offenders originally sentenced between 2010–11 and 2011–12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

### 3.4.3 Seriousness of reoffending

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

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

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



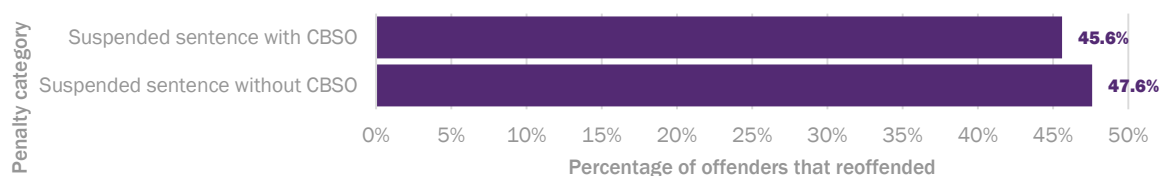
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Includes offenders originally sentenced between 2010–11 and 2011–12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

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

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

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



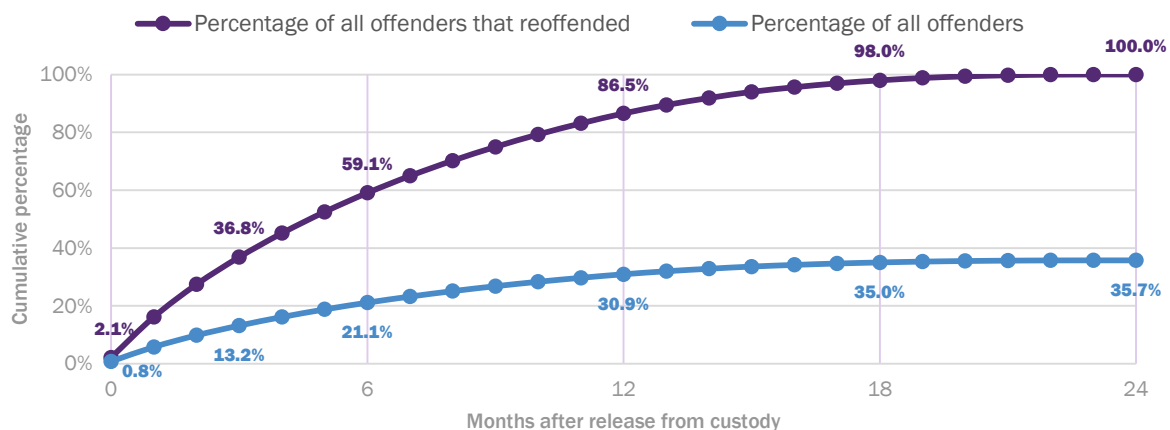
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Includes offenders originally sentenced between 2010–11 and 2011–12 who reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.

### 3.4.5 Time to reoffending

Figure 3-16 reveals that 35.7 per cent of all offenders reoffended within 2 years of being released from custody. The first 6 months after release is the most critical in terms of reoffending. Over one-third (36.8%) of reoffenders had reoffended within 3 months of release, and over half (59.1%) of offenders who reoffended did so within 6 months.

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



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) Includes offenders originally sentenced between 2010–11 and 2011–12 that reoffended within 2 years of their release from custody. Excludes offenders serving more than 3 years of post-sentence custody.
- 2) The 0.8% of offenders who offended within 0 months of their expected release from custody comprise offenders who may have reoffended while in custody or may have been released from custody earlier than estimated.

## 3.5 The effect of prior imprisonment

Another issue relevant to the review was the extent to which a person's prior sentence of imprisonment influences their future risks of imprisonment. In particular, concerns were raised during consultation undertaken as part of this review that any 'flattening' of the current sentencing structure in Queensland (that is, a reduction in the number of sentencing orders available to courts in sentencing), as has occurred in some other states and territories (particularly Victoria) might have the result of 'fast-tracking' offenders to prison. Questions were also raised about whether the availability of immediate release on court ordered parole in Queensland has resulted in imprisonment becoming a more attractive sentencing option for courts in preference to community-based alternatives (including non-custodial orders), and the impact of this on future sentencing outcomes.

All offenders who were sentenced to a term of actual imprisonment in 2010–11 to 2011–12 were analysed to determine whether the presence of prior imprisonment increased the likelihood of subsequent imprisonment (see Figure 3-17). For the purposes of this analysis, 'actual imprisonment' was defined to include single and concurrent sentences of imprisonment, as well as partially suspended sentences. Prior offending and reoffending was operationalised as any sentencing event with an offence date that occurred within two years of an offender's expected release from custody.

Figure 3-17: Methodology used to determine prior offending and reoffending

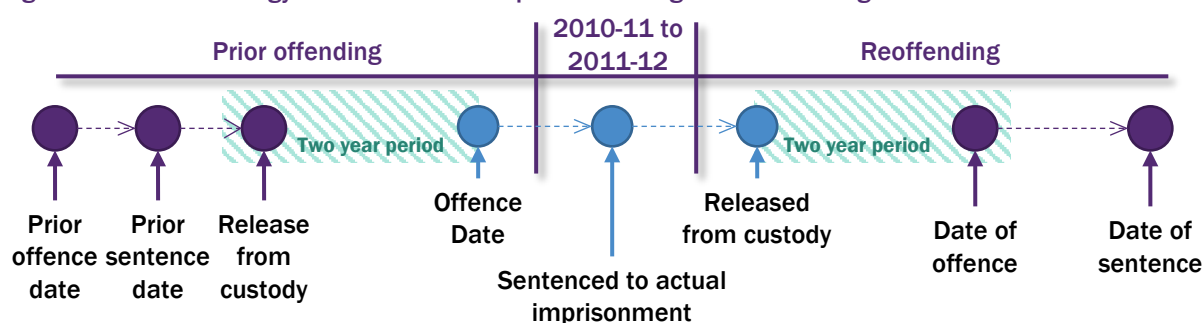
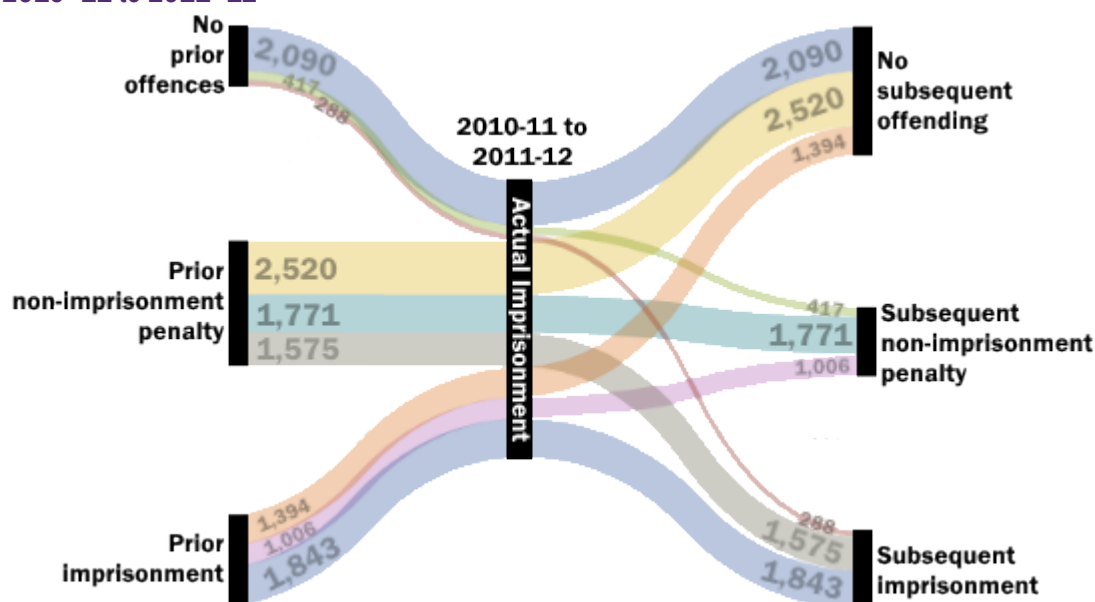


Figure 3-18 shows offenders who were sentenced to actual imprisonment from 2010–11 to 2011–12, and the presence (or absence) of their prior and subsequent offending history. The figure illustrates that a larger proportion of offenders who served prior sentences of imprisonment go on to receive subsequent sentences of imprisonment, compared to offenders with non-imprisonment prior sentences. Of the 4,243 offenders with prior imprisonment, 43.4 per cent (n=1,843) were subsequently imprisoned. This proportion is much higher than the 26.8 per cent (n=1,575) of offenders with prior non-imprisonment penalties who went on to receive imprisonment; and the 10.3 per cent (n=288) of offenders with no prior sentences.

Figure 3-18: Prior and subsequent penalties for offenders sentenced to actual imprisonment from 2010–11 to 2011–12



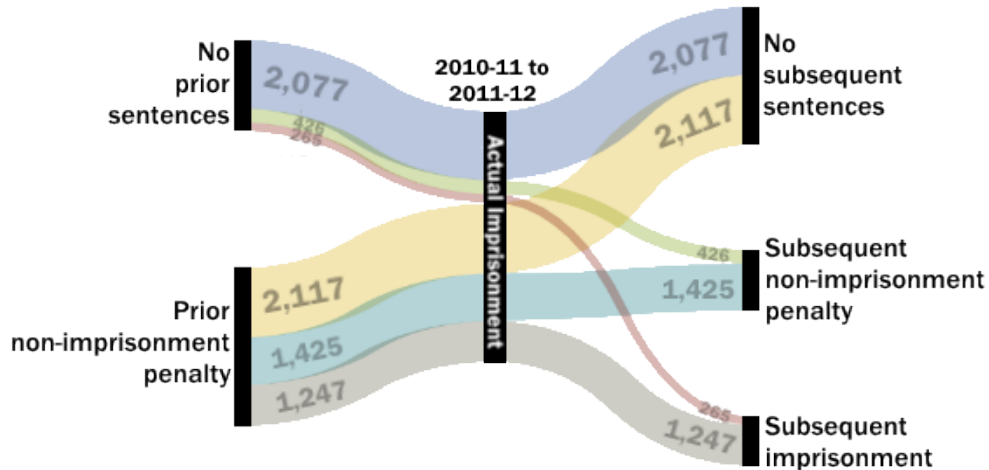
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) 'Actual imprisonment' includes offenders sentenced to either imprisonment or a partially suspended sentence.
- 2) Prior and subsequent sentences are those with an offence date that occurred within 2 years of an offender's release from custody.

Figure 3-19 shows the pathway of the 7,557 offenders who were sentenced to actual imprisonment for the first time from 2010–11 to 2011–12. Out of the 3,363 offenders who were subsequently sentenced for offences that occurred within 2 years of the expected release, 41.5 per cent (n=1,512) received another period of actual imprisonment.

**Figure 3-19: Prior and subsequent penalties for offenders sentenced to actual imprisonment for the first time from 2010–11 to 2011–12**



Source: QGS0, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) 'Actual imprisonment' includes offenders sentenced to either imprisonment or a partially suspended sentence.
- 2) Includes data for offenders where the first period of actual imprisonment in the 13-year dataset (2005–06 to 2017–18) occurred between 2010–11 and 2011–12.
- 3) Prior and subsequent sentences are those that occurred within 2 years of an offender's release from custody.

While this analysis might suggest that the presence of imprisonment on an offender's criminal history might increase the likelihood of receiving subsequent sentences of imprisonment, there are a number of significant limitations of this analysis, given the number of factors that may affect whether a person is sentenced to imprisonment. The Council's analysis in this section focused on a single factor: whether the presence of prior imprisonment on an offender's history increases the likelihood of subsequent imprisonment if an offence is committed within 2 years of release. There were no controls (for example) on the seriousness of offending, the type of offence committed, or the circumstances of the offending. More research is required to determine the effect that prior imprisonment has on the likelihood of subsequent sentences of imprisonment.

## Chapter 4 Fundamental principles

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

The Council has drawn these principles from a range of sources including the Terms of Reference for the review, the *Queensland Parole System Review: Final Report*<sup>40</sup> ('the Parole System Review') and submissions made to that review, the Australian Law Reform Commission's (ALRC) report *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (*Pathways to Justice* report) released in March 2018,<sup>41</sup> and views expressed by stakeholders during early consultation.

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

### 4.1 Principle 1: Court ordered parole should be retained

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

The Parole System Review recommended the retention of court ordered parole, noting that the intention of this system, as defined by the Australian Law Reform Commission, is: 'to divert low-risk offenders from custody whilst ensuring post release supervision'.<sup>42</sup>

The Parole System Review attributed the stabilisation of prisoner numbers from August 2006 until mid-2012 to the introduction of court ordered parole.<sup>43</sup> At the same time, it referred to the decline in the use of alternative sentencing options such as suspended sentences and combined prison/probation orders following the order's introduction.<sup>44</sup> While it is possible some net widening from other orders also occurred as a result (for example, the use of court ordered parole where a sentence of probation or community service would previously have been ordered), this trend is not specifically discussed in the Parole System Review's report. The report, however, notes the exclusion of sex offenders from court ordered parole appears to have resulted in their placement on alternative sentencing orders. As at 30 September 2016, of sex offenders under supervision in the community sentenced to imprisonment or probation of 3 years or less, 237 were on probation, 40 on a combined prison and probation order, and only 8 on a Board ordered parole order.<sup>45</sup> This issue is discussed further below and in Chapter 12 of this report.

The Parole System Review supported court ordered parole being retained on the basis that:

- (a) a system involving the Parole Board is resource-intensive and time consuming;
- (b) without court ordered parole, the prison population would rapidly expand;
- (c) early release systems that do not involve a Parole Board are used without problems in other jurisdictions; and
- (d) any concern about motivating prisoners to address their criminogenic needs in prison could be addressed by adopting a system whereby the Parole Board could, in certain exceptional circumstances, pre-emptively cancel the issuing of a parole order by the Chief Executive that would otherwise have taken effect pursuant to court ordered parole.<sup>46</sup>

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

<sup>40</sup> Queensland Parole System Review (n 10).

<sup>41</sup> Australian Law Reform Commission (n 21).

<sup>42</sup> Queensland Parole System Review (n 10) 57 [263]. The retention of court ordered parole was Recommendation 2.

<sup>43</sup> Ibid 57 [264].

<sup>44</sup> Ibid 81 [372].

<sup>45</sup> Ibid 86 [407].

<sup>46</sup> Ibid 85 [397].

This position was supported by the Queensland Government in its response to the Parole System Review's recommendations released in February 2017.<sup>47</sup>

The retention of court ordered parole was supported by stakeholders providing feedback to the Council over the course of the review, with no stakeholders calling for court ordered parole to be removed in Queensland. However, some concerns have been expressed about the potential for offenders subject to automatic release to be set up to fail on their release if there are not appropriate supports in place and also about the manner in which successful completions are measured. The utility of parole for short sentences of imprisonment has also been questioned. These issues are considered further in Chapter 11 of this report.

## 4.2 Principle 2: Suspended sentences should be retained

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

In its recent report, the ALRC recognises that suspended sentences can be 'a useful sentencing option, as a "last chance" for Aboriginal and Torres Strait Islander offenders to avoid full-time custody'.<sup>48</sup> They are also useful for offenders who are not in need of supervision.

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

do not always address the purposes of sentencing and can have significant negative consequences for the offender. Nevertheless, unless access to community based sentences is improved, the removal of short and suspended sentences of imprisonment as sentencing options may lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to jail.<sup>49</sup>

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

Recommended reforms to suspended sentences to improve their operation and remove current barriers to allow them to be combined with other sentencing orders when sentencing for a single offence are discussed in Chapter 10 of this report.

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

The Terms of Reference call for the removal or minimising of anomalies in sentencing or parole laws that create inconsistency or constrain sentencing options.<sup>50</sup>

The Terms of Reference also require the Council to identify and address any inherent complexities in the legislative framework, including recognition of pre-sentence custody, that contribute to or cause complexity in calculating an offender's overall period of incarceration, with a view to simplifying the calculation process and preventing discharge and detention error.<sup>51</sup>

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

<sup>47</sup> Queensland Government (n 11) – response to Recommendation 2. Recommendation 2 is expressly referred to in the Council's Terms of Reference.

<sup>48</sup> Australian Law Reform Commission (n 21) 266 [7.144].

<sup>49</sup> Ibid 230 [7.5].

<sup>50</sup> See Terms of Reference, 2 (Appendix 1).

<sup>51</sup> Ibid.

The Council's recommendations — and specifically those relating to the current parole provisions in the *Penalties and Sentences Act 1992* (Qld) (PSA), and relating to declarations of pre-sentence custody, as discussed in Chapter 11 — are designed to address a number of current legislative complexities. The Council has also identified what it considers to be unjustified anomalies in the operation of the law — such as the ability to combine a suspended sentence with a community-based order, which is currently limited to circumstances where a court is sentencing an offender for more than one offence — and has recommended reforms to remedy these.

#### 4.4 Principle 4: Any changes to existing community-based sentencing orders or new sentencing options should aim to reduce Queensland's prison population,<sup>52</sup> while maintaining community safety

The Queensland Parole System Review concluded that: '[t]he restrictions on community based orders is likely having adverse impacts upon the prison population' and recommended that '[a] suitable entity, such as the Sentencing Advisory Council, should undertake a review into sentencing options and, in particular, community based orders, to advise the Government of any necessary changes'.<sup>53</sup>

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

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

Adult offenders are more likely to receive a sentence involving immediate imprisonment (either a partially suspended sentence or imprisonment) as their most serious sentencing outcome than they were in previous years (see Figures 2-7 and 2-9).<sup>54</sup>

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

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

| Year        | NSW   | Vic  | Qld   | SA    | WA    | Tas   | NT    | ACT  | Aust         |
|-------------|-------|------|-------|-------|-------|-------|-------|------|--------------|
| <b>2016</b> | 140.8 | 98.5 | 147.2 | 131.0 | 217.3 | 100.8 | 648.5 | 91.4 | <b>142.2</b> |
| <b>2017</b> | 142.7 | 98.8 | 152.5 | 139.0 | 236.9 | 103.5 | 632.8 | 89.9 | <b>146.0</b> |
| <b>2018</b> | 142.7 | 98.6 | 155.3 | 137.3 | 245.6 | 105.2 | 649.8 | 93.8 | <b>147.2</b> |

Source: Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2019*, Cat No. 4512.0, Table 9.

While imprisonment rates in Queensland are rising, the number of offenders proceeded against by police has decreased (down 3,115 offenders, or 3% between 2016–2017 and 2017–18),<sup>55</sup> as have the number of offenders sentenced across all Queensland court levels (157,260 in 2015–16, dropping to 150,042 in 2016–17 and 133,496 in 2017–18).<sup>56</sup>

<sup>52</sup> See Terms of Reference, 1 (Appendix 1).

<sup>53</sup> Queensland Parole System Review (n 10) 101 [499] and Recommendation 4.

<sup>54</sup> Based on data published by the Australian Bureau of Statistics: *Australian Bureau of Statistics, Criminal Courts, Australia, 2012–13* (Catalogue No. 4513.0, 27 March 2014) and *Australian Bureau of Statistics, Criminal Courts, Australia, 2017–18* (Catalogue No. 4513.0, 28 February 2019) Tables 25 and 26 (Summary outcomes by selected principal offence, higher courts and Magistrates Courts — Queensland). The proportion was calculated by summing the total count of orders involving custody in a correctional institution imposed by principal offence for each court level and dividing this by the total number of defendants proven guilty in these courts.

<sup>55</sup> Australian Bureau of Statistics, *Recorded Crime — Offenders, 2017–18* (Catalogue No. 4519.0, 15 March 2019) Summary — Key Findings.

<sup>56</sup> Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18* (Catalogue No. 4513.0, 28 February 2019), Table 24.

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

Prison overcrowding is a problem in Queensland. Queensland Corrective Services (QCS) data show:<sup>57</sup>

- Queensland's prison population has increased by over 57 per cent since January 2012.
- Male prisoner numbers have grown by 53 per cent in south Queensland from January 2012 to January 2018 (3,661 to 5,610).
- Female prisoner numbers in south Queensland have grown by 82 per cent over the same time (311 to 568). One-third (35%) of female prisoners identify as Aboriginal or Torres Strait Islander.
- The imprisonment rate of women in Queensland was the third highest in Australia as at 30 June 2018.<sup>58</sup>

As at 30 June 2018, Queensland's total built-cell capacity was 7,197 beds:

- Low security:<sup>59</sup> 815 built beds;
- High security:<sup>60</sup> 6,382 built beds.

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

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

This means that as at 30 June 2018:

- The secure population was 1,813 prisoners above capacity, resulting in 3,626 prisoners sharing a cell (designed for one prisoner) with one or more other prisoners;<sup>61</sup>
- The low-security population of 649 was accommodated by 815 beds.

The Queensland Government, as part of the 2019 State Budget, has committed to building a new stand-alone correctional facility near Gatton, which will provide about 1,000 beds for male prisoners by 2023, as well as additional funding to commission and operate the expanded Capricornia Correctional Centre.<sup>62</sup>

<sup>57</sup> Queensland Corrective Services, Submission No. 27 to Queensland Crime and Corruption Commission, *Taskforce Flaxton – An Examination of Corruption Risks in Corrective Services Facilities*, 20 April 2018, 6–7 updated and expanded upon by feedback from QCS.

<sup>58</sup> For the period 2017–18, Queensland's female population was second highest when compared to the rest of Australia, and Queensland's female imprisonment rate was third highest compared to the rest of Australia: Australian Government, Productivity Commission (n 33) Tables 8A.4 and 8A.5. This held true into December 2018 in figures published by the ABS: Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2018* (Catalogue No. 4512.0, 14 March 2019) Tables 1, 4 and 5.

<sup>59</sup> Low-security facilities do not have a razor-wire perimeter fence and are a progression point for prisoners through the correctional system. To progress to a low-security facility, prisoners must demonstrate good institutional behaviour, not have been sentenced to a sex offence, and be assessed as a low risk of escape, in addition to other assessment factors. In Queensland those facilities are the Helana Jones Centre, Numinbah Women's Correctional Centre, Palen Creek Correctional Centre and the Capricornia, Lotus Glen, Townsville Women's, Townsville Men's Correctional Centre Farms, and 10 work camps.

<sup>60</sup> High-security facilities are characterised by a two-tier razor-wire perimeter fence and heightened security. In Queensland, those facilities are the Arthur Gorrie, Brisbane, Capricornia, Lotus Glen, Maryborough, Southern Queensland, Wolston and Woodford Correctional Centres, as well as Borallon Training and Correctional Centre, Brisbane Women's Correctional Centre, and the Townsville Correctional Centre Complex (includes separate male and female facilities).

<sup>61</sup> QCS advised that some cells have been retro fitted with bunk beds; however, these cells were originally designed to accommodate only one person.

<sup>62</sup> Minister for Police and Minister for Corrective Services, Mark Ryan, Media Release, 'Queensland Government Invests in Regional Jobs as Part of Criminal Justice Reform' (Media Release, 11 June 2019).

While new infrastructure might alleviate overcrowding in Queensland correctional centres, the relative costs of imprisonment over more effective low-cost alternatives also need to be considered. The real net operating expenditure per prisoner per day in 2017–18 in Queensland was \$181.55.<sup>63</sup> In contrast, the real net operating expenditure per offender per day for supervising an offender in the community in 2017–18 was \$13.79.<sup>64</sup>

The net operating expenditure in Queensland of managing offenders in the community remains below that of all other Australian jurisdictions, which may indicate a need for further investment in Queensland in community correctional services. The highest net operating costs per offender per day in 2017–18 were recorded for the NT (\$49.12), followed by the ACT (\$38.38), WA (\$32.81) and Victoria (\$32.40). The lowest, excluding Queensland, were for Tasmania (\$16.04) followed by NSW (\$22.38).<sup>65</sup>

In considering the potential impacts of reform proposals, the Council (and other stakeholders) were conscious of the need to ensure additional pressure was not placed on the criminal justice system and that lower-cost and more effective alternatives to imprisonment are used where appropriate. One example has been the Council's recommended approach to potential changes to parole, including removing parole for short sentences of imprisonment. The Council is concerned that incremental changes be introduced, and the impact of other reforms monitored, prior to more significant changes that might have unintended outcomes.

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

The Terms of Reference expressly refers to the need to take into account the impact of any recommendations on the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.<sup>66</sup>

The ALRC noted in its 2017 *Pathways to Justice* report that 'evidence suggests that Aboriginal and Torres Strait Islander offenders are less likely to receive a community based sentence than non-Indigenous offenders'.<sup>67</sup> They 'may be more likely to end up in prison for the same offence'.<sup>68</sup> Even when given a community-based sentence, they may be more likely to be imprisoned due to breach of conditions.<sup>69</sup>

'Improving compliance with conditions is integral to reducing the incarceration rate of Aboriginal and Torres Strait Islander peoples'.<sup>70</sup> According to research, 'compliance with community based orders would increase if programs and conditions were relevant to Aboriginal and Torres Strait Islander offenders and if offenders were given greater support'.<sup>71</sup> Imprisonment rates could be reduced by 'expanding the availability of community based sentences to individuals with complex needs'<sup>72</sup> who are 'often found ineligible for a community based sentence. As a result they are likely to be given a sentence of imprisonment or a sentence that increases the risk of imprisonment in the longer term'.<sup>73</sup> Compliance with conditions may be enhanced

<sup>63</sup> Australian Government Productivity Commission (n 33) Table 8A.17, 'Prisoner' is defined as: 'A person held in full time custody under the jurisdiction of an adult corrective services agency. This includes sentenced prisoners serving a term of imprisonment and unsentenced prisoners held on remand': 8.28.

<sup>64</sup> Ibid Table 8 A.17. 'Offender' is defined as: 'An adult person subject to a non-custodial order administered by corrective services, which includes bail orders if those orders are subject to supervision by community corrections': 8.28.

<sup>65</sup> Ibid.

<sup>66</sup> See Terms of Reference, 1 (Appendix 1).

<sup>67</sup> Australian Law Reform Commission (n 21) 234 [7.13].

<sup>68</sup> Ibid 230 [7.4], citing Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2017*, Cat No. 4512.0 (2017) Table 19.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid 254 [7.95].

<sup>71</sup> Ibid 254 [7.97], citing Fiona Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) 32 *Sydney Law Review* 645.

<sup>72</sup> Ibid 240 [7.38], citing Boris Beranger, Don Weatherburn and Steve Moffatt, 'Reducing Indigenous Contact with the Court System' (Issue Paper No. 54, NSW Bureau of Crime Statistics and Research, December 2010).

<sup>73</sup> Ibid 240 [7.39], citing Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 45, 117–8; Victorian Alcohol and Drug

by publicly available, clear and transparent guidelines about the administration of community-based sentencing orders.

Regimes that exclude community-based sentencing order options via schedules of disqualifying offences have been identified as a potential factor contributing to 'Aboriginal and Torres Strait Islander offenders being under-represented as recipients of community based sentences compared to imprisonment ... [as they] may be sentenced to short terms of imprisonment when they commit low-to-mid range violent offences'.<sup>74</sup>

The Council's recommended reforms aim to ensure, as far as possible, any barriers to access for Aboriginal and Torres Strait Islander people are removed, that these orders operate flexibly and take into account the particular circumstances of Aboriginal and Torres Strait Islander offenders, including in the types of conditions that are imposed, and that orders identified as working well for Aboriginal and Torres Strait Islander offenders are not removed unnecessarily.

---

Association, Submission No. 92 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4 and further citing, in n 63: Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.1]–[5.38]; Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [2.34]–[2.39], [2.47]–[2.52]; House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) [1.4]–[1.16], [1.26]–[1.47], [1.67]–[1.86], [1.97]–[1.111]; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) [4.24]–[4.26]. See also Australian Law Reform Commission (n 21) 241 [7.40].

<sup>74</sup> Ibid 242 [7.44]. The report cites legislative examples from NSW, NT, Victoria and SA.

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

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

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

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

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

The panel supported community-based sentencing options that allow for greater flexibility. It noted the importance of early identification of the issues facing an offender and whether some conditions of an order could trigger breaches. This could be due to the offender's circumstances, such as poverty, a lack of transport, impaired capacity/developmental disorders, family or cultural obligations, or work or schooling responsibilities. More flexibility should assist the court and those supervising the person subject to the order to try to mitigate identified risks. The Council's views on the adoption of the proposed new community correction order, as recommended by a majority of the Council, are discussed in Chapter 8 of this report.

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

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

## 4.6 Principle 6: Community-based sentencing orders have significant advantages over imprisonment where the offender does not pose a demonstrated risk to the community

The Council supports the position that community-based sentencing orders have significant advantages over imprisonment where the offender does not pose a demonstrated risk to the community.<sup>75</sup> For example, community-based sentencing orders cost less, as well as avoid the 'contaminating effects from imprisonment with other offenders'<sup>76</sup> and are more effective in reducing reoffending than a short term of

<sup>75</sup> Ibid 230 [7.3].

<sup>76</sup> Ibid n 4, citing NSW Law Reform Commission, *Sentencing* (Report No. 139, 2013) 199–200 [9.16]–[9.17].

imprisonment.<sup>77</sup> A community-based sentencing order offers ‘the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender’.<sup>78</sup>

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

#### 4.7 Principle 7: Judicial discretion in the sentencing process is fundamentally important

The Terms of Reference explicitly recognise ‘the importance of judicial discretion in the sentencing process’.<sup>79</sup>

The Council supports community-based options being available for a wide range of offending, including where imprisonment may also have been justified.<sup>80</sup>

In the context of people of different socioeconomic backgrounds, ‘the issue of unequal impact of conditions has been raised as elevating the importance of providing judicial officers with wide discretion in response to minor breaches’ of community-based sentencing orders.<sup>81</sup>

Some of the impacts of restricting judicial discretion through legislative reform are discussed in Chapter 5 of this report (section 5.7). Many of these reforms restrict the options available to a court in sentencing and are, in this respect, contrary to the intention of the Terms of Reference to increase sentencing flexibility.

The Council’s general position is that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing outlined in the PSA, or in reducing recidivism.<sup>82</sup> This is because, as a matter of principle, it assumes that every offence and every offender are the same, which is patently not the case.

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

<sup>77</sup> According to research: Australian Law Reform Commission (n 21) 233 [7.10], quoting Joanna Wang and Suzanne Poynton, ‘Intensive Correction Orders versus Short Prison Sentence: A Comparison of Re-offending’ (Crime and Justice Bulletin No. 207, NSW Bureau of Crime Statistics and Research, October 2017). Studies have shown that intensive community supervision coupled with targeted treatment is one of the most effective ways of addressing the underlying causes of criminal behaviour: (n 21) 233 [7.12], citing Wai-Yin Wan et al, ‘Parole Supervision and Re-offending: A Propensity Score Matching Analysis’ (NSW Bureau of Crime Statistics and Research, 2014); ‘Parole Supervision and Reoffending’ (Trends & Issues in Crime and Criminal Justice No. 485, Australian Institute of Criminology, 2014); Steve Aos, Marna Miller and Elizabeth Drake, ‘Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates Individual State Developments’ (2006) 19 *Federal Sentencing Reporter* 275; Elizabeth Drake, Steve Aos and Marna Miller, ‘Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State’ (2009) 4 *Victims and Offenders* 170.

<sup>78</sup> *Boulton v The Queen* (2014) 46 VR 308, 335 [115] (Maxwell P, Nettle, Neave Redlich and Osborn JJA), quoted in Australian Law Reform Commission (n 21) 230 [7.3].

<sup>79</sup> See Terms of Reference, 1 (Appendix 1).

<sup>80</sup> See also Sentencing Advisory Council (Tasmania), *Phasing Out of Suspended Sentences* (Final Report No. 6, 2016) 36; Sentencing Advisory Council (Victoria), *Suspended Sentences — Interim Report* (2005) 27 [3.1] which reflect this same view.

<sup>81</sup> Australian Law Reform Commission (n 21) 256 [7.105] n 157, citing Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) [4.126], in that context relating to breach of suspended sentences.

<sup>82</sup> See, for instance, Queensland Law Society, *Mandatory Sentencing Laws Policy Position*, 4 April 2014, 2: ‘The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect, but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism’ (citing Sentencing Advisory Council (Victoria), *Does Imprisonment Deter? A Review of the Evidence* (2011) 2). See also Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) 13–15 [28]–[41].

One example is the exclusion of sexual offences from the court ordered parole scheme. The Council has found the exclusion of these offences from this scheme has resulted in the increased use of alternative forms of orders, such as partially suspended sentences and imprisonment and probation orders. These forms of alternative sentencing orders do not provide the same level of supervision of offenders, nor do they provide QCS with the same ability to respond quickly to concerns about issues of safety and escalating risk as parole orders offer. In this way, a reform ostensibly intended to ensure community safety by requiring sexual offenders to apply to the Parole Board for release on parole, rather than being subject to automatic release, has had the reverse impact of resulting in more offenders being left unsupervised in the community or, for those subject to supervision on probation, QCS has more limited powers. This is discussed further in section 4.14 and Chapter 12.

The Council's recommendations in relation to current mandatory sentencing provisions is contained in Chapter 5 (section 5.7.6) of this report.

#### **4.8 Principle 8: It is important to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing set out in the PSA**

The Council supports courts having maximum flexibility to tailor a sentence to the offence and the offender.<sup>83</sup> Reform of community-based sentencing order sentence regimes should be aimed at making them 'more accessible and flexible, to provide greater support and to mitigate against breach'.<sup>84</sup>

Inflexible community-based sentencing regimes are likely to exclude complex-needs offenders or encourage high rates of breach and revocation,<sup>85</sup> and may prevent the 'imposition of treatment conditions that address the underlying causes of reoffending'.<sup>86</sup> In fact, as the ALRC has observed, 'issues of accessibility and flexibility are interrelated, particularly in relation to offenders with complex needs'.<sup>87</sup>

The ALRC, citing the Queensland Parole System Review Report, has commented that 'the perceived lack of flexibility of community-based orders in Queensland has potentially adverse consequences, including increasing the size of the prison population, as well as increasing the usage of parole in situations where an offender has spent no time in prison and thus has no need for prison-to-community reintegration'.<sup>88</sup>

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

A number of the reforms recommended in this report aim to address the current lack of flexibility in the available range of orders. These reforms include the introduction of a new form of community-based sentencing order – the community correction order – with a broad range of available conditions that can be better tailored to respond to the purposes of sentencing and the individual circumstances of the offender, with the ability to combine this new form of order with a short term of imprisonment, or with a wholly or partially suspended sentence.

<sup>83</sup> See Terms of Reference, 1 (Appendix 1) and Sentencing Advisory Council (Tasmania) (n 80) 36; Sentencing Advisory Council (Victoria), above n 80, 27.

<sup>84</sup> Australian Law Reform Commission (n 21) 229 [7.1].

<sup>85</sup> Ibid 234 [7.16], citing NSW Law Reform Commission (n 76) [10.37]–[10.39].

<sup>86</sup> Ibid 235 [7.16] citing NSW Law Reform Commission (n 76) [11.10], [11.43], [11.51].

<sup>87</sup> Ibid 234–5 [7.16] and nn 95–96.

<sup>88</sup> Ibid 246 [7.63], citing Queensland Parole System Review (n 10) [499], Recommendation 4 and [454]–[455]; Tamara Walsh, 'Defendants' and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93, 107–8. See also Associate Professor T Walsh, Submission No. 51 to Australian Law Reform Commission, *Inquiry into the Incarceration of Aboriginal and Torres Strait Islander Peoples*.

#### 4.9 Principle 9: Limited executive power to deal with minor breaches may enhance community-based sentencing order flexibility

Ensuring there are appropriate responses to breaches of community-based sentencing orders is important to maintaining confidence in the use of these orders and to ensuring they are viewed as credible alternatives to immediate imprisonment.

This principle recognises that sentence flexibility may be enhanced by delegating more authority to probation and parole officers to respond to non-compliance, but within parameters defined by legislation. Sometimes more flexible responses, short of returning a case to court, may be required to enable a more appropriate and efficient response to breaches of conditions.<sup>89</sup>

Drawing on the experience of other jurisdictions, the Council is also concerned that any scheme does not operate in a way that is overly cumbersome or that raises concerns about the inappropriate use of administrative power. This is discussed further in Chapter 8 and section 11.13.5 of this report.

#### 4.10 Principle 10: Community-based sentencing orders, and the services delivered under them, must be adequately funded and properly administered

The sentencing orders of courts must be properly administered in order to satisfy the intended purposes of each order and facilitate a fair and just sentencing regime that protects community safety.<sup>90</sup>

While not the primary focus of this review, the Council acknowledges that to work efficiently and enjoy judicial confidence, community-based sentencing orders must be properly funded, including for mechanisms such as pre-sentence reports, judicial monitoring, supervision of offenders and treatment in the community (where these are relevant).<sup>91</sup>

The ALRC has previously recognised that extra resources will be required to expand the availability of community-based sentencing options in rural and remote areas.<sup>92</sup> The ALRC has also acknowledged, however, that ‘resourcing alone will not be sufficient’, with remote settings requiring consultation with local representatives ‘to expand the range of programs and services’.<sup>93</sup>

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

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

- occupational health and safety/public liability concerns;
- community reluctance to participate;
- difficulty attracting qualified staff;
- supporting greater integration and information sharing between Aboriginal and Torres Strait Islander communities and community corrections staff; and
- providing accessible and legal transport.<sup>94</sup>

<sup>89</sup> Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (Victoria, Department of Justice, 2002) 3. For instance, Victoria’s *Sentencing Act 1991* contains power for the Secretary of the Department of Justice to deal administratively with a breach of community correction order in relation to unpaid community work or a curfew condition, if the breach is not sufficiently serious to file a charge for the offence (ss 83AU, 83AV).

<sup>90</sup> See Terms of Reference, 1 (Appendix 1).

<sup>91</sup> Sentencing Advisory Council (Tasmania) (n 80) 36, 98.

<sup>92</sup> Australian Law Reform Commission (n 21) 237 [7.28].

<sup>93</sup> Ibid 237 [7.29]–[7.30], quoting Public Defenders NSW, Submission No. 10 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (11 March 2005) 4.

<sup>94</sup> Ibid 239–240 [7.36] citing Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xiv and the following

With respect to community correction orders (CCOs) in Victoria, the ALRC suggests that given '[t]here are no remote communities in Victoria', other jurisdictions 'that move towards a Victorian CCO approach are likely to have additional resourcing issues that are amplified by remoteness'.<sup>95</sup>

The Council's views on the introduction of CCOs are discussed in Chapter 8 of this report. Service system challenges are discussed in Chapter 13.

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

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

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

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

- the risk principle – that the level of program intensity be matched to offender risk level (defined as the risk of reoffending, absent intervention or treatment), and that intensive levels of intervention and treatment be reserved for offenders with the highest level of risk;
- the need principle – that criminogenic needs (i.e. those functionally related to persistence in offending) require commensurate and concurrent redress; and
- the responsivity principle – that the style and modes of intervention be matched or tailored to each individual offender's learning style and abilities and be responsive to individual strengths and levels of motivation.<sup>96</sup>

Based on this framework, which is informed by research evidence, the management of offenders in accordance with RNR principles involves avoiding the over-treating of low-risk and low-need offenders, which may actually serve to increase risks of reoffending, and instead reserving the highest level of supervision and intensity of treatment services for offenders with high risk and criminogenic need.<sup>97</sup>

The ALRC's report, in this context, acknowledges that: 'Research has consistently shown that the level of intervention under a sentence served in the community should be proportionate to the risk level of the offender.'<sup>98</sup>

The application of the RNR framework is informed by an assessment of offender needs. The effective management of offenders and design of services delivered to people on community-based sentencing orders, therefore, is one that takes individual needs into account, such as those that may arise from their gender, age, cultural background, physical or mental impairment, and health status. Importantly, the management of offenders must take into account the particular needs of Aboriginal and Torres Strait

---

submissions made to the ALRC *Inquiry into the Incarceration of Aboriginal and Torres Strait Islander Peoples*: Dr T Anthony, Submission No. 115; National Aboriginal and Torres Strait Islander Legal Services, Submission No. 109; Legal Aid ACT, Submission No. 107; Just Reinvest NSW, Submission No. 82; Criminal Lawyers Association of the Northern Territory, Submission No. 75; Law Council of Australia, Submission No. 108; Legal Aid NSW, Submission No. 101; Law Society of New South Wales' Young Lawyers Criminal Law Committee, Submission No. 98; NSW Bar Association, Submission No. 88.

<sup>95</sup> Ibid 252 [7.91] citing Council of Australian Governments, *Prison to Work Report* (2016) 74.

<sup>96</sup> Arie Freiberg et al, *Queensland Drug and Specialist Courts Review: Final Report* (2016) 133 (references omitted).

<sup>97</sup> Ibid 34.

<sup>98</sup> Australian Law Reform Commission (n 21) 246 [7.59].

Islander offenders. Culturally responsive strength-based interventions are recognised as having the potential to reduce the risk of reoffending by building an offender's strengths and capabilities.<sup>99</sup>

However, courts have recognised that while it 'may be perfectly proper to increase the sentence in order to enable a cure to be undertaken whilst the accused is in prison ... it is not correct to increase the sentence above that within the appropriate range for the offence itself merely in order to provide an opportunity to cure'.<sup>100</sup> Proportionality acts as a limiting principle, requiring that the length of the sentence imposed (and also, the interventions delivered under them<sup>101</sup>) should not be disproportionate to the seriousness of the offending.

Accordingly, conditions attached to community-based sentencing orders should be realistic in length (proportionate) and be of the minimum number necessary to fulfil the purposes of sentencing.<sup>102</sup> Conditional orders that are too long are not only a disproportionate penalty, but also increase the chances of breach (of conditions or by further offending).

An offender's circumstances, health, disposition and maturity, and accordingly their risk to society, are likely to change over the period of any sentence. Such changes are more likely to occur in cases of offenders on community-based sentencing orders because of the opportunities thereby created for the offender and responsibility imposed to address the causes of offending and work towards rehabilitation and reintegration.<sup>103</sup>

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

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

#### **4.12 Principle 12: Public confidence in the criminal justice system should be encouraged and maintained, with sentencing practices considering community expectations<sup>104</sup> and taking into account the impact on victims of crime**

The ALRC has recognised that community-based sentences 'are designed to be punitive while fulfilling other sentencing purposes, such as rehabilitation and deterrence'.<sup>105</sup>

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

<sup>99</sup> On strength-based approaches to offender rehabilitation, see, for instance, 'Information', *Good Lives Model* (Web Page) <<https://www.goodlivesmodel.com/information.shtml>> and Gwenda Willis and Troy Ward, 'Risk Management versus the Good Lives Model: The Construction of Better Lives and the Reduction of Harm' in Isabelle Dréan-Rivette and Martine Evans (eds) *Transnational Criminology Manual – Volume 3* (Wolf Legal Publishing, 2010) 763, available at: <<http://herzog-evans.com/wp-content/uploads/2014/09/willis-ward.pdf>> 3/765.

<sup>100</sup> *Channon v The Queen* (1978) 20 ALR 1, 9 (Brennan J), 28–9 (Toohey J) citing *R v Moylan* [1969] 3 All ER 783, 785–6 (Widgery LJ), applying *R v Ford* [1969] 3 All ER 782.

<sup>101</sup> On this point, see Freiberg et al (n 96) 69.

<sup>102</sup> Sentencing Advisory Council (Tasmania) (n 80) 36; Sentencing Advisory Council (Victoria) (n 80) 27.

<sup>103</sup> *Boulton v The Queen* (2014) 46 VR 308, 343–4 [161] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>104</sup> See Terms of Reference, 1 (Appendix 1).

<sup>105</sup> Australian Law Reform Commission (n 21) 233 [7.9].

The punitive features of community-based sentencing orders require explanation to the public. The Victorian Court of Appeal has commented that the process of communication may begin with the sentencing court, but the responsibility for communicating ‘the message’ about such orders rests overwhelmingly with Government.<sup>106</sup>

One of the key functions of the Council is: ‘to give information to the community to enhance knowledge and understanding of matters relating to sentencing’.<sup>107</sup> The Council carries out this function in several ways, including running face-to-face educational sessions for students and the broader community (‘Judge for Yourself’), publishing information about sentencing on its website, and using other media channels, such as radio and television, to explain the key principles and factors a court takes into account in sentencing.

In 2018 the Council ran a pilot program in Cunnamulla to examine community understanding about sentencing. Key findings were:

- limited understanding of sentencing and confusion about the court process and the penalties imposed;
- varied reasons for the breaching of sentencing conditions, such as not understanding the implications of the penalty, or cultural, social or other commitments taking precedence.<sup>108</sup>

This project and its outcomes are described below.

Qualitative research from the QGSO, referenced in Chapter 3 of this report, confirms these findings, and emphasises the importance of offenders having the conditions and requirements of community-based sentencing orders explained in a way that they can easily understand.<sup>109</sup> These concerns were raised particularly in relation to Aboriginal and Torres Strait Islander offenders.<sup>110</sup>

As highlighted by the UK Law Commission, in releasing a proposal for a new Sentencing Code in 2018, ‘public confidence is diminished when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible’.<sup>111</sup> The complexity of sentencing laws, and the number of different order types, with different names, condition types and different consequences on breach, can thereby also contribute to limited understanding of sentencing and confusion over terminology, which itself risks reducing community confidence in these orders.

The UK Ministry of Justice commissioned research into how sentences might be better expressed, to improve understanding.<sup>112</sup> Key language barriers included terms such as ‘suspended’, ‘custody’, ‘minimum’ and ‘parole’. Minimum, for example, was broadly understood by the community to mean ‘the least possible’ rather than ‘at least’, which triggered a negative emotional response.<sup>113</sup>

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

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

<sup>106</sup> *Boulton v The Queen* (2014) 46 VR 308, 337–8 [124]–[127] (Maxwell P, Nettle, Neave Redlich and Osborn JJA).

<sup>107</sup> *Penalties and Sentences Act 1992* (Qld) s 199(1)(c).

<sup>108</sup> Queensland Sentencing Advisory Council, *Annual Report 2017–18* (2018) 17.

<sup>109</sup> Queensland Government Statistician’s Office (n 4) s 4.1.6.

<sup>110</sup> *Ibid* s 4.3.2.

<sup>111</sup> Law Commission (England and Wales), *The Sentencing Code: Summary of Report* (2018) 13 [1.32].

<sup>112</sup> Philip Wilson and Rob Ellis, *Communicating Sentencing: Exploring New Ways to Explain Adult Sentences* (UK Ministry of Justice Analytical Series, 2013).

<sup>113</sup> *Ibid* 16.

Ensuring the impact of offences on victims of crime is taken into account, together with broader community expectations, is another key consideration in determining the appropriate use of community-based sentencing orders. As a general principle, community-based sentencing orders should only be available as an alternative to actual custody where the use of these orders does not compromise victim or community safety.<sup>114</sup> In this sense, community safety should be the overriding consideration.

#### ENHANCING ENGAGEMENT WITH COMMUNITIES ON SENTENCING ISSUES – CUNNAMULLA PILOT

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

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

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

- limited understanding of sentencing and confusion about the court process and the penalties imposed;
- varied reasons for breaching sentencing conditions, such as not understanding the implications of the penalty, or cultural, social or other commitments taking precedence; and
- limited community-based legal representation due to the ‘drive in–drive out’ nature of legal assistance.

Community members made it very clear that raising awareness of the consequences of penalties among young people is a community priority. For example, they were keen for young people to realise the impacts of a criminal history on their future employment prospects.

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

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

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

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

The principle of equality before the law is a founding principle of the rule of law: ‘the type of sentence a person receives should not be determined by where they live’.<sup>115</sup> As a general principle, realistic sentencing options for an offender should, where possible, not be compromised by geography or the fact that the offender is sentenced or resides in a regional or remote area.<sup>116</sup>

Chapters 2 and 13 highlight the number of challenges faced in meeting the needs of offenders living in rural and remote regions of Queensland. Increasing the flexibility of orders and associated conditions, as

<sup>114</sup> This principle is already embedded in section 9 of the *Penalties and Sentences Act 1992* (Qld) and principles that apply in the sentencing of offences involving the use of, counselling or procuring the use of, or attempting or conspiring to use, violence against another person, as well as any offence of a sexual nature committed against a child under 16 years, or a child exploitation material offence. In some jurisdictions, it has been further identified as a principle in the making of specific types of sentencing orders — see, for example, s 66 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides: ‘(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender’ and ‘(2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender’s risk of reoffending’.

<sup>115</sup> Australian Law Reform Commission (n 21) 237 [7.28], citing *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) Preamble.

<sup>116</sup> Ibid Recommendation 7-1: 14, cf 234.

recommended by the Council, is one means by which community-based sentencing orders may be made more broadly available.

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

The Parole System Review report noted an anomaly: the absence of a power to order a parole release date for sex offenders, even where the sentence is under 3 years, is inconsistent with the option to wholly suspend their imprisonment. Where imprisonment with release before the full term is served is warranted, the likely outcome is a suspended sentence even though ‘court-ordered parole, if available, would instead have been ordered’.<sup>117</sup>

The report also noted that sex offenders ‘are released without the supervision that they might have otherwise received. Obviously this can have serious consequences’.<sup>118</sup> This is because conditions cannot be applied to a suspended sentence and, for example, a sex offender ‘cannot be required ... to avoid places children frequent, cannot be required to avoid unsupervised contact with them or be prevented from grooming a victim’ for the rest of the sentence.<sup>119</sup>

Monthly QCS data for the preceding five years (to November 2016) showed that ‘more sex offenders, with terms of imprisonment of 3 years or less, are discharged from prison to freedom on a partially suspended sentence (without any supervision) than they are to a period of community supervision such as parole or probation’.<sup>120</sup>

However, as noted by the Parole System Review:

An evaluation of QCS sexual offender treatment programs found that if sex offenders were subject to supervision after release from prison, on parole or under the *Dangerous Prisoners (Sexual Offenders) Act 2003*, they were less likely to reoffend. The reduction in risk of reoffending under supervision was present regardless of whether the offender participated in a sexual offender treatment program.<sup>121</sup>

The Council’s concern that sexual offenders be appropriately supervised in the community has been a key consideration in the Council recommending that the availability of court ordered parole should be extended to sexual offences. This will give courts the option to set a release date, safe in the knowledge that as a supervised form of order, the Parole Board can swiftly respond to any escalation in risk levels by returning an offender to custody or adjusting the conditions of their release. Under the Council’s proposed reforms to suspended sentences, courts will also be permitted to combine a suspended sentence with a community-based order, including supervision as a component, when sentencing a person for a single offence. Together, these reforms should mean more sexual offenders are subject to active supervision as a condition of their order.

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

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

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

---

<sup>117</sup> Queensland Parole System Review (n 10) 6 [39].

<sup>118</sup> Ibid 6 [40].

<sup>119</sup> Ibid 6 [40]; cf 95 [462], 97 [472].

<sup>120</sup> Ibid 102 [502].

<sup>121</sup> Ibid 102 [504].

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

Some of the data limitations identified during the initial stages of the review are discussed in Chapter 14 of this report. The strength of evidence in support of the use of particular forms of sentencing and parole orders, and forms of interventions under them, is summarised in Chapter 3. More information is contained in the literature review undertaken by QUT, which is available on the Council's website.

## Chapter 5 Sentencing process and framework

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

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

This chapter provides a high-level overview of the current approach to sentencing and sentencing framework that supports the sentencing of adult offenders in Queensland and which applies to the sentencing of federal offenders. The operation of parole laws is discussed in Chapter 11 of this report.

The chapter presents recommendations regarding the principles that guide courts in determining whether a sentence of imprisonment or one served in the community is preferable.

It also considers the operation of mandatory sentencing provisions in Queensland, the uncertainty these provisions sometimes create in their interpretation and application, and how this impacts on sentencing, as well as the Council's recommendation that current mandatory sentencing provisions should be reviewed.

### 5.1 Purposes of the *Penalties and Sentences Act 1992 (Qld)* (PSA)

The *Penalties and Sentences Act 1992 (Qld)* (PSA) is the key piece of legislation that guides sentencing for offences in Queensland. Five of the purposes of the PSA are particularly relevant to this review:

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

Consistency in sentencing in this context refers to the application of a consistent approach (i.e. using the same purposes and principles) for sentencing similar offences, rather than the application of the same sentence.<sup>122</sup>

### 5.2 Sentencing purposes

Section 9 of the PSA sets out sentencing guidelines. Section 9(1) limits the purposes of sentencing to five (and combinations of them):

- (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
- (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- (c) to deter the offender or other persons from committing the same or a similar offence; or
- (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

<sup>122</sup> Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Don't Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 270–71.

(e) to protect the Queensland community from the offender.

The Act does not suggest that one purpose should be more, or less, important than any other purpose, and in practice, their relative weight must be assessed taking into account the individual circumstances involved. The purposes overlap and none of them can be considered in isolation; they are guideposts to the appropriate sentence, sometimes pointing in different directions.<sup>123</sup>

The concept of 'just punishment' reflects the principle of proportionality — a fundamental principle of sentencing in Australia. Sentencing courts must ensure the sentence imposed: 'should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its *objective* circumstances'.<sup>124</sup> While a sentence must not be 'extended beyond what is appropriate to the crime merely to protect society', the propensity of an offender to commit future acts of violence, and the need to protect the community is a legitimate sentencing consideration.<sup>125</sup>

The principle of proportionality, as discussed in section 4.11, is of direct relevance to sentencing courts in setting the duration and intensity of conditions ordered under a community-based sentencing disposition. Courts cannot impose a longer order or attach more onerous conditions (even those directed at the offender's treatment or rehabilitation), 'if the resulting order would be disproportionate to the gravity of the offending'.<sup>126</sup>

Deterrence has a forward-looking, crime prevention focus and aims, as a consequence of the penalty imposed, to discourage the offender and other potential offenders from committing the same or a similar offence.<sup>127</sup>

Denunciation in a sentencing context is concerned with communicating 'society's condemnation of the particular offender's conduct'.<sup>128</sup> The sentence imposed represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.<sup>129</sup>

## 5.3 Principle of imprisonment as a sentence of last resort

### 5.3.1 The current approach

The PSA states imprisonment must generally only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable.<sup>130</sup> However, these two principles do not apply to certain offences, including:

- offences involving 'the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person, or that resulted in physical harm to another person';<sup>131</sup>
- offences of a sexual nature committed in relation to a child under 16 years;<sup>132</sup>
- child exploitation material, child abuse computer games, films and publication offences;<sup>133</sup> and

<sup>123</sup> *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

<sup>124</sup> *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).

<sup>125</sup> *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 473, 475 (Mason CJ, Brennan, Dawson and Toohey JJ).

<sup>126</sup> *Boulton v The Queen* (2014) 46 VR 308, 328 [75] (Maxwell P, Nettle, Neave Redlich and Osborn JJA). The Court went on to comment that this position was not displaced by the offender's need to consent to the making of the order, with the Court finding: 'the willingness of the offender to consent to treatment proposed as part of a CCO does not relieve the court of the obligation to ensure that the order remains within the bounds of proportionality': 328 [76].

<sup>127</sup> Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014) 250–51.

<sup>128</sup> *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).

<sup>129</sup> *Ibid* citing *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ).

<sup>130</sup> *Penalties and Sentences Act 1992* (Qld) s 9(2)(a).

<sup>131</sup> *Ibid* s 9(2A).

<sup>132</sup> *Ibid* s 9(4)(a).

<sup>133</sup> *Ibid* s 9(6A).

- certain listed offences committed with a serious organised crime circumstance of aggravation.<sup>134</sup>

Instead, the PSA sets out factors in relation to which courts must have primary regard in sentencing for these offences.<sup>135</sup> The Act also states:

- in the case of sexual offences committed against children, the offender must serve an actual term of imprisonment, unless there are exceptional circumstances;<sup>136</sup> and
- for offences with a serious organised crime circumstance of aggravation, that a term of imprisonment must be served with a 'base component' of 7 years, or the maximum penalty for the offence (whichever is less).<sup>137</sup>

Mandatory penalties also apply under the PSA for repeat serious child sexual offences,<sup>138</sup> and under other Queensland legislation for other types of offences. Forms of mandatory sentencing are discussed further at section 5.7 of this report.

### 5.3.2 Issues

In its Options Paper, the Council invited views on what changes, if any, are required to existing sentencing principles under section 9 of the PSA to allow for the greater use of community-based sentencing orders in appropriate cases (that is, where the safety of victims and other community members will not be compromised).

This question was asked in response to concerns raised by legal stakeholders during preliminary consultation about what was considered to be the eroding of imprisonment as a sentence of last resort as a result of legislative reform, and that this may reduce the ultimate effectiveness of any reforms intended to reduce the use of imprisonment.<sup>139</sup>

In addition to section 9 of the PSA providing this principle does not apply when sentencing for certain offence types, in 2014 this principle was removed from the Act altogether.<sup>140</sup> It was subsequently re-inserted into the Act in 2016 following a change of Government.<sup>141</sup>

Earlier changes in 1997 removed section 9(3) of the PSA,<sup>142</sup> as it currently was, which provided:

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

Subsection 3(b) of the PSA gave legislative expression to the common law principle of parsimony in a different form from that which still exists in Queensland under section 9(2)(a), which provides that imprisonment should only be used as a sentence of last resort. The *Victorian Sentencing Act 1991* still gives

<sup>134</sup> Ibid s 9(7A). See further s 161Q, which defines a 'serious organised crime circumstance of aggravation'.

<sup>135</sup> Ibid ss 9(3), (6) and (7). The approach to be taken in sentencing for an offender for an offence with a serious organised crime circumstance of aggravation is set out in Pt 9D, Div 2.

<sup>136</sup> Ibid s 9(4)(b).

<sup>137</sup> Ibid ss 161R(1)–(2).

<sup>138</sup> Ibid pt 9B div 3.

<sup>139</sup> For example, this view was expressed by a number of stakeholders at a roundtable hosted by the Council on 14 May 2019. Participants are listed at Appendix 2 of this report.

<sup>140</sup> Section 9(2)(a) omitted by s 34(1) *Youth Justice and Other Legislation Amendment Act 2014* (Qld), which came into effect on 28 March 2014.

<sup>141</sup> Section 9(2)(a) reinserted by s 61(2) *Youth Justice and Other Legislation Amendment Act (No. 1) 2016* (Qld) commencing 1 July 2016 (see s 2).

<sup>142</sup> *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) s 6(3).

separate recognition to the principle of parsimony in much the same terms as the former Queensland provision.<sup>143</sup>

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

Surely that is the very essence of the exercise of judicial discretion in sentencing. Courts are not entitled to impose sentences which are considered by the court to be inappropriate in the circumstances and more severe than is necessary. This provision is meaningless and ought to be deleted.<sup>144</sup>

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

The Australian Law Reform Commission (ALRC) has described the principle of parsimony as follows:

The principle of parsimony recognises the inherent dignity and worth of offenders by mandating concern for their welfare. It acknowledges that some sentences can have devastating consequences for both the individual offender and the wider community, and it operates to ensure that judicial officers exercise restraint when wielding the formidable power of the state to punish those who violate its laws.<sup>145</sup>

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

The court *must not* pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.<sup>146</sup>

The NSW legislation similarly provides that 'a court *must not* sentence an offender to imprisonment, unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate'.<sup>147</sup> The relevant section goes on to set out the following additional requirements that apply to a court when imposing a sentence of 6 months or less:

A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:

- (a) its reasons for deciding that no penalty other than imprisonment is appropriate, and
- (b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).<sup>148</sup>

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

<sup>143</sup> *Sentencing Act 1991* (Vic) s 5(3): 'Subject to subsections (2G), (2GA) and (2H), a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'. Subsections (2G), (2GA) and (2H) limit the types of orders a court can make for an offence classified as 'category 1 offence' or a 'category 2 offence' (custodial orders — but excluding ability to combine imprisonment with a community correction order), unless specific criteria are met. See *Sentencing Act 1991* (Vic) s 3(1) for definitions: Category 1 offences include: murder, intentionally or recklessly causing serious injury in circumstances of gross violence or if the victim was an emergency worker, custodial officer or youth justice custodial worker on duty, rape, sexual penetration of a child, aggravated home invasion, aggravated carjacking and drug trafficking and drug cultivation — large commercial quantity. Category 2 offences include: manslaughter, child homicide, intentionally causing serious injury (other than where a category 1 offence), kidnapping, armed robbery where offender had a firearm, the victim suffered an injury, or was committed in company, home invasion, carjacking, arson causing death, culpable driving causing death and dangerous driving causing death.

<sup>144</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Second Reading Speech — Penalties and Sentences (Serious Violent Offences) Amendment Bill' (Denver Beanland, Attorney-General and Minister for Justice) 596.

<sup>145</sup> Australian Law Reform Commission, *Same Crime: Same Time: Sentencing of Federal Offenders* (Report No. 103, 2006) 152 [5.10] (citations omitted).

<sup>146</sup> *Criminal Justice Act 2003* (UK) s 152(2) (emphasis added).

<sup>147</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1) (emphasis added).

<sup>148</sup> *Ibid* s 5(2).

where it imposes a short sentence of imprisonment, to state its reasons for deciding that imprisonment was the only appropriate penalty.

UK commentators have noted that while the use of such provisions ‘represent a common approach to ensuring that imprisonment is reserved for the most serious offences’, in practice, they have proven ineffective in restricting the use of prison to the most serious offences.<sup>149</sup> They suggest two main reasons for this: (1) the sentencing of some offenders to prison in circumstances where the court has overestimated the gravity of the offence and imposed a custodial sentence when a community order would have been sufficient; and (2) sentencing practices for offenders convicted of minor crimes who have lengthy records of recent, related prior offending, including ‘because the court, having repeatedly imposed non-custodial sentences, sees no reasonable alternative except escalating the severity of the court’s response by changing the nature of the sanction’.<sup>150</sup>

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

An offender’s prior convictions are normally relevant only to the quantum of punishment imposed, and may not alone justify committal to custody. Only when the offender has a very extensive record of prior convictions and the court has exhausted all non-custodial sentencing options may a term of custody be imposed to reflect this.<sup>151</sup>

Under their preferred option, where a high-level community order would be appropriate but for the offender’s prior criminal history, the existing conditions of the community order would be extended — such as by allowing the court to impose a certain number of hours, or additional hours, of unpaid work, or to extend the period of an electronically monitored curfew (which would also be separately recorded by the court at time of sentencing).<sup>152</sup>

### 5.3.3 Submissions and consultation

Views expressed during earlier consultation that the current principles under section 9 need to be reviewed, continued to be expressed by legal stakeholders during the later stages of the review. The concern is that without significant reforms to the existing provisions, the intended objectives of the review — to increase the flexibility of sentencing orders and to promote the greater use of community-based sentencing orders in place of imprisonment in appropriate cases — will be subverted.

Specific proposals made included:

- A suggestion by Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis of The University of Queensland School of Law, that section 9 be amended to include a new principle (2)(a)(iii) that: ‘a sentence that allows the offender to stay in the community must always be considered’, in addition to a review of all provisions that limit the application of the current principles under section 9(2)(a).<sup>153</sup> Express mention is made of section 9(2A), which ‘precludes application of these principles in sentencing for any case involving violence, or physical harm to another person’.<sup>154</sup>
- A proposal by the Queensland Law Society (QLS) that the section could be amended to include in the ‘exceptions’ to imprisonment as a last resort that: ‘the Court could have regard to concerns about the safety of the victims and other community members when determining whether imprisonment should be imposed’ (thereby creating ‘an “exception” to an “exception”’).<sup>155</sup>

<sup>149</sup> Julian V Roberts and Lyndon Harris, ‘Reconceptualising the Custody Threshold in England and Wales’ (2017) 28 *Criminal Law Forum* 477, 478–479.

<sup>150</sup> Ibid 492–493.

<sup>151</sup> Ibid 495.

<sup>152</sup> Ibid 494.

<sup>153</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 2.

<sup>154</sup> Ibid.

<sup>155</sup> Submission 15 (Queensland Law Society) 2.

- Support by Fighters Against Child Abuse Australia (FACAA) for amendments to section 9 to clearly identify what offences are not appropriate for a community-based sentencing order.<sup>156</sup> In particular, FACAA submits: 'any crimes of child abuse and crimes of violence or of a sexual nature should not ever be given a suspended or a community-based sentence'.<sup>157</sup>

Legal Aid Queensland (LAQ) raised broader concerns about the potential of the current provisions to limit the availability of any new community-based sentencing order in the form of a CCO if introduced, submitting:

In our view the maintaining of sections 9(2A), (4), (6), (6A) and (7) of the PSA will greatly restrict any benefit a CCO may offer. ... If the abovementioned subsections are not amended, there may need to be inserted into section 9 (for example an additional paragraph in subsection 3) recognising the value of imposing community based orders or requiring a sentencing court to have regard to the various options under the CCO that may be relevant to the offender.<sup>158</sup>

Sisters Inside was also among those stakeholders that supported a review of section 9, noting concerns that 'the principle of imprisonment as a last resort has been eroded by successive amendments to section 9' over time.<sup>159</sup> They submitted:

In our view, section 9 requires a comprehensive review to ensure that a sentence which supports people to remain or return to the community on a community based order is *a/ways* considered by judicial decision makers. In our view, this principle is particularly important in the context of Queensland's high remand rates, especially for Aboriginal and Torres Strait Islander women in prison.<sup>160</sup>

The Queensland Council for Civil Liberties (QCCL) did not see a need for reform, suggesting that the current principles under section 9 — specifically, that imprisonment is a last resort, and a sentence allowing the offender to stay in the community is preferable, '[i]n combination with the requirement to consider the physical harm to community members if a non-custodial sentence is imposed for a violent offence ... are broad enough to ensure that community-based sentencing orders are considered where appropriate'.<sup>161</sup> In the event that additional legislative guidance was provided, the QCCL supported this being 'directed towards the substantive provisions of the PSA in order to provide more targeted guidance'.<sup>162</sup>

#### 5.3.4 The Council's view

As discussed earlier in this report, the Council identified as a fundamental principle for the review that any changes to existing community-based sentencing orders or new sentencing options should aim to reduce Queensland's prison population, while maintaining community safety.

Existing sentencing trends suggest there are a complex range of factors contributing to prisoner numbers in Queensland. Considering sentencing issues alone, these factors are likely to include:

- the increasing numbers of people serving pre-sentence custody on remand which, based on interstate and international research, may increase the risk of being sentenced to imprisonment and the length of any custodial sentence imposed;
- changes to maximum penalties and the seriousness with which particular types of conduct is viewed (for example, breaches of domestic violence orders — see further section 11.8.6 this report);
- the potential net-widening effects of some orders, which may result in some offences that previously would have received a community-based penalty instead attracting a custodial sentence;
- the consequences of breach, which in the case of parole and custodial sentences served in the community, generally involves a presumption that the person be returned to and/or serve the whole of the sentence in prison;

<sup>156</sup> Submission 4 (Fighters Against Child Abuse Australia) 6.

<sup>157</sup> Ibid.

<sup>158</sup> Submission 6 (Legal Aid Queensland) 5.

<sup>159</sup> Submission 7 (Sisters Inside) 2.

<sup>160</sup> Ibid (emphasis in original).

<sup>161</sup> Submission 8 (Queensland Council for Civil Liberties) 1.

<sup>162</sup> Ibid 2.

- the increasingly complex issues experienced by offenders, which may result in many offenders finding it difficult to comply with the conditions of intermediate orders, including due to the limited availability of services, or an unwillingness to consent to the making of these orders;
- the potential compounding effect for an offender of having a term of imprisonment on their criminal history, placing them at greater risk of receiving a prison sentence in future (see further section 3.5 of this report).

The challenges of reforming community-based sentencing orders and the principles that guide their use as a mechanism to reduce prisoner numbers are substantial. The Council nonetheless considers the investment is one worth making, given these orders provide an opportunity to implement more evidence-based, cost-effective and fair responses to crime in circumstances where this does not compromise community safety.

The Council accepts that legislative guidance on the principles to be applied by courts in sentencing will not in itself be sufficient to encourage the greater use of community-based orders. However, such guidance may be beneficial in signalling to courts an expectation by the legislature that community-based orders will be considered, and when the use of such an order may, or may not, be considered appropriate. These principles thereby may give legislative expression to a renewed willingness to embrace alternatives to custody as viable and credible alternatives to imprisonment rather than just as ‘alternatives to alternatives’ (for example, probation in place of a fine).

As indicated above, a number of legal stakeholders have called for a comprehensive review of section 9, and reconsideration of the principles that limit the current application of the principles set out at section 9(2)(a) of the Act. The relevant amendments made to this section have occurred over a number of years and successive terms of government. These amendments have been primarily made to remedy perceived deficiencies in the guidance provided to courts for the sentencing of specific categories of offending, and to encourage the use of actual custody. The offence types captured include offences involving the use or attempted use of violence or resulting in physical harm, sexual offences against children, child exploitation material offences, and stated offences committed with a serious organised crime circumstance of aggravation.

It is not possible for the Council to do justice to such a review as part of its current Terms of Reference, given the scope of other matters the Council has been directed to consider. While the Council can see benefits in such a review, we consider this work is best undertaken as part of a separate review where appropriate consultation and consideration of potential impacts of any proposed changes can be undertaken.

However, the Council supports the proposal put forward by Professors Douglas and Walsh, Dr Lelliott and Ms Wallis that section 9(2)(a) be amended in the more immediate term to include a new principle that: ‘a sentence that allows the offender to stay in the community must always be considered’.<sup>163</sup> While an apparently minor addition, it will ensure (apart from those exceptions provided for in other subsections) that there is a stronger focus under the Act on encouraging the greater use of community-based sentencing options where the court considers this is appropriate.

The introduction of specific sentencing principles to guide the use of CCOs, should this new order be introduced, is discussed in section 8.11.1 of this report.

Proposals have been made by some stakeholders in relation to the principles guiding the application of mandatory penalties. These are discussed in section 5.7 of this report. There is one proposal, put forward by the Queensland Police Union of Employees (QPU), that the Council considers could usefully form part of the section 9 review. Specifically, that a general provision be inserted into the PSA that provides: ‘in sentencing an individual for an offence which contains a mandatory provision (other than one which cannot be mitigated, such as murder), the Court must impose such sentence unless there are exceptional circumstances which justify imposing an alternate sentence’.<sup>164</sup> As such a provision would interact with other principles of general application set out under section 9 of the PSA, the Council considers it important this proposal be considered in the context of any other proposed changes to existing sentencing principles set out in section 9 and elsewhere.

<sup>163</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 2.

<sup>164</sup> Submission 10 (Queensland Police Union of Employees) 3–4.

## RECOMMENDATIONS: SENTENCING PRINCIPLES UNDER SECTION 9 PSA

1. Section 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld) should be amended to insert a new principle to which courts must have regard in sentencing, which provides that a sentence that allows the offender to stay in the community must always be considered (subject to existing legislative exceptions).
2. Section 9 should be reviewed to consider whether the current legislative exceptions to the principles set out in section 9(2)(a), in particular under subsections (2A), (4), (6A) and (7A), are appropriate and should be retained if the Council's recommended reforms to community-based sentencing orders (including the proposed introduction of a new intermediate sanction, a 'community correction order' – CCO) are adopted. Consideration should also be given to whether grounds to depart from current mandatory sentencing provisions should be provided for under the Act, such as in 'special' or 'exceptional' circumstances. Such review might be undertaken by the Department of Justice and Attorney-General in consultation with stakeholders, or by some other appropriate entity.

## 5.4 Sentencing options for state offences

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

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

As discussed in Chapter 1, orders can also be classified as being either 'substitutional' or 'non-substitutional', with the main difference being that substitutional sanctions, on a term of imprisonment being imposed, allow the form to be altered (e.g. such as ordering that it be served by way of intensive correction in the community), whereas non-substitutional sanctions are not alternative forms of imprisonment, but rather sentencing orders in their own right.<sup>165</sup>

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

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

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

### 5.4.1 Probation orders

A probation order can be made by a court if it convicts an offender of an offence punishable by imprisonment or a regulatory offence.<sup>166</sup>

<sup>165</sup> Freiberg and Ross (n 2) 108 as cited in Sentencing Advisory Council (Victoria) (n 2) 49.

<sup>166</sup> *Penalties and Sentences Act 1992* (Qld) s 91.

When sentencing an offender for a single offence, probation may be imposed in conjunction with a fine,<sup>167</sup> or a term of imprisonment (provided the period imposed does not exceed 12 months and is not suspended).<sup>168</sup> Probation may also be ordered alongside a community service order.<sup>169</sup>

Where ordered on its own, rather than part of a prison plus probation order under section 92(1)(b) of the PSA, a probation order may be made with or without a conviction being recorded<sup>170</sup> for a maximum period of 3 years.<sup>171</sup> The minimum period of the order varies depending on whether the order is made on its own (in which case, a minimum of 6 months applies) or as part of a combined prison plus probation order (in which case, the order must be for a minimum of 9 months).<sup>172</sup> Probation orders commence on the day the order is made, although if made as part of a combined imprisonment plus probation order, the requirements do not commence until the offender's release from prison.<sup>173</sup>

Probation is served in the community with monitoring and supervision provided by an authorised corrective services officer. The person must agree to the order being made and comply with the requirements under the order.<sup>174</sup> A probation order must contain certain conditions called 'general requirements'<sup>175</sup> and can include additional requirements.<sup>176</sup>

General requirements are that the person who is subject to the order must:

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

Additional conditions that can be imposed are:

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

Failure to comply with a requirement of probation, without reasonable excuse, is an offence punishable by 10 penalty units<sup>177</sup> (approximately \$1,306<sup>178</sup>).

<sup>167</sup> Ibid s 45(2).

<sup>168</sup> Ibid ss 92(1)(b), (5).

<sup>169</sup> Ibid s 109.

<sup>170</sup> Ibid ss 90, 91(a).

<sup>171</sup> Ibid s 92(2)(a).

<sup>172</sup> Ibid s 92(2).

<sup>173</sup> Ibid ss 92(2)–(4). Sections 160B to 160D of the *Penalties and Sentences Act 1992* (Qld) relating to the setting of a parole release or parole eligibility date do not apply to the term of imprisonment imposed under this form of order: s 160A(6)(b).

<sup>174</sup> Ibid s 96.

<sup>175</sup> Ibid s 93.

<sup>176</sup> Ibid s 94.

<sup>177</sup> Ibid s 123(1).

<sup>178</sup> From 1 July 2018, the value of a penalty unit was \$130.55: *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2018* (Qld) s 4 amending s 3 of the *Penalties and Sentences Regulation 2015* (Qld). This increased on 1 July 2019 to \$133.45. See *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2019* (Qld) s 4.

### 5.4.2 Community service orders

Community service orders are orders, with or without a conviction being recorded,<sup>179</sup> that require an offender to perform unpaid community service for the number of hours (between 40 and 240 hours<sup>180</sup>) stated in the order.<sup>181</sup> The order must be completed within 12 months, or another period allowed by the court.<sup>182</sup>

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

- not to commit another offence during the period of the order;
- to report to, and receive visits from, a correctional services officer as directed by that officer;
- to perform in a satisfactory way community service directed by a correctional services officer for the number of hours stated in the order, and at the times directed by the officer;
- to tell a corrective services officer about any changes of address or employment within two business days;
- not leave, or stay out of, Queensland without permission; and
- comply with every reasonable direction of a corrective services officer.<sup>183</sup>

The person being sentenced must agree to the order being made.<sup>184</sup>

As with probation orders, contravention of the conditions of a community service order is an offence.<sup>185</sup>

The making of a community service order is mandatory in circumstances where a court convicts an offender of certain prescribed offences committed in a public place while the offender was ‘affected by an intoxicating substance’.<sup>186</sup> These reforms were introduced in 2014,<sup>187</sup> as part of the Queensland Government’s ‘Safe Night Out Strategy’<sup>188</sup> and are discussed below in section 5.7.4 of this chapter.

### 5.4.3 Graffiti removal orders

A separate form of order, known as a ‘graffiti removal order’ also exists (discussed further in section 5.7.4 of this chapter), which is an order of up to 40 hours requiring an offender to remove graffiti, usually within 12 months, with or without a conviction being recorded.<sup>189</sup> The same types of requirements that apply to community service orders also apply to people subject to a graffiti removal order.<sup>190</sup>

The making of this order is mandatory where the person is convicted of causing wilful damage to property that is in a public place or visible from a public place by graffitiing it, or is in possession of an instrument that has, is, or is reasonably suspected of being about to be used for graffiti (e.g. a spray can), unless the person is not able to comply with the order because of a physical, intellectual or psychiatric disability.<sup>191</sup>

This order is also a relatively recent addition to the PSA, with the relevant provisions having been inserted in 2013<sup>192</sup> and is discussed below in section 5.7.4 of this chapter on ‘Mandatory penalties’.

<sup>179</sup> *Penalties and Sentences Act 1992* (Qld) s 100.

<sup>180</sup> *Ibid* 103(2)(a).

<sup>181</sup> *Ibid* s 102.

<sup>182</sup> *Ibid* s 103(2)(b).

<sup>183</sup> *Ibid* s 103(1).

<sup>184</sup> *Ibid* s 106.

<sup>185</sup> *Ibid* s 123(1).

<sup>186</sup> *Ibid* pt 5, div 2, subdiv 2.

<sup>187</sup> *Safe Night Out Legislation Amendment Act 2014* (Qld) s 92, which commenced on 1 December 2014 (s 2(5)).

<sup>188</sup> Queensland Government, *Safe Night Out Strategy* (June 2014).

<sup>189</sup> *Penalties and Sentences Act 1992* (Qld) pt 5A.

<sup>190</sup> *Ibid* s 110C

<sup>191</sup> *Ibid* ss 110A(2), (3).

<sup>192</sup> *Criminal Law and Other Legislation Amendment Act 2013* (Qld) s 47, which commenced on 27 September 2013 (2013 SL No. 187).

#### 5.4.4 Intensive correction orders

Intensive correction orders (ICOs) are a sentence of imprisonment of 1 year or less ordered to be served in the community under supervision with a conviction recorded.<sup>193</sup> The offender must comply with a number of conditions, including reporting twice weekly to an authorised corrective services officer, taking part in counselling and other programs as directed, and performing community service.<sup>194</sup> The offender must agree to the order being made and to comply with the requirements under the order.<sup>195</sup>

If the person does not comply with the conditions of the order, a court may revoke the order and order the person to serve the remaining period of the sentence in prison.<sup>196</sup>

ICOs and options relating to their retention and reform are discussed in Chapter 7 of this report.

#### 5.4.5 Suspended sentences of imprisonment

A suspended sentence is a term of imprisonment of 5 years or less suspended in full (called a wholly suspended sentence) or in part (called a partially suspended sentence) for a period (called the operational period) up to 5 years.<sup>197</sup> When a court makes a suspended sentence a conviction must be recorded.<sup>198</sup>

In Queensland, there are no conditions that attach to a suspended sentence order, other than that the person does not commit another offence punishable by imprisonment. While a suspended sentence can be combined with other forms of orders, such as probation or community service, this option is only available to courts when sentencing a person for more than one offence.<sup>199</sup>

If a person subject to a suspended sentence commits further offences punishable by imprisonment during the operational period of the order, the court must order the offender to serve the whole of the suspended period in prison (unless unjust to do so),<sup>200</sup> plus any other penalties imposed for the new offence.

Potential reforms to suspended sentences, including changes to enable courts to make conditional forms of suspended sentence orders, are discussed in Chapter 10 of this report.

#### 5.4.6 Imprisonment

A sentence of imprisonment is, as the name of this order suggests, an order that must be served in a correctional services facility. If a court sentences a person to 3 years or less in prison and does not convict the person of a sexual or serious violent offence<sup>201</sup> the court must set a parole release date at sentencing<sup>202</sup> (called ‘court ordered parole’). This can include releasing the person directly from court on parole.<sup>203</sup> There are some circumstances in which this does not apply (for example, if the person has had their court ordered parole cancelled).<sup>204</sup>

If the sentence is for more than 3 years’ imprisonment, or for a sexual offence, or if the person has had their parole cancelled, then the court may only fix a parole eligibility date.<sup>205</sup> In the case of offenders declared

<sup>193</sup> *Penalties and Sentences Act 1992* (Qld) ss 111–12, 113(1).

<sup>194</sup> *Ibid* s 114.

<sup>195</sup> *Ibid* s 117.

<sup>196</sup> *Ibid* s 127(1).

<sup>197</sup> *Ibid* s 144.

<sup>198</sup> *Ibid* s 143.

<sup>199</sup> *R v Hood* [2005] 2 Qd R 54, 65 [40], 67 [48] (Jerrard JA, Helman J agreeing).

<sup>200</sup> *Penalties and Sentences Act 1992* (Qld) s 147.

<sup>201</sup> For circumstances in which a person can, or must, be declared as convicted of a serious violent offence, see *Penalties and Sentences Act 1992* (Qld) pt 9A div 3.

<sup>202</sup> *Penalties and Sentences Act 1992* (Qld) s 160B.

<sup>203</sup> *Ibid* s 160G(1).

<sup>204</sup> *Ibid* s 160B(2). Another exception to this is if an offender is sentenced to a term of imprisonment under s 161R(2) of the Act (which relates to the sentencing of an offender convicted of a prescribed offence with a serious organised crime circumstance of aggravation): s 160B(7).

<sup>205</sup> *Ibid* ss 160B, 160D.

convicted of a serious violent offence, the person's parole eligibility date is automatically set at the day after the person has served 80 per cent of their sentence for the offence, or 15 years (whichever is less).<sup>206</sup> The Parole Board Queensland decides whether to grant the prisoner parole when they apply. If no eligibility date is set, Queensland Corrective Services (QCS) determines the date based on the relevant legislation (e.g. generally a prisoner is eligible for parole the day after reaching 50 per cent of the period of imprisonment).<sup>207</sup>

The operation of court ordered parole, and its potential expansion, including to sexual offences as recommended in the Queensland Parole System Review Report, is discussed in Chapter 11 of this report.

#### 5.4.7 Combination orders

##### Current legal framework

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

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

As discussed at section 5.4.1 (above), a court may also sentence an offender to a combined imprisonment and probation order, provided the term of imprisonment imposed is not more than 12 months and is not suspended in whole or in part, and to probation with a community service order.

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

- a sentence of up to 12 months' imprisonment served by way of an ICO, with a probation order of any length (*R v M; ex parte Attorney-General* [2000] 2 Qd R 543);
- an order of suspended imprisonment with probation, a community service order or ICO;
- imprisonment of longer than 12 months with probation (*R v Saebbar* [2011] QCA 142).

Greater flexibility is provided when sentencing an offender for two or more offences. In *R v Hood*,<sup>208</sup> the Queensland Court of Appeal reconsidered previous authorities, determining that in circumstances where an offender is sentenced for more than one offence, certain orders can be made together, with the primary consideration being whether the orders are compatible, or at least not inconsistent with each other. For example:

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

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

Permitted and prohibited order combinations as these apply to the use of ICOs and suspended sentences in Queensland are discussed in sections 7.1.4 and 10.2 of this report.

##### Current use of combination orders in Queensland

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

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

<sup>206</sup> Corrective Services Act 2006 (Qld) s 182.

<sup>207</sup> Ibid s 184.

<sup>208</sup> [2005] 2 Qd R 54.

- community service with probation (50.1% of community service orders were made alongside probation at the same court event; and 19.2% of probation orders were combined with community service);
- a recognisance order/good behaviour bond with a partially or wholly suspended sentence (26.8% of recognisance orders combined with a partially suspended sentence orders and 17.2% combined with wholly suspended sentences; 7.2% of partially suspended sentences were combined with a recognisance order, and 4.6% of wholly suspended sentences);
- recognisance order with probation (18.0% of recognisances, and 4.7% of probation orders);
- probation with a partially or wholly suspended sentence (15.3% of probation orders were combined with a wholly suspended sentences, and 14.4% with a partially suspended sentence; 15.5% of wholly suspended sentences were combined with probation, and 14.9% of partially suspended sentences);
- a community service order with a wholly suspended sentence (7.1% of community service orders; 2.8% of wholly suspended sentences); and
- partially suspended sentences with imprisonment (27.8% of partially suspended sentences, and 8.3% of prison sentences).

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

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

### Relevance to the review

The ability of courts in sentencing to combine orders was of direct relevance to the review and the Council's consideration of the best mix of community-based sentencing orders for Queensland. This is because, as has been recognised by other sentencing councils and law reform bodies tasked with undertaking similar reviews, the purposes and functions of some sentencing orders may be able to be met through the use of combination orders.<sup>209</sup>

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

<sup>209</sup> In Tasmania, for example, the ability of a court to combine imprisonment with a new community correction order (CCO) was used as a basis for the Tasmanian Sentencing Council to argue that there was no longer a need to retain partially suspended sentences in that jurisdiction: Sentencing Advisory Council (Tasmania) (n 80) x, xviii (Recommendation 47).

- the maximum length of the orders: limited to 12 months for an ICO, but is 3 years for probation orders, and 5 years for a suspended sentence;
- a court's powers on breach: unlike a suspended sentence, which involves the whole or part of the prison sentence imposed being suspended, a person who is subject to an ICO is taken to be serving their prison sentence in the community. This means that, on breach, the person is only liable to serve the period remaining on the sentence at the time of the breach;
- how the order is structured: to achieve the same conditions as an ICO, a court would need to combine elements of supervision, program participation, community service and potentially a residential facility requirement in the community order or orders made, compared with ICOs where these conditions are already packaged within a single form of order.

The Council has heard from some legal stakeholders that the focus should be on providing courts with as many sentencing options as possible, and that ICOs, while limited in use, should be retained for the small number of cases where this order is appropriate. Potential reforms to ICOs are discussed in Chapter 7 of this report. The Council's views on the introduction of a conditional form of suspended sentence are explored in Chapter 10.

## 5.5 Commonwealth offences and community-based orders in Queensland

Where a person is to be sentenced for a Commonwealth offence, the *Crimes Act 1914* (Cth) applies. State sentencing laws are only applicable if, and to the extent that, Commonwealth law makes them applicable.<sup>210</sup> This means that a court cannot impose a sentencing order available under state law when sentencing a person for a Commonwealth offence if Commonwealth sentencing legislation has a contrary provision, or if it is covered in the *Crimes Act 1914* (Cth).<sup>211</sup>

There are six sentencing options available to a court when sentencing a person for a Commonwealth offence under the *Crimes Act 1914* (Cth):<sup>212</sup>

1. Dismiss the charge (s 19B(1)(c));
2. Impose a section 19B bond (s 19B(1)(d) — the bond is imposed without recording a conviction and can include conditions such as supervision by a probation officer);
3. Impose a conditional release (bond) (s 20(1)(a) — this is imposed with the recording of a conviction and can include conditions such as supervision by a probation officer);
4. Make a state/territory community-based order (s 20AB) — this type of order can only be imposed with the recording of a conviction and only where administrative arrangements have been made between the relevant State or Territory and the Commonwealth. In Queensland, current orders permitted to be made are community service orders and intensive correction orders;
5. Impose a fine (ss 4B and 4D — imposed with the recording of a conviction);
6. Sentence the person to imprisonment. The options available to the court depend the length of the head sentence (or aggregate sentence):<sup>213</sup>
  - a. Not exceeding 6 months: two options —
    - i. Ordering release immediately or after serving a specified period under a recognizance release order, without a non-parole period (ss 19AC(1), 20(1)(b)). This is analogous to a wholly or partially suspended sentence but can include

<sup>210</sup> *Judiciary Act 1903* (Cth) s 68. See also the explanation in *Hili v The Queen* (2010) 242 CLR 520, 527 [21] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>211</sup> *Putland v The Queen* (2004) 218 CLR 174, 179–80 [7] (Gleeson CJ).

<sup>212</sup> For a useful guide see Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (2018).

<sup>213</sup> *Ibid* 125 (Table 1) and 129 [553] for a summary of requirements and options.

conditions such as supervision by a probation officer if the sentence does not exceed 3 years; or

- ii. Declining to make a recognizance release order, because it is not required for sentences not exceeding 6 months, which means the sentence of imprisonment must be served in full, with no non-parole period.<sup>214</sup>
- b. Greater than 6 months but not greater than 3 years: the court must make a recognizance release order as described in (i) above,<sup>215</sup> unless it declines to do so because it is satisfied such an order is not appropriate, having regard to the nature and circumstances of the offence/s and antecedents of the person (or because of defined interaction with a state or territory sentence),<sup>216</sup> in which case the person must serve the whole of the sentence in custody.
- c. Greater than 3 years: The court cannot impose a recognizance release order. It must impose imprisonment and fix a single non-parole period.<sup>217</sup> It can decline to fix a non-parole period using an identical version of the 'appropriateness' criteria used for declining to make a recognizance release order in (b) above.<sup>218</sup> Release on parole is ultimately a decision for the Commonwealth Attorney-General, who can make, or refuse to make, a parole order.<sup>219</sup>

For the purpose of this section, only sentencing options that include a community-based sentencing component will be further discussed.

### 5.5.1 Bond with a discretion not to record a conviction: section 19B *Crimes Act 1914* (Cth)

A court may release an offender on a bond without recording a conviction under section 19B of the *Crimes Act 1914* (Cth). The court must be satisfied<sup>220</sup> that in all the circumstances — including the matters to which a court has regard when passing sentence in section 16A of the *Crimes Act 1914* (Cth) — that 'it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation'; having regard to:

- i. the character, antecedents, age, health or mental condition of the person;
- ii. the extent (if any) to which the offence is of a trivial nature; or
- iii. the extent (if any) to which the offence was committed under extenuating circumstances.<sup>221</sup>

A court that imposes a section 19B bond may include a condition that the person will, during the period of the order, be subject to the supervision of a probation officer for no more than 2 years. In Queensland, a court may impose other conditions; however, community service cannot be imposed as a condition.<sup>222</sup> Under

<sup>214</sup> This is due to a discretion to decline to make a recognizance release order — see s 19AC(3) of the *Crimes Act 1914* (Cth). There are exceptions regarding the non-parole period for 'minimum non-parole period' offences, which are beyond the scope of this discussion — see Commonwealth Director of Public Prosecutions (n 212) 129 [553].

<sup>215</sup> *Crimes Act 1914* (Cth) s 19AC(1).

<sup>216</sup> Ibid ss 19AC(4)–(5). There are exceptions regarding the non-parole period for 'minimum non-parole period' offences, which are beyond the scope of this discussion — see Commonwealth Director of Public Prosecutions (n 212) 129 [553].

<sup>217</sup> *Crimes Act 1914* (Cth) s 19AB.

<sup>218</sup> Ibid s 19AB(3).

<sup>219</sup> Ibid s 19AL.

<sup>220</sup> The application of this discretion involves a two-stage test involving firstly, identifying at least one of the three factors outlined and secondly, determining the expedience of punishment/nominal punishment consideration in light of those factors and the matters to which a court is to have regard when passing sentence (including s 16A): see Commonwealth Director of Public Prosecutions (n 212) 79 [335] citing *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568; *DPP (Cth) v Moroney* [2009] VSC 584, 7 [15]; *Morrison v Behrooz* (2005) 155 A Crim R 110. See also *Cobiac v Liddy* (1969) 119 CLR 257, 276 (Windeyer J).

<sup>221</sup> *Crimes Act 1914* (Cth) s 19B(1) (discharge without conviction). For a discussion on what is 'trivial' or 'extenuating circumstances' see *Castle v DPP (Cth)* [2019] QDC 49, 15–17 [33]–[44] (Dearden DCJ).

<sup>222</sup> See *R v Shambayati* (1999) 105 A Crim R 373, 375–6 [16] (Pincus, Davies and Thomas JJA), in which the Court concluded that community service may only be imposed by an order made under section 20AB of the *Crimes Act 1914* (Cth). This was

section 20A(5)(a), if a person subject to a section 19B bond has breached the order, the court may revoke the order, record a conviction and re-sentence the person, or take no action.

### 5.5.2 Conditional release (bond): section 20(1)(a) *Crimes Act 1914* (Cth)

A court may release an offender on conditional release, which is a bond with security that the offender will comply with conditions under section 20(1)(a) of the *Crimes Act 1914* (Cth).

For this type of bond, a conviction must be recorded. If a court imposes a conditional release bond, the court may also include a condition that the person will, during the period of the order, be subject to the supervision of a probation officer for no more than 2 years.<sup>223</sup> A court may impose other conditions; however, as is the case for section 19B bonds, community service cannot be imposed as a condition.<sup>224</sup>

Under section 20A(5)(b), if a person subject to a conditional release bond has breached the order, the court may impose a pecuniary penalty and allow the order to continue, revoke the order and re-sentence the person, or take no action.

### 5.5.3 A recognizance release order: section 20(1)(b) *Crimes Act 1914* (Cth)

A recognizance release order under section 20(1)(b) of the *Crimes Act 1914* (Cth) is similar to a suspended sentence where a court imposes a term of imprisonment of 3 years or less, and orders that a person be released forthwith or after a specified period upon giving security.<sup>225</sup>

If a court imposes a recognizance release order, the court may also include a condition that the person will, during the period of the order, be subject to the supervision of a probation officer for no more than 2 years.<sup>226</sup> As discussed above, a court may impose other conditions, but it may not impose community service as a condition.<sup>227</sup>

Under section 20A(5)(c), if a person subject to a recognizance release order has breached the order, the court may:

- impose a pecuniary penalty;
- extend the good behaviour period;
- revoke the order and impose a community-based order;
- revoke the order and order imprisonment; or
- take no action.

### 5.5.4 State/territory community-based orders: section 20AB *Crimes Act 1914* (Cth)

Section 20AB of the Commonwealth *Crimes Act 1914* makes some state and territory community-based sentencing options available to courts when sentencing for Commonwealth offences, provided the court is in a participating State and the State's legislation empowers courts to impose the order specified. An order not otherwise listed in section 20AB(1AA) can be prescribed for the purposes of that subsection (as occurred with Queensland's ICOs).<sup>228</sup>

---

discussed in Commonwealth Director of Public Prosecutions (n 212) 87 [5.5.7] citing *Adams v Carr* (1987) 47 SASR 205, 214 (von Doussa J) which held community service was a valid condition under s 20(1)(a) in South Australia.

<sup>223</sup> *Crimes Act 1914* (Cth) ss 20(1)(a)(iv), (1A).

<sup>224</sup> See *R v Shambayati* (1999) 105 A Crim R 373, 375–6 [16] (Pincus, Davies and Thomas JJA) and discussion at n 222 above.

<sup>225</sup> Where the sentence does not exceed 6 months, the court can choose between a recognizance release order or a fixed term: *Crimes Act 1914* (Cth) s 19AC(3). This is discussed further in section 7.10 of this report regarding short sentences and the use of intensive correction orders for sentences of 6 months or less in the Commonwealth jurisdiction.

<sup>226</sup> *Crimes Act 1914* (Cth) ss 20(1)(b), (1A).

<sup>227</sup> See *R v Shambayati* (1999) 105 A Crim R 373, 375–6 [16] (Pincus, Davies and Thomas JJA) and discussion at n 222 above.

<sup>228</sup> *Crimes Act 1914* (Cth) s 20AB(1AA)(c) includes sentences or orders 'prescribed for the purposes of this subsection'. Prescribed orders are found in regulation 6 of the *Crimes Regulations 1990* (Cth), where particular sentence types and the

A participating State is one that has an arrangement with the Commonwealth regarding state officers exercising powers and performing functions, and state facilities and procedures being made available, in relation to the carrying out or enforcement under the *Crimes Act 1914* (Cth) of orders made under that Act or another Act.<sup>229</sup> This ensures that such orders are supervised and administered lawfully by state corrections staff.

The orders remain Commonwealth orders despite the fact that it is the state corrections staff who administer them, and it is the Commonwealth sentencing laws and criteria that apply when imposing sentence (although state provisions applying 'with respect to such a sentence or order' are imported by section 20AB(3) so long as they are not inconsistent with Commonwealth law and are capable of application).<sup>230</sup> For example, if a community-based order is made under section 20AB, a conviction is automatically recorded (which, under Queensland law, is discretionary except in the case of ICOs).<sup>231</sup>

Section 20AB of the *Crimes Act 1914* (Cth) expressly recognises community service orders<sup>232</sup> and ICOs<sup>233</sup> among the types of community-based orders that may be made in sentencing an offender for a Commonwealth offence. Probation is not listed as a community-based sentencing option for the purposes of section 20AB. However, CCOs (as they exist in Victoria, NSW and Tasmania) that include the power of courts to impose probation-like conditions are listed.<sup>234</sup>

The Commonwealth Director of Public Prosecutions' (CDPP) submission to the Council noted that CCOs were not commonly imposed for Commonwealth offences in Victoria, and the duration of CCOs (5 years for indictable offences) was not a practical issue.<sup>235</sup> Similarly, in NSW these new sentencing orders were not regularly imposed.<sup>236</sup> At the time of the CDPP submission in early June 2019, only one Tasmanian CCO had been imposed in a Commonwealth sentence.<sup>237</sup>

Data provided by the CDPP<sup>238</sup> showed that between the 2015–16 and 2018–19 financial years, 22 ICOs were imposed for Commonwealth offences in the ACT. The totals for other jurisdictions, between 2014–15 and 2018–2019, varied:

- NSW: three CCOs, 232 ICOs and 18 further ICOs handed down in response to state offending (i.e. the CDPP conducted the proceedings along with some federal charges).
- Victoria: 651 CCOs
- WA: two ICOs.
- Queensland: 162 ICOs (by year: 39/60/39/19/5).

Under the *Crimes Act 1914* (Cth), the appropriateness of the community-based order as originally made under section 20AB can only be reconsidered if:

- the person has failed to comply with the order, and breach proceedings are initiated by information notice;<sup>239</sup>

---

specific state and territory legislation are applicable. The requirement regarding a participating State still applies. ICOs are found at Regulation 6, item 4.

<sup>229</sup> *Crimes Act 1914* (Cth) s 3B. Territories are referenced in the same manner as states.

<sup>230</sup> See also ss 20AC(1), (9) of the *Crimes Act 1914* (Cth) regarding such state laws being acknowledged as 'applied provisions' in the breach context.

<sup>231</sup> *Penalties and Sentences Act 1992* (Qld) s 100, 111. Contrast with s 19B(1)(d) of the *Crimes Act 1914* (Cth).

<sup>232</sup> *Crimes Act 1914* (Cth) s 20AB(1AA)(a)(v).

<sup>233</sup> *Ibid* s 20AB(1AA)(a)(ix).

<sup>234</sup> *Ibid* s 20AB(1AA)(a)(iii).

<sup>235</sup> Submission 13 (Commonwealth Director of Public Prosecutions) 4 [24].

<sup>236</sup> *Ibid* 4–5 [25].

<sup>237</sup> *Ibid* 5 [27].

<sup>238</sup> Data provided by the Office of the Director of Public Prosecutions to the Queensland Sentencing Advisory Council on 4 June 2019, as at 29 May 2019. Note: 'A defendant can receive more than one of these penalties due to multiple results. These can include a penalty from a summary hearing and then a subsequent penalty from a breach or appeal'.

<sup>239</sup> *Crimes Act 1914* (Cth) ss 20AC(2), (6).

- the sentence is appealed;<sup>240</sup>
- an application is made for the exercise of the executive prerogative power to pardon or remit a sentence.<sup>241</sup>

A person sentenced for a Commonwealth offence in Queensland can also apply for a reconsideration of a community-based order if:

- the matter is reopened under section 188 of the PSA, as a procedural provision permitted under section 68 of the *Judiciary Act 1903* (Cth) – for instance, if the court imposed a sentence decided on a clear factual error of substance;<sup>242</sup>
- an application under section 120 of the PSA (as a procedural provision, as above) to have the order amended or revoked on the basis that the offender is unable to comply because there has been a material change in their circumstances, or their circumstances were not accurately presented to the court at sentence, or they are no longer willing to comply with the order.

The ALRC considered ‘a wider [Commonwealth] judicial power to reconsider a sentence, such as where there is new information relating to exceptional events occurring after sentence, or where there has been a fundamental change in the circumstances of an offender after sentencing’ but chose not to recommend any changes. The ALRC was concerned that ‘[adopting] this approach significantly detracts from the goal of promoting finality of the sentencing process’ and that any need to reconsider the sentence on these grounds could ‘more appropriately [be] dealt with by an application for the exercise of the executive power to pardon or remit a sentence’.<sup>243</sup>

The CDPP has noted that ‘the provisions in s 20AC operate to the exclusion of any provisions of state or territory law relating to a breach of the applied order’.<sup>244</sup> Under section 20AC(6) of the *Crimes Act 1914* (Cth), if a court is satisfied that the person has failed to comply with the order, it may impose a pecuniary penalty and allow the order to continue, revoke the order and re-sentence the person (taking into account prior compliance), or take no action.

In contrast, under the PSA, a person who has contravened a community-based order without reasonable excuse commits a separate contravention offence<sup>245</sup> and, on conviction, courts may admonish and discharge the offender or make an order requiring the payment of an amount required to be paid by the community-based order and either allow the order to continue or re-sentence the offender.<sup>246</sup> A magistrate may also increase the number of hours of community service work to be performed and/or extend the period of the order allowed for performance (with the offender’s consent).<sup>247</sup> Additionally, if a person breaches an ICO, a court may revoke the order and commit the offender to prison for the unexpired portion of the term of imprisonment.<sup>248</sup>

### 5.5.5 Combination of orders

A sentence combining a term of imprisonment and a community-based order for a single Commonwealth offence is not permitted under the Commonwealth sentencing regime.<sup>249</sup> However, combined orders can be achieved in two ways. A court may impose a recognizance release order (analogous to a suspended

<sup>240</sup> Although the power of an appellate court to receive fresh evidence is restricted: see Australian Law Reform Commission (n 145) 439 [16.7]–[16.9] (citations omitted).

<sup>241</sup> Australian Law Reform Commission (n 145) 437 [16.2], citing *Jovanovic v The Queen* (1999) 106 A Crim R 548, 551 [15].

<sup>242</sup> *Penalties and Sentences Act 1992* (Qld) s 188(1)(c).

<sup>243</sup> Australian Law Reform Commission (n 145) 443–4 [16.25].

<sup>244</sup> Commonwealth Director of Public Prosecutions (n 212) 102 [445]. See *Crimes Act 1914* (Cth) ss 20AC, 20AC(6).

<sup>245</sup> *Penalties and Sentences Act 1992* (Qld) s 123.

<sup>246</sup> *Ibid* ss 125(2)–(4)(a) for the Magistrates Courts and ss 126(2)–(5) for the Supreme and District Courts.

<sup>247</sup> *Ibid* ss 125(2)(b)–(c).

<sup>248</sup> *Ibid* s 127.

<sup>249</sup> *Atanackovic v The Queen* (2015) 45 VR 179, 205–6 [82]–[87] (Weinberg, Kyrrou and Kaye JJA).

sentence) with certain conditions such as being subject to the supervision of a probation officer.<sup>250</sup> Secondly, if there are multiple offences, a court may impose different sentence orders for separate offences.

## 5.6 Sentencing process

Sentencing in Queensland, as in other Australian states and territories, is not a mechanical or mathematical exercise.<sup>251</sup> Queensland courts sentence by applying an ‘instinctive synthesis’ approach:

the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an ‘instinctive synthesis’. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which ... balances many different and conflicting features.<sup>252</sup>

The High Court, in considering the proper approach to sentencing, has recognised ‘there is no single correct sentence’ and sentencing judges are to be allowed as much flexibility in sentencing as is in keeping with consistency of approach and applicable legislation.<sup>253</sup>

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

Unless legislation fixes a mandatory penalty (as it does for certain offences, discussed below at 5.7), ‘the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances’.<sup>254</sup> Sentencing courts have a wide discretion yet must take into account all relevant considerations (and only relevant considerations) including legislation and case law.<sup>255</sup>

The discretion can ‘miscarry’ when the sentence is clearly unjust<sup>256</sup> – either being ‘manifestly excessive’ or ‘manifestly inadequate’.<sup>257</sup> Such sentences, which an appeal court can set aside, fall ‘outside the *range* of sentences which could have been imposed if proper principles had been applied’.<sup>258</sup>

Consistency in sentencing requires like cases to be treated alike and different cases, differently.<sup>259</sup> Queensland’s Court of Appeal has stated that ‘community confidence in the sentencing process depends ... on a wide variety of judges imposing sentences which are consistent, and which are formulated by reference to relevant discretionary factors and by having regard to the relevant legislation, comparable sentences, and the guidance of appellate court decisions’.<sup>260</sup>

The administration of criminal justice works as a system, not as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.<sup>261</sup>

<sup>250</sup> *Crimes Act 1914* (Cth) s 20(1A). However, a condition cannot include community service: see *R v Shambayati* (1999) 105 A Crim R 373, 375–6 [16] (Pincus, Davies and Thomas JJA).

<sup>251</sup> *Markarian v The Queen* (2005) 228 CLR 357, 372–5 [30]–[39] (Gleeson CJ, Gummow, Hayne and Callinan JJ) as cited in *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 262 CLR 428, 443 [45] (Kiefel CJ, Bell and Keane JJ). See also *Barbaro v The Queen* (2014) 253 CLR 58, 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

<sup>252</sup> *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 262 CLR 428, 434 [5] (Kiefel CJ, Bell and Keane JJ) citing *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ) (emphasis in original).

<sup>253</sup> *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>254</sup> *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 262 CLR 428, 434 [7] (Kiefel CJ, Bell and Keane JJ).

<sup>255</sup> *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ) and *Barbaro v The Queen* (2014) 253 CLR 58, 70 [25] (French CJ, Hayne, Kiefel and Bell JJ).

<sup>256</sup> *House v The King* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernann JJ).

<sup>257</sup> *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 262 CLR 428, 434 [7] (Kiefel CJ, Bell and Keane JJ).

<sup>258</sup> *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original).

<sup>259</sup> *R v Pham* (2015) 256 CLR 550, 559 [28] (French CJ, Keane and Nettle JJ), citing *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ), 608 [65] (Gaudron, Gummow and Hayne JJ) and *Hilli v The Queen* (2010) 242 CLR 520, 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>260</sup> *R v Jones* [2011] QCA 147, 8 [27] (Daubney J, Muir and White JJA agreeing).

<sup>261</sup> *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

However, if cases show a range of sentences for similar offending that is ‘demonstrably contrary to principle’, they do not have to be followed in future.<sup>262</sup>

‘Consistency’ does not require exact replication. The ultimate sentencing discretion lies somewhere between a non-punishment (like an unconditional discharge) and the maximum penalty set in the legislation.<sup>263</sup> The so-called range is ‘merely a summary of the effect of a series of previous decisions’; it reflects parliament’s recognition that ‘the range of circumstances surrounding each offence will also be great’.<sup>264</sup> The history of a range of sentences for similar offending does not guarantee the range, including its upper and lower limits, is correct.<sup>265</sup> Previous sentences have been described as a guide only,<sup>266</sup> and stating them as a ‘range’ does not establish a sentencing pattern.<sup>267</sup> It is ‘consistency in the application of relevant legal principles’ that is sought, ‘not numerical equivalence’.<sup>268</sup> Of more use are cases where the Court of Appeal has ‘laid down some relevant principle, delineated the yardsticks for particular offending, or re-sentenced’.<sup>269</sup>

Recording sentences for comparison is only useful if the ‘unifying principles’ revealed by those sentences are explained. The reasons why the sentences were fixed as they were must be clear<sup>270</sup> and it is important to properly characterise the offending conduct.<sup>271</sup>

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

The potential for inconsistency which derives from this complexity of purpose and from the breadth of relevant factual considerations is particularly acute when a radically new sentencing option such as the CCO becomes available. The addition of CCOs makes the sentencing task, in this sense, even more complex.<sup>272</sup>

In this case, a guideline judgment was issued as a means of giving courts guidance in the use of this new order (which at that time, did not contain any limits on its maximum duration, other than the maximum penalty for the offence being sentenced). Unlike other sentencing orders, there was found to be ‘no sufficient body of sentencing practice’ capable of providing a framework to promote consistency of approach.<sup>273</sup> The failure of sentencing courts to provide sufficient reasons in setting the duration of the orders also meant the bases upon which this decision was being reached lacked transparency.<sup>274</sup>

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

First, the promotion of consistency of approach is necessary to avoid the perception of injustice which may result from differences in the treatment of individual cases. Secondly, there is a need to promote public

<sup>262</sup> *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 262 CLR 428, 445 [50] (Kiefel CJ, Bell and Keane JJ).

<sup>263</sup> *R v Streatfield* (1991) 53 A Crim R 320, 325 (Thomas J, Cooper J agreeing).

<sup>264</sup> *R v Ryan and Vosmaer; Ex parte A-G (Qld)* [1989] 1 Qd R 188, 193 (Dowsett J).

<sup>265</sup> *Hili v The Queen* (2010) 242 CLR 520, 537 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1, 70-1 [304] (Simpson J, Matthews J agreeing).

<sup>266</sup> *R v Hoerler* (2004) 147 A Crim R 520, 532 [49] (Spigelman CJ), citing *R v Whyte* (2002) 55 NSWLR 252, 278-82 [168]-[189] and *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

<sup>267</sup> *R v Hoerler* (2004) 147 A Crim R 520, 531 [47] (Spigelman CJ). See also *R v Ross* [1996] QCA 411, 3, 5 (Moynihan, Mackenzie and Cullinane JJ), citing *R v Auberson* [1996] QCA 321, 7 (Fitzgerald P and de Jersey J, Pincus JA agreeing) and *R v Walsh* (Court of Criminal Appeal Queensland, Connolly, Williams and Ambrose JJ, 12 June 1986) 6. See also *Green v The Queen* [1999] NSWCCA 97 [24] (Barr J, Greg James J and Carruthers AJ agreeing).

<sup>268</sup> *Barbaro v The Queen* (2014) 253 CLR 58, 74 [40] (French CJ, Hayne, Kiefel and Bell JJ), citing *Hili v The Queen* (2010) 242 CLR 520, 535 [48]-[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>269</sup> *R v Bush (No. 2)* [2018] QCA 46, 12 [76]-[77] (Sofronoff P, Morrison JA and Douglas J).

<sup>270</sup> *Wong v The Queen* (2001) 207 CLR 584, 606 [59] as reproduced in *Hili v The Queen* (2010) 242 CLR 520, 537 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>271</sup> *R v Bush (No. 2)* [2018] QCA 46, 12 [77] (Sofronoff P, Morrison JA and Douglas J).

<sup>272</sup> *Boulton v The Queen* (2014) 46 VR 308, 319 [36] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>273</sup> *Ibid* 320 [43].

<sup>274</sup> *Ibid* 320 [44]. This point was raised in submissions made by the Director of Public Prosecutions and by Victoria Legal Aid and was accepted by the court.

understanding of, and confidence in, the use of the new sentencing option by promoting the principled application of it.<sup>275</sup>

The avoidance of ‘unjustifiable discrepancy in sentencing’ has been recognised by the High Court as ‘a matter of abiding importance to the administration of justice and to the community’, so that public confidence in the administration of justice is not eroded.<sup>276</sup>

## 5.7 Mandatory sentencing

### 5.7.1 What is a mandatory sentence?

Mandatory sentences generally involve Parliament prescribing ‘a minimum or fixed penalty for an offence’.<sup>277</sup> In Queensland, mandatory sentencing can take various forms, such as mandating non-parole periods, prescribing minimum penalties to be imposed, driving disqualification periods, directing that community service must be served as well as any punishment, and mandating the circumstances where a court can set only a parole release or eligibility date. Current offences and mandatory penalties to which these apply are summarised in Appendix 4.

The ALRC has identified, ‘[m]andatory sentencing can take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing’.<sup>278</sup>

The Queensland Parole System Review Report considered mandatory non-parole periods that apply in sentencing in Queensland under Part 9A of the PSA (commonly referred to as the ‘serious violent offence (SVO)’ scheme), and recommended that ‘where a sentence is to be imposed for an offence that presently carried a mandatory non-parole period, the sentencing judge should have the discretion to depart from that mandatory period’ (Recommendation 7).<sup>279</sup>

This recommendation was not supported by the Queensland Government at that time on the basis that ‘the potential risk to community safety by implementing Recommendation 7 outweighs the benefits it could bring to the new parole system’.<sup>280</sup>

The QPU, in its submission to the Council, supported mandatory sentences but also suggested an exceptional circumstances exception:

The QPU believes there is a place for mandatory sentencing. In [particular], it has long been QPU policy to seek Government commitment to introducing mandatory imprisonment for assaults on police officers and emergency service workers, including hospital staff and professionals.

The QPU does however recognise the importance of maintaining a discretion in the Courts to properly exercise their sentencing options and arrive at the most appropriate sentence for each individual. Particularly, the QPU recognises there will be cases where the imposition of a mandatory sentence would create a real injustice.

The Courts have adopted an exceptional circumstances test in some instances where the sentencing discretion requires departure from precedent or comparative sentences. A similar test is embodied in the PSA, s 9(4)(b)<sup>281</sup> for example.

The QPU would support a general provision in the PSA which provided that in sentencing an individual for an offence which contains a mandatory provision (other than one which cannot be mitigated, such as murder), the Court must impose such sentence *unless there are exceptional circumstances which justify*

<sup>275</sup> Ibid 319 [37] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>276</sup> *Lowe v The Queen* (1984) 154 CLR 606, 611 (Mason J).

<sup>277</sup> Law Council of Australia, *Mandatory Sentencing: Factsheet* (No. 1405, undated).

<sup>278</sup> Australian Law Reform Commission (n 145) 538–9 [21.54] (citations omitted).

<sup>279</sup> Queensland Parole System Review (n 10).

<sup>280</sup> Queensland Government (n 11) 3.

<sup>281</sup> Section 9(4)(b) of the *Penalties and Sentences Act 1992* (Qld) provides: ‘In sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years ... the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.’

*imposing an alternate sentence. Such provision should apply to all offences which contain a mandatory sentencing provision, whenever enacted.*<sup>282</sup>

The Council has previously raised concerns about the impact of the SVO scheme on sentencing practices for manslaughter where the death of a child has been caused, which are outlined in its *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report* released by the Council last year.<sup>283</sup>

While a review of mandatory sentences was not specifically requested under the current Terms of Reference, mandatory provisions are relevant in the context of the Council's task of reviewing sentencing and parole legislation 'to identify any anomalies in sentencing or parole laws that create inconsistency or constrain the available sentencing options available to a court and advise how these anomalies could be removed or minimised'.<sup>284</sup>

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

For example, section 91 of the PSA states that a court can make a probation order if it convicts an offender 'of an offence punishable by imprisonment or a regulatory offence'. In relation to some offences, there has been confusion regarding whether specific offences exclude probation as a sentencing option or not.<sup>285</sup>

The mandatory sentences that apply under the SVO regime, mandatory cumulative imprisonment for prescribed offences committed on a parole order, and specific offences of failing to stop and weapons offences are examined below. Mandatory community service and graffiti orders are also discussed as examples of mandatory sentencing under the PSA that require specific orders to be made for prescribed offences.

### 5.7.2 Arguments for and against mandatory sentencing

Arguments in favour of mandatory sentencing include that mandatory sentences:

- promote sentencing consistency by avoiding unduly lenient or harsh sentences and increase transparency in sentencing;
- provide more certainty about the sentencing outcome as judicial officers generally have very limited or no ability to depart from the mandatory sentence;
- deter individuals from offending; and
- where the mandatory penalty is imprisonment, reduce repeat offending due to the person being imprisoned.<sup>286</sup>

Arguments against mandatory sentencing include that mandatory sentences:

- increase the severity of sentences imposed, with no deterrent benefit;<sup>287</sup>

<sup>282</sup> Submission 10 (Queensland Police Union of Employees) 3–4 (emphasis added).

<sup>283</sup> Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child – Final Report* (2018) xxxiv, xxxix (Advice 3) and 9.4.4.

<sup>284</sup> Terms of Reference, 2 (Appendix 1).

<sup>285</sup> For a discussions of the operation of this provision in the context of mandatory sentencing provisions, see 'Evasion offence and the PSA framework' at 5.7.4 of this paper.

<sup>286</sup> Australian Law Reform Commission (n 145) 539–40 [21.58] citing Mirko Bagaric, 'Consistency and Fairness in Sentencing: The Splendour of Fixed Penalties' (2000) 2 *California Criminal Law Review* 1 and Mirko Bagaric, 'What Sort of Mandatory Penalties Should We Have?' (2002) 23 *Adelaide Law Review* 113.

<sup>287</sup> Anthony N Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2/3) *Osgoode Hall Law Journal* 287, 291 citing Michael Tonry, 'Mandatory Penalties' in Michael Tonry (ed), *Crime and Justice: A Review of Research*, vol 16 (Chicago: University of Chicago Press, 1992) 243; Daniel S Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-first Century' in Michael Tonry (ed), *Crime and Justice: A Review of Research* vol 23 (Chicago: University of Chicago Press, 1998) 1.

- do not allow the court to take into account the individual circumstances of the case, which can result in injustice;<sup>288</sup>
- give discretion to police and prosecuting authorities to decide which charge to apply,<sup>289</sup> which, unlike the sentencing process, is less transparent and open to external scrutiny — such as through the appeals process;
- can lead to inconsistencies in sentences and are often not effective in deterring offenders from offending;<sup>290</sup>
- can disproportionately affect particular groups in society;<sup>291</sup>
- contravene sentencing principles and international human rights standards;<sup>292</sup> and
- departs from the separation of powers doctrine.<sup>293</sup>

There are also concerns that mandatory sentencing schemes may also raise constitutional issues. In particular whether ‘the scope and severity of [such schemes are] such that the sentencing discretion effectively [has] passed from the judiciary to the legislative arm of government’.<sup>294</sup>

The ALRC has recommended against the imposition of mandatory sentences in relation to federal offences,<sup>295</sup> and recommended against mandatory imprisonment for federal and state offenders because it has a disproportionate impact on Aboriginal and Torres Strait Islander people.<sup>296</sup>

The ALRC has cautioned:

Prescribing mandatory terms of imprisonment for a federal offence is generally incompatible with sound practice and principle in this area. Mandatory sentencing has the potential to offend against the principles of proportionality, parsimony and individualised justice. In particular, the ALRC considers that the judiciary should retain its traditional sentencing discretion to enable justice to be done in individual cases.

<sup>288</sup> Australian Law Reform Commission (n 145) 540 [21.59] citing George Zdenkowski, ‘Sentencing Trends: Past Present and Prospective’ in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 175; Neil Morgan, ‘Mandatory Sentences in Australia: Where Have We Been and Where are We Going?’ (2000) 24 *Criminal Law Journal* 164, 176–9; Neil Morgan, ‘Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities’ (2002) 23 *Adelaide Law Review* 141, 151. See also Anthony Gray, ‘Mandatory Sentencing Around the World and the Need for Reform’ (2017) 20(3) *New Criminal Law Review* 391, 395.

<sup>289</sup> Ibid. See also Kendra Roth, ‘Judicial Sentencing for Sexual Assault: Why Mandatory Minimum Penalties are Not the Answer’ (2017) *The Liberty Lawyer* 10, 12; Gray (n 288) 414–5; Cassia Spohn, ‘Criticisms of Mandatory Minimums’ in Andrew von Hirsh, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 279, 279–81.

<sup>290</sup> Ibid citing Declan Roche, *Mandatory Sentencing* (Trends and Issues in Crime and Criminal Justice No. 138, Australian Institute of Criminology, 1999) 4–6. See also Morgan, ‘Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities’ (n 288) 148–9; Sentencing Task Force, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (VGPO, 1989) 185–6; Michael Tonry, ‘The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings’ (2009) 38 *Crime and Justice* 65, 68; Judith Bessant, ‘Australia’s Mandatory Sentencing Laws, Ethnicity and Human Rights’ (2001) 8 *International Journal on Minority and Group Rights* 369, 378–80; Gray (n 288), 421–4; An Doob and CM Webster, ‘Studies of the Impact of New Harsh Sentencing Regimes’ in von Hirsh, Ashworth and Roberts (eds) (n 289) 49, 50–1.

<sup>291</sup> Ibid citing Morgan ‘Mandatory Sentences in Australia: Where Have We Been and Where are We Going?’ (n 288) 179; Morgan, ‘Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities’ (n 288) 153. See also Gray (n 288) 415.

<sup>292</sup> Ibid citing Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (2002) 286–8; Human Rights and Equal Opportunity Commission, *Mandatory Detention Laws in Australia* <www.hreoc.gov.au>; United Nations Commissioner for Human Rights and UNICEF, *Setting Out the International Standards on Mandatory Sentencing of Juveniles* <www.dfat.gov.au/media/releases/foreign/2000/fa014\_2000\_att.html>; Kate Galloway and Allan Ardill, ‘Queensland: A Return to the Moonlight State’ (2014) 39 *Alternative Law Journal* 3; Bessant (n 290) 376–8.

<sup>293</sup> Gray (n 288) 427–30; Tammy Solonec, ‘“Tough on Crime”: Discrimination by Another Name — The Legacy of Mandatory Sentencing in Western Australia’ (2015) 8(18) *Indigenous Law Bulletin* 7, 8.

<sup>294</sup> Australian Law Reform Commission (n 145) 539 [27.57].

<sup>295</sup> Ibid 49, Recommendation 21–3.

<sup>296</sup> Australian Law Reform Commission (n 21) 15, Recommendation 8–1.

While the imposition of substantial penalties may be appropriate in relation to offences like people smuggling, it is important that the legislature not prejudice the appropriate minimum penalty in legislation without regard to the facts of individual cases.

The maintenance of individualised justice and broad judicial discretion are essential attributes of our criminal justice system, outweighing the potential deterrent effect that mandatory sentencing might have. The ALRC thus recommends that the Australian Government take steps to ensure that federal criminal offence provisions do not prescribe mandatory minimum terms of imprisonment.<sup>297</sup>

The Law Council of Australia, in considering mandatory sentencing, has similarly raised concerns that:

[T]here is a lack of convincing evidence to suggest that the justifications often given for mandatory sentences – retribution, effective deterrence, incapacitation, denunciation and consistency – achieve the set aim. Instead, mandatory sentencing regimes can produce unjust results with significant economic and social costs without a clear and directly attributable corresponding benefit in crime reduction. Further, mandatory sentencing scheme undermine community confidence in judges to administer justice and deliver appropriate sentencing outcomes. This is not supported by evidence which shows that when members of the public are fully informed about the particular circumstances of the case, they support judges' sentences as appropriate.<sup>298</sup>

### 5.7.3 Serious Violent Offence (SVO) scheme

#### Why the regime was introduced

The mandatory non-parole period that applies to a serious violent offence (SVO), as listed in schedule 1 of the PSA in certain defined circumstances, was introduced in 1997 with the intention of ensuring that sentences reflected community expectations.<sup>299</sup> The Attorney-General explained that the approach was based upon 'a reasonable community expectation that the sentence imposed will reflect the true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it'.<sup>300</sup>

Under the SVO regime, there is no discretion to reduce the non-parole period if the sentence imposed is 10 years or more for an offence listed in schedule 1. The offender must serve 80 per cent or 15 years of the sentence (whichever is less) before applying for parole. There is a discretion to make an SVO declaration if the sentence is less than 10 years. However, the PSA does not provide guidance on what factors should be considered by a judge in relation to exercising the discretion to make a declaration.<sup>301</sup> The exception to this is in the case of an offence involving the use or attempted use of violence against a child under 12 years, or that caused the death of a child under 12 years, where section 161B(5) provides the sentencing court must treat the age of the child as an aggravating factor.

<sup>297</sup> Australian Law Reform Commission (n 145) 541–2 [21.63]–[21.65] (citations omitted).

<sup>298</sup> Law Council of Australia (n 82) 46 [192] citing Kate Warner et al, 'Public Judgement on Sentencing: Final results of the Tasmania Jury Study' (Trends and Issues in Crime and Criminal Justice No. 407, Australian Institute of Criminology, 2011) 3 as to the final point.

<sup>299</sup> Queensland Parole System Review (n 10) 103 [511].

<sup>300</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice) cited in Queensland Parole System Review (n 10) 103 [511].

<sup>301</sup> The Court of Appeal has provided guidance: *R v McDougall* [2007] 2 Qd R 87; *R v Smith* [2019] QCA 33; *R v Bojovic* [2000] 2 Qd R 183; *R v Collins* [2000] 1 Qd R 45; *R v Eveleigh* [2003] 1 Qd R 398.

### Unintended consequences

A review of cases where an offender has been declared to be convicted of an SVO indicates that head sentences are being reduced to take into account a plea of guilty and other matters in mitigation.<sup>302</sup> For example, in *R v Castner*<sup>303</sup> the Court of Appeal observed:

The difficulty for the applicant is that her Honour considered both the applicant's rehabilitation and remorse in her reasons and indeed considered that a sentence in the realm of 12 to 13 years' imprisonment could have been appropriate if it were not for the mitigating circumstances. Her Honour accepted the mitigating circumstances and moderated the sentence imposed to ten years.<sup>304</sup>

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. The Council has previously commented on the potential impact of SVOs in respect of child manslaughter and identified this as an important area for future investigation.<sup>305</sup> The Council considers the operation of the SVO regime merits a separate review and for this reason did not canvass options in relation to its operation as part of the review.

A mandatory non-parole period can also have consequences for the community, as offenders subject to these regimes will spend less of their sentence being supervised in the community and therefore have less time to receive supervision while they reintegrate into the community.<sup>306</sup>

Not only are SVO-declared offenders eligible to receive less time supervised as they reintegrate into the community after serving a substantial period in custody, the corrective services policy does not permit offenders sentenced to life imprisonment or an SVO to transition to low security.<sup>307</sup> The Queensland Parole System Review observed this can be counterproductive 'as nearly all prisoners will be discharged to the community at some point' and that '[i]t is important that prisoners are managed through a careful program of reintegration'.<sup>308</sup>

This recommendation was not accepted by the Queensland Government, which cited safety concerns and the previous escape from a low-security facility of a convicted murderer.<sup>309</sup> The most recent Annual Report released by QCS notes there were seven escapes from low-security prisons in the financial year 2017–2018.<sup>310</sup>

<sup>302</sup> For example, a sentencing court at first instance reduced the sentence from 12–13 years' imprisonment to 10 years' imprisonment: *R v Castner* [2018] QCA 265, 5 [15] (Brown J, Philippides JA and Ryan J agreeing); a sentencing court considered the range was from eight to 10 years' imprisonment and imposed eight years' imprisonment taking into account the SVO: in *R v McGuire* [2017] QCA 250, 14 [82] (Boddice J); a sentencing court reduced the sentence from 16 years' imprisonment to 14 years' imprisonment to take into account the plea of guilty: *R v George* [2001] QCA 135, 9 (White J). See also Eric Colvin, 'Sentencing Principles in the High Court and PSA' (2003) 3 *Queensland University of Technology Law and Justice Journal* 86, 96.

<sup>303</sup> *R v Castner* [2018] QCA 265.

<sup>304</sup> *Ibid* 5 [15] (Brown J, Philippides JA and Ryan J agreeing).

<sup>305</sup> Queensland Sentencing Advisory Council (n 283) xxxiv, xxxix (Advice 3) and 9.4.4.

<sup>306</sup> On this point, see *R v Clark* [2016] QCA 173, 3–4 [6] (McMurdo P). The 2013 amendments referred to have since been repealed and the 80 per cent non-parole period no longer applies to offenders sentenced to a term of imprisonment for trafficking. However, the offence is still listed in sch 1 of the *Penalties and Sentences Act 1992* (Qld) for the purposes of an SVO declaration.

<sup>307</sup> Queensland Parole System Review (n 10) 184 [916].

<sup>308</sup> *Ibid* 184 [919].

<sup>309</sup> Queensland Government (n 11) 11 — in response to Recommendation 58 of the Queensland Parole System Review.

<sup>310</sup> Queensland Corrective Services, *Annual Report: 2017–18* (2018) 43, n 2: 'Low security correctional centres do not have razor wire security fences like high security facilities. Escape risks from low security facilities are managed through a thorough assessment of prisoners to determine suitability before transfer to these facilities. QCS continues to enforce strict requirements to be assessed as suitable for low custody. Prisoners who escape from lawful custody face additional criminal sanctions, such as being charged with the offence of escape from lawful custody, and are returned to a high security facility for the remainder of their sentence.' Note 12 reports that the daily average prison population was 7,962 prisoners in high security and 668 prisoners in low security.

### 5.7.4 Mandatory penalties

#### Cumulative order of imprisonment and the PSA framework

Similarly to head sentence reductions where courts declare SVOs, there has been criticism that section 156A of the PSA is producing a similar anomaly. Section 156A of the PSA operates where an offender is convicted of an offence (or of counselling or procuring the commission of, or attempting or conspiring to commit, an offence) against a provision mentioned in schedule 1 of the PSA. If the offence is committed while the prisoner is serving a term of imprisonment<sup>311</sup> the sentence imposed must be served cumulatively with any other term of imprisonment.

Whilst the sentence must be cumulative, under section 9 of the PSA, a court ‘must’ have regard to ‘sentences already imposed on the offender that have not been served’ and ‘sentences that the offender is liable to serve because of the revocation of orders made’.<sup>312</sup>

The Court of Appeal has observed that the provision has ‘the effect of distorting standard sentencing tariffs by encouraging lower head sentences with a view to avoiding their stringent consequences’.<sup>313</sup> However, the need to avoid a crushing sentence is important to both the offender and the community, as discussed in *R v Hill*:<sup>314</sup>

An excessive sentence which is ‘crushing’ upon the applicant risks his ceasing attempts to improve his education, address the underlying causes of his criminality and generally rehabilitate himself. It risks producing a prisoner who, upon his release, poses a greater danger to the community than a prisoner who is not completely institutionalised.<sup>315</sup>

Cases dealing with section 156A in the context of court ordered parole and the effect of its operation with other provisions regarding parole cancellation are discussed in section 11.9.7.

Similar to section 156A of the PSA, if imprisonment is ordered for an offence under section 33 of the *Bail Act 1980* (Qld), this must be served cumulatively, upon any other term of imprisonment imposed or being served at the time of sentence. Section 33 provides for an offence where a person fails to surrender in accordance with their undertaking and is apprehended under a warrant. It is a defence if a person can satisfy the court that there was a reasonable cause for failing to appear and the person has surrendered as soon as practicable.<sup>316</sup> If a person is sentenced to imprisonment for the offence, section 33(4) of the *Bail Act 1980* (Qld) provides:

- (4) Where a court in making an order under this section directs that a term of imprisonment (the **first mentioned term of imprisonment**) be imposed (whether in the first instance or in default payment of a fine) upon a defendant then, notwithstanding any Act, law or practice, the following applies—
  - (a) the first mentioned term of imprisonment shall take effect from the expiration of the deprivation of liberty of the defendant pursuant to a term of imprisonment—
    - (i) imposed upon the defendant pursuant to this section or a law of the Commonwealth or the State at the same time as the first mentioned term of imprisonment is imposed; or
    - (ii) which the defendant is serving pursuant to this section or a law of the Commonwealth or the State at the time the first mentioned term of imprisonment is imposed;
  - (b) if during the time the defendant is serving the first mentioned term of imprisonment a further term of imprisonment is imposed upon the defendant pursuant to a law of the Commonwealth or the State, the further term of imprisonment shall take effect from the expiration of the deprivation of liberty of the defendant pursuant to the first mentioned term of imprisonment;

<sup>311</sup> Other circumstances include being released on post-prison community-based release; a leave of absence from a term of imprisonment or at large after escaping: *Penalties and Sentences Act 1992* (Qld) s 156A(1)(b).

<sup>312</sup> *Penalties and Sentences Act 1992* (Qld) ss 9(2)(l)–(m).

<sup>313</sup> *R v Moore; Ex parte A-G (Qld)* (2002) 128 A Crim R 527, 527 [2] (McPherson JA).

<sup>314</sup> [2017] QCA 177.

<sup>315</sup> *Ibid* 9 [47] (Applegarth J, Sofronoff P and Atkinson J agreeing).

<sup>316</sup> *Bail Act 1980* (Qld) s 33(2).

- (c) if before the defendant commences to serve the first mentioned term of imprisonment a further term of imprisonment is imposed upon the defendant pursuant to a law of the Commonwealth or the State, the first mentioned term of imprisonment shall take effect from the expiration of the deprivation of liberty of the defendant pursuant to the further term of imprisonment.

The effect of this provision is that a period of imprisonment imposed for failing to appear is cumulative. This may cause confusion where a sentence of imprisonment under section 33 of the *Bail Act 1980* (Qld) is suspended, as discussed in *Mallory v Commissioner of Police*:<sup>317</sup>

Putting to one side for the moment what the effect of section 154(1)(b) [of the *Penalties and Sentences Act 1992* (Qld), 'Calculation of term of imprisonment'] is, as to when a term of imprisonment on a summary conviction starts, it is clear that for a cumulative order of imprisonment, the term of imprisonment does not start until the end of the period of imprisonment the offender is serving or has been sentenced to serve.

That being the case, when you go back to section 144 [of the *Penalties and Sentences Act 1992* (Qld)], dealing with when sentences of imprisonment may be suspended, that section gives the court power to order that a term of imprisonment be suspended but, under subsection 144(5), requires that the court must state an operational period during which the offender must not commit another offence punishable by imprisonment if they are to avoid being dealt with under section 146 for the suspended sentence. And subsection 144(6) provides that the operational period starts on the day the order is made. So there is an anomaly there where a purported operational period imposed on the day of sentence starts on the day of sentence but, in fact, the cumulative sentence does not start until sometime in the future, which seems to me to be problematic.<sup>318</sup>

### Evasion offence and the PSA framework

If an offender is convicted of an evasion offence under section 754 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA)<sup>319</sup> the mandatory minimum penalty that applies is 50 penalty units (which currently equates to \$6,527)<sup>320</sup> or 50 days' imprisonment served wholly in a corrective services facility. This constrains sentencing discretion.

First, the provision departs from the general sentencing principle that if an offence does not result in physical harm to another person, a period of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable.<sup>321</sup>

The only available option for an offender to remain in the community is to impose the mandatory minimum fine. Where a fine is imposed, a court 'must' take into account the financial circumstances of the offender, and the nature of the burden that the payment of the fine will be on the offender.<sup>322</sup> A court cannot give practical consideration to this when imposing a fine for a section 754 offence, as it is constrained by imposing the mandatory minimum amount. In addition, there can be serious flow-on consequences for an offender for non-payment, including imprisonment.<sup>323</sup>

<sup>317</sup> [2017] QDC 54.

<sup>318</sup> Ibid 7 [25]–[26] (Bowskill QC DCJ).

<sup>319</sup> An evasion offence is where 'a police officer using a police service motor vehicle gives the driver of another motor vehicle a direction to stop ... the driver of the motor vehicle must stop the motor vehicle as soon as reasonably practicable if a reasonable person would stop the motor vehicle in the circumstances': *Police Powers and Responsibilities Act 2000* (Qld) ss 754(1)–(2).

<sup>320</sup> *Penalties and Sentences (Penalties Unit Value) Amendment Regulation 2018* (Qld). A penalty unit was \$130.55 per unit: 50 x 130.55 = \$6,527 (rounded down). This increased to \$133.45 from 1 July 2019. See *Penalties and Sentences Regulation 2015* (Qld).

<sup>321</sup> *Penalties and Sentences Act 1992* (Qld) s 9(2)(a).

<sup>322</sup> Ibid s 48.

<sup>323</sup> If the fine is referred to the State Penalties Enforcement Registry (SPER) under the *State Penalties Enforcement Act 1999* (Qld) (SPEA). Under SPEA, there can be consequences for non-payment such as: suspension of the person's driver licence (pt 5 div 7); seizure or immobilising of a person's vehicles (pt 5 div 7A subdiv 1); or enforcement by imprisonment (pt 6).

Therefore, by imposing a fine in an amount for which a court has no discretion to reduce, an offender may be subject to severe consequences or imprisoned without any intervention by the sentencing court as a consequence of poverty, despite the court considering that imprisonment was not warranted when the fine was imposed.

Secondly, a review of Supreme and District Court decisions illustrates there is uncertainty about the intended interaction of this provision with other general provisions that exist under the PSA. Under section 91 of the PSA, a court can make a probation order 'if a court convicts an offender of an offence punishable by imprisonment'. As an offence under section 754 of the PPRA is punishable by either a fine or imprisonment, a number of District Court decisions have ruled that probation is an available sentencing option.<sup>324</sup> In contrast, one District Court decision has ruled that it is not.<sup>325</sup>

The different interpretations about whether section 91 of the PSA applies when sentencing an offender under section 754 of the PPRA means that magistrates (who deal most often with this offence<sup>326</sup>) have conflicting decisions on the sentencing options available to them when sentencing for this offence under the PPRA.<sup>327</sup> This uncertainty can lead to inconsistent sentences and anomalies.

A review of data for evasion offence shows:

- between 2006–07 and 2017–18 there were 8,171 sentenced cases involving an evasion offence;
- of these, 1,574 offenders identified as Aboriginal and/or Torres Strait Islander (19.4%) and 6,528 identified as non-Indigenous (80.6%);<sup>328</sup>
- only 1,439 cases reported an evasion offence as the MSO, indicating that the offence is more often sentenced with another offence which receives a higher penalty; and
- the number of evasion offences sentenced each financial year has increased almost every year, increasing by 331 per cent from 314 sentenced offences in 2006–07 to 1,352 in 2017–18 (and peaking at 1,410 in 2016–17).

Figure 5-1 shows that for offenders sentenced for an evasion offence as the MSO committed on or after 17 October 2013 (N=852), 45.9 per cent received a fine, 29.1 per cent received an imprisonment sentence, 15.7 per cent received probation, and 5.8 per cent received community service.

<sup>324</sup> The most recent decision is *Campbell v Galea* [2019] QDC 53. See also *Commissioner of Police Service v Magistrate Spencer* [2014] 2 Qd R 23; *Forbes v Jingle* [2014] QDC 204; *Cronin v Commissioner of Police* [2016] QDC 63; *Sbresni v Commissioner of Police* [2016] QDC 18; *Skinner v The Commissioner of Police* [2016] QDC 138.

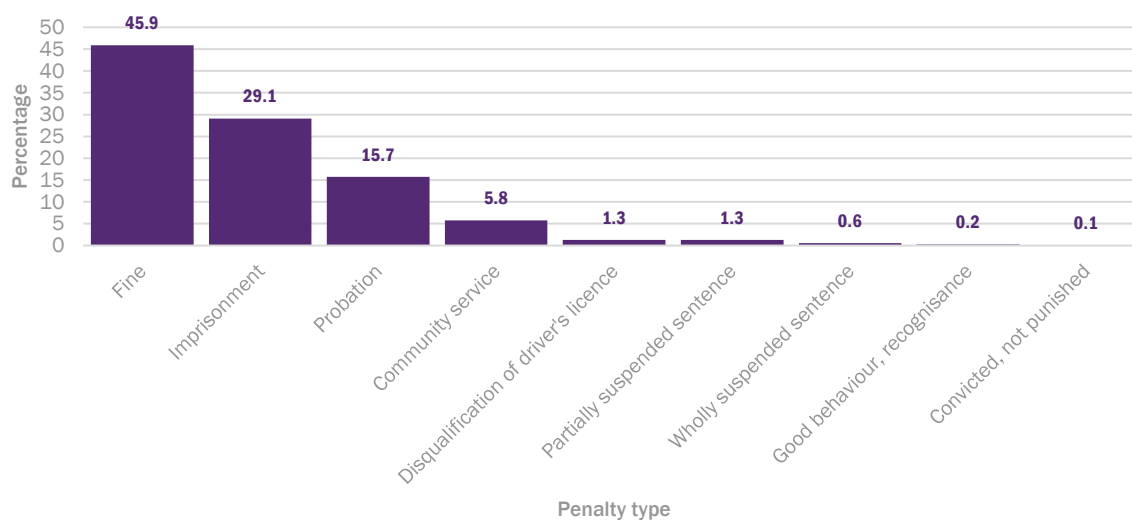
<sup>325</sup> *Doig v The Commissioner of Police* [2016] QDC 320.

<sup>326</sup> Data collected show that where the evasion offence is the most serious offence (MSO) Magistrates Courts will sentence 99.9 per cent of all offenders. Where the evasion offence is not the MSO, Magistrates Courts will sentence 91.2 per cent, the District Court will sentence 7.4 per cent and the Supreme Court will sentence 1.3 per cent together with other offences receiving a more serious sentence.

<sup>327</sup> As discussed by Long SC, DCJ in *Campbell v Galea* [2019] QDC 53, 26 [58].

<sup>328</sup> In a further 69 cases, the status was 'unknown', so they have not been included.

**Figure 5-1: Penalty type for evasion offence (MSO), where offence committed on or after 17 October 2013<sup>329</sup>**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) 'Disqualification of driver's licence' appears when that was the most serious sentence imposed reported in the data for the offence. If an offender received another sentence order and a driving disqualification, only the sentence order will be reported in the figure.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### Weapons offences and the PSA framework

Mandatory minimum penalties for some weapons offences were introduced in 2013.<sup>330</sup> Similar to the evasion offence, the District Court in interpreting these provisions in the context of the current provisions of the PSA has determined that a community-based order is available for offences that attract mandatory imprisonment under the *Weapons Act 1990* (Qld).<sup>331</sup>

A review of the data for weapons offences, which are subject to the mandatory minimum imprisonment regime,<sup>332</sup> illustrate the penalty types that are being imposed where a weapons offence is the MSO.

There have only been 54 sentences where the offence was an MSO. Figure 5-2 shows that 79.6 per cent (n=43) were sentenced to imprisonment, 7.4 per cent (n=4) received probation, and 5.6 per cent (n=3) received a fine.

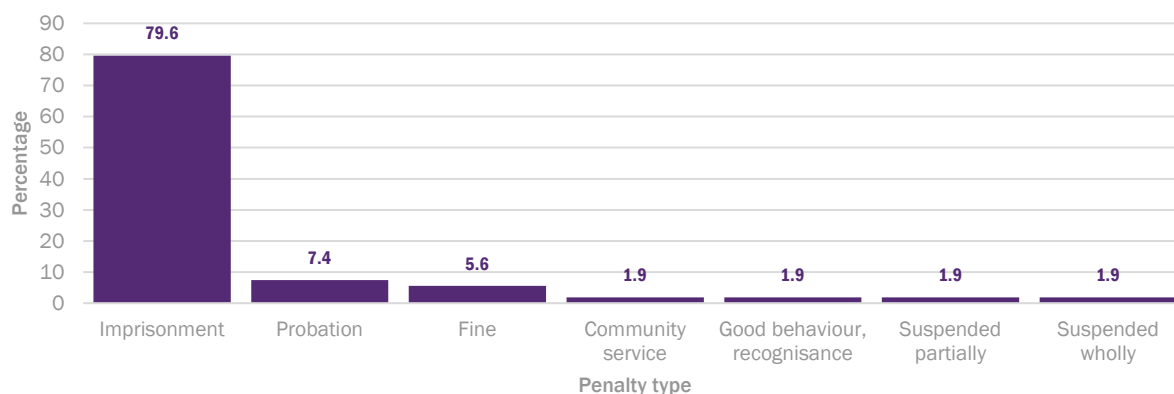
<sup>329</sup> For these offences, the period from 17 October 2013 is used because this is when the wording of s 754 of the *Penalties and Sentence Act 1992* (Qld) was amended to prescribe the mandatory 'minimum of 50 penalty units or 50 days imprisonment served wholly in a corrective services facility'. See *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 64.

<sup>330</sup> *Weapons and Other Legislation Amendment Act 2012* (Qld).

<sup>331</sup> *R v Ham* [2016] QDC 255, 5 [16] (Chowdhury DCJ): 'the minimum penalty prescribed by s 50B(1)(e) [of the *Weapons Act 1990*] does not exclude the operation of ss. 91 and 101 *Penalties and Sentences Act 1992*. By extension the same ruling applied to the minimum penalties provided by s. 50(1)(d) *Weapons Act 1990*' (emphasis added). See Appendix 4 for a list of offences and mandatory minimum penalties.

<sup>332</sup> *Weapons Act 1990* (Qld) ss 50(1); 50(1); 50B(1); 65(1).

**Figure 5-2: Penalty type for mandatory minimum weapons offences (MSO) (where offence occurred on or after 1 February 2013)<sup>333</sup>**



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

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### **Mandatory community service and the PSA framework**

Mandatory community service orders were introduced in the PSA in 2014.<sup>334</sup> A sentencing court must make a community service order for an offender (whether or not it also makes another order) for a ‘prescribed offence’ (affray, grievous bodily harm, wounding, common assault, certain types of serious assault, and assaulting or obstructing police) committed with a circumstance of aggravation (committed in a public place while adversely affected by an intoxicating substance).<sup>335</sup> This ‘does not apply if the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with a community service order’.<sup>336</sup>

If the person is also imprisoned, the community service order is suspended until the person is released, and extended by the period of time detained.<sup>337</sup> Unlike all other community-based orders in the PSA (except graffiti removal orders), an offender is not required to consent to the making of the order under the mandatory community-based order regime.<sup>338</sup> If the offender does not comply and the order is revoked and the offender resentenced,<sup>339</sup> it is mandatory for the court to record a conviction.<sup>340</sup>

If a court determines that, having considered the relevant sentencing principles<sup>341</sup> and for reasons other than a physical, intellectual or psychiatric disability,<sup>342</sup> a community-based order is not appropriate, it must still make the community service order. For example, the offence may not otherwise warrant community service, the offender may have served time on pre-sentence custody, which is in itself a just sentence for the

<sup>333</sup> This is the date of commencement of the mandatory minimum penalties introduced in the *Weapons and Other Legislation Amendment Act 2012* (Qld) s 2.

<sup>334</sup> Introduced through the *Safe Night Out Legislation Amendment Act 2014* (Qld). See *Penalties and Sentences Act 1992* (Qld) pt 5 div 2 subdiv 2; s 120A.

<sup>335</sup> *Penalties and Sentences Act 1992* (Qld) s 108B.

<sup>336</sup> *Ibid* s 108B(2A).

<sup>337</sup> *Ibid* s 108D.

<sup>338</sup> *Ibid* s 106(2).

<sup>339</sup> *Ibid* s 125–126.

<sup>340</sup> *Ibid* s 12(6).

<sup>341</sup> *Ibid* s 9.

<sup>342</sup> *Ibid* s 108B(2A): if a court is satisfied that, because of the offender’s physical, intellectual or psychiatric disability, the offender is not capable of complying with a community service order.

offending, or the offender may not be a resident of Queensland or have other personal circumstances that would make it difficult to comply with an order and supervision.<sup>343</sup>

### Graffiti removal order and the PSA framework

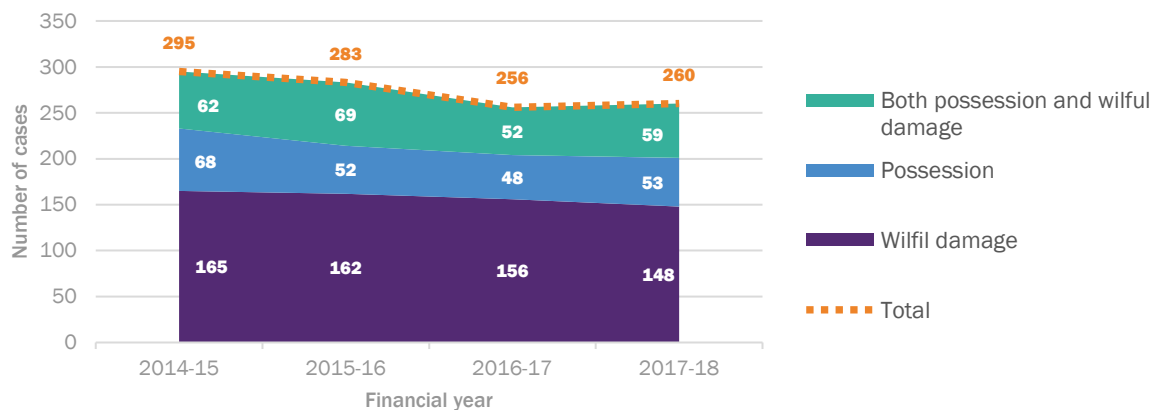
Graffiti removal orders, discussed earlier in this chapter at section 5.4.3, are a separate form of mandatory order which mimic community service and must be made if a court convicts an offender of a 'graffiti offence' (possession of a graffiti instrument<sup>344</sup> or wilful damage by graffiti<sup>345</sup>).<sup>346</sup> The mandatory graffiti removal order was introduced on 27 September 2013.<sup>347</sup>

There are similar provisions requiring imposition of the order irrespective of whether any other order is made, suspension and extension in the case of imprisonment and the discretion to not make the order due to inability to comply because of a disability.

As discussed above, if a court determines that, having considered the relevant sentencing principles<sup>348</sup> and for reasons other than a physical, intellectual or psychiatric disability,<sup>349</sup> a graffiti removal order is not appropriate, it must still make the graffiti removal order.

Data obtained from 2014–15 to 2017–18 show that there were 1,094 sentencing events for a graffiti offence (whether or not it was the most serious offence) that attracted a mandatory graffiti removal order. There were 631 sentences for wilful damage by graffiti (57.7%), 221 sentences for possession of a graffiti instrument (20.2%), and the remaining 242 sentences were for both wilful damage by graffiti and possession at the same court event (22.1%). Figure 5-3 shows the breakdown of graffiti offences sentenced to a graffiti removal order for each financial year.

**Figure 5-3: Graffiti offences sentenced by type of offence, 2014–15 to 2017–18**



Source: QGS0, Queensland Treasury — Courts Database, extracted September 2018.

Note: Excludes offenders who committed a graffiti offence prior to introduction of the mandatory graffiti removal order on 27 September 2013.

A graffiti offence was the most serious offence sentenced at 70.0 per cent of court events involving a graffiti offence (n=766). In the remaining 328 court events, another offence was more serious than the graffiti offence (30.0%), as shown in Figure 5-4.

<sup>343</sup> Ibid s 103: General requirements of community service order include report to and receive visits from an authorised corrective services officer, notify a change in the offender's place of residence, must not leave or stay out of Queensland without permission.

<sup>344</sup> *Summary Offences Act 2005* (Qld) s 17.

<sup>345</sup> *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code') s 469 cl 9.

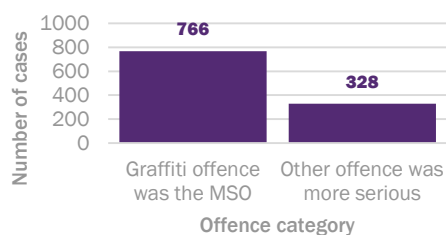
<sup>346</sup> *Penalties and Sentences Act 1992* (Qld) s 110A.

<sup>347</sup> *Criminal Law and Other Legislation Amendment Act 2013* (Qld).

<sup>348</sup> *Penalties and Sentences Act 1992* (Qld) s 9.

<sup>349</sup> Ibid s 110A(3): if a court is satisfied that, because of a physical, intellectual or psychiatric disability, the offender is not capable of complying with a graffiti removal order.

**Figure 5-4: Proportion of cases in which a graffiti offence was the most serious offence, 2014–15 to 2017–18**

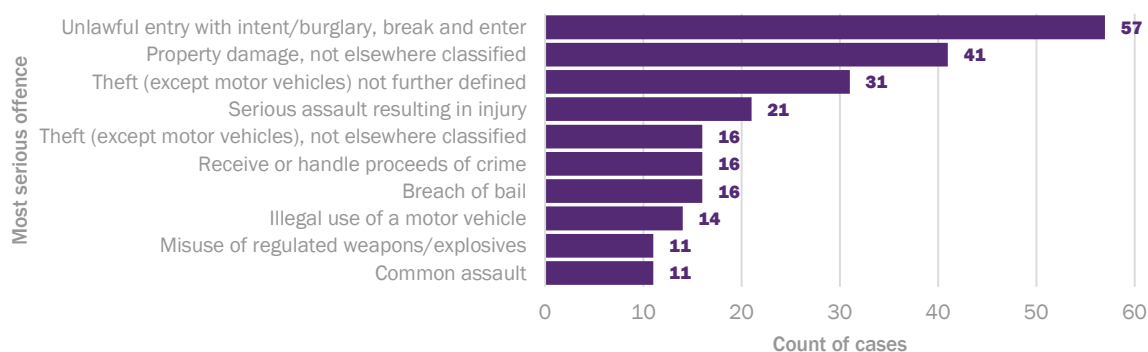


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Excludes offenders who committed a graffiti offence prior to introduction of the mandatory graffiti removal order on 27 September 2013.

Figure 5-5 shows the top 10 most serious offences that were sentenced alongside a graffiti offence in cases where the graffiti offence was not the most serious offence (MSO). The most common MSO was unlawful entry (n=57), followed by property damage (n=41) and theft (n=31).

**Figure 5-5: Top 10 most serious non-graffiti offences sentenced alongside a graffiti offence, 2014–15 to 2017–18**

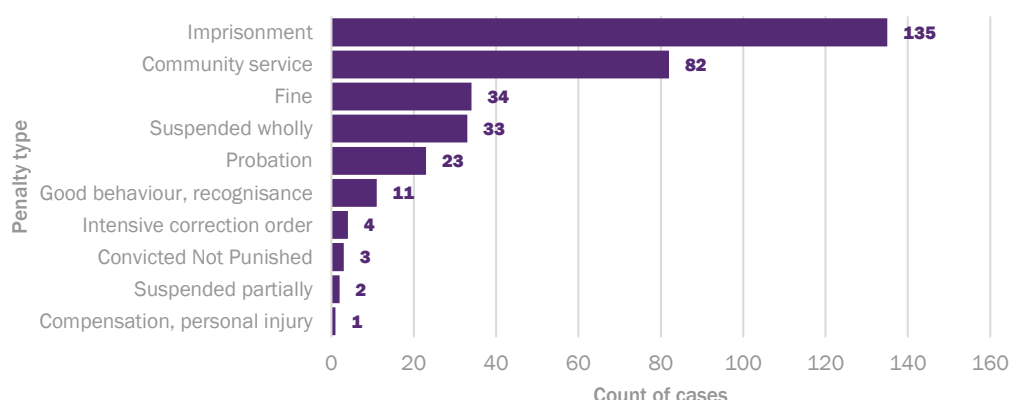


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Excludes offenders who committed a graffiti offence prior to introduction of the mandatory graffiti removal order on 27 September 2013.

For cases involving a graffiti offence where the graffiti offence was not the MSO, Figure 5-6 shows the penalty imposed for the MSO. The most common penalty imposed on the MSO was imprisonment (n=135), followed by community service (n=82). Fines and suspended sentences were the next most common (n=34, n=33, respectively).

**Figure 5-6: Most serious penalty for non-graffiti offences sentenced alongside a graffiti offence (MSO), 2014–15 to 2017–18**



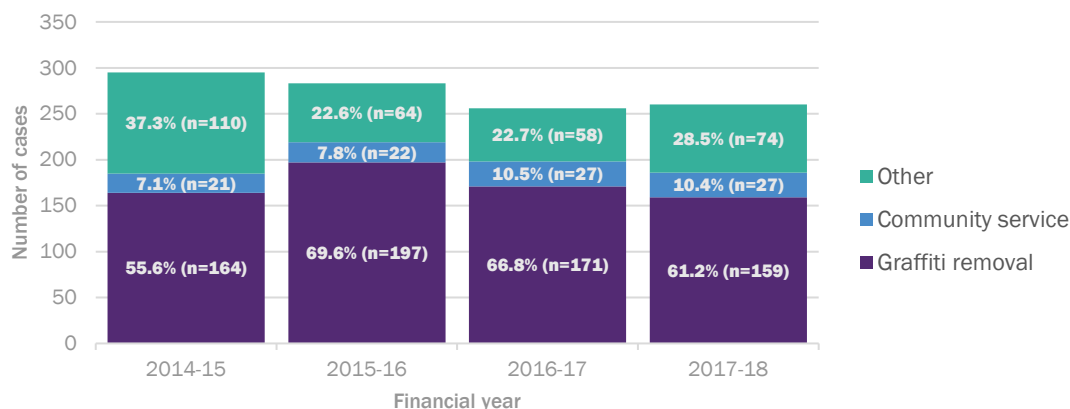
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) Excludes offenders who committed a graffiti offence prior to introduction of the mandatory graffiti removal order on 27 September 2013.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

The data also showed a graffiti removal order was not consistently imposed, although there could be a number of reasons for this (including the way the data were recorded). A graffiti removal order or a community service order was only issued in 72.0 per cent of sentencing events involving a graffiti offence (n=788). In 28.0 per cent of cases a mandatory graffiti removal order was not issued for a graffiti offence (n=306). Figure 5-7 shows the breakdown of penalty outcomes for graffiti offences by financial year.

**Figure 5-7: Penalty outcome for graffiti offences, 2014–15 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

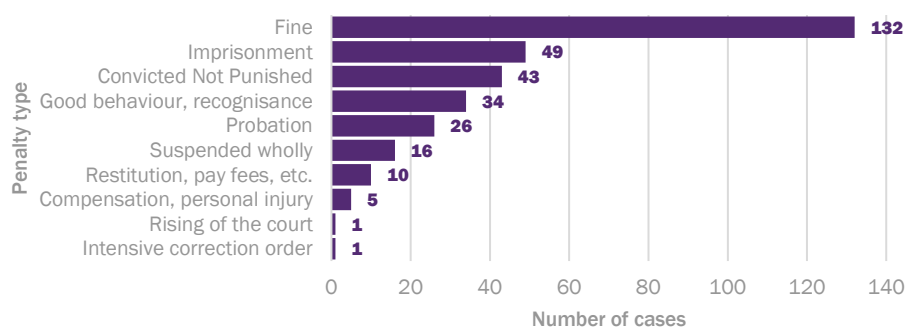
Note: Excludes offenders who committed a graffiti offence prior to introduction of the mandatory graffiti removal order on 27 September 2013.

This shows that either:

- the sentencing court was satisfied that because of any physical, intellectual or psychiatric disability of the offender, the offender was not capable of complying with a graffiti removal order; or
- the sentencing court did not impose the mandatory graffiti removal order and imposed another order; or
- the graffiti removal order was made and not recorded in the data.

Figure 5-8 shows the penalties imposed for a graffiti offence in cases where a graffiti removal order was not issued.<sup>350</sup> The most common penalty was a fine in 41.6 per cent of cases (n=132), followed by imprisonment in 15.5 per cent of cases (n=49), and convicted but not further punished in 13.6 per cent of cases (n=43).

**Figure 5-8: Penalties issued in place of graffiti removal orders, 2014–15 to 2017–18**



Source: QGS0, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) Excludes offenders who committed a graffiti offence prior to introduction of the mandatory graffiti removal order on 27 September 2013.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 5.7.5 Alternatives to mandatory imprisonment

In its 2014 Mandatory Sentencing Discussion Paper, the Law Council of Australia identified the following alternatives to mandatory sentencing:<sup>351</sup>

- justice reinvestment — diverting funds from incarceration to community-based programs and services that address the underlying causes of crime;
- responding to underlying social problems and averting crime;
- applying standard non-parole periods which still enable judicial discretion;
- increasing maximum penalties for particular offences to reflect community concern regarding the seriousness of an offence.

### 5.7.6 The Council's position on mandatory sentences

#### Submissions

In preliminary consultation, legal stakeholders generally agreed that mandatory sentencing was seen as limiting the proper exercise of the sentencing discretion, and that judicial officers cannot give effect to commonly recognised common law sentencing principles or to significant cooperation by an offender with law enforcement agencies.

The Council's Options Paper invited feedback on whether mandatory sentencing provisions were sufficiently clear so as to operate with certainty and consistency and, if not, what provisions should be considered for review and how should they be reformed. The majority of legal stakeholders who responded to the question supported discretion in sentencing.<sup>352</sup> Professors Douglas and Walsh, Dr Lelliott and Ms Wallis stated:

<sup>350</sup> There were 306 sentence events with 317 penalties imposed for graffiti offences (because there can be more than one graffiti offence sentenced at the one event).

<sup>351</sup> Law Council of Australia (n 82) 39–45.

<sup>352</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland), 2; Submission 6 (Legal Aid Queensland) 5–6; Submission 7 (Sisters Inside) 2–3; Submission 8 (Queensland Council for Civil Liberties) 2; Submission 15 (Queensland Law Society) 2; Preliminary submission (Bar Association of Queensland) 31 August 2018, 2.

It is our view that all sentences should be discretionary. There is an enormous variety of circumstances in which offences can be committed and mandatory penalties may stymie the ability of courts to sentence appropriately. We are not aware of any research that suggests that mandatory sentences have a stronger specific or general deterrent effect. While maximum penalties are appropriate, provisions should be reviewed that include mandatory penalties.<sup>353</sup>

Similarly, the QLS expressed concerns in respect of mandatory sentencing:

The [QLS] does not support mandatory sentencing because it neither deters nor reduces crime and creates anomalous and unjust outcomes. There is limited empirical support for mandatory sentencing as a crime reduction tool; rather the evidence suggests that it causes significant economic and social harm preserving judicial discretion and flexibility is the best means of achieving consistency and justice in the sentencing process.<sup>354</sup>

...

As with all forms of mandatory sentencing, the ... provisions do not achieve clarity, certainty or consistency in the sentencing process. Rather, they operate inflexibly and result in unjust or perverse outcomes because judges cannot properly distinguish between different cases. These issues are an inherent feature of mandatory provisions and are not the result of judicial reasoning or other factors.<sup>355</sup>

The QLS referred specifically to mandatory provisions in respect of sexual offences, SVOs, cumulative imprisonment terms, evasion offence, weapons offences, and murder.<sup>356</sup>

The Bar Association of Queensland expressed a strong opposition to mandatory sentencing provisions as they can:

- produce inefficiencies and delay in the criminal justice system by not providing a motivation for a plea of guilty, resulting in more trials (even when there are limited prospects of success);
- erode judicial independence by eliminating factors that can be considered by a court in determining an appropriate sentence; and
- can result in unjust, unduly harsh and disproportionate sentences.<sup>357</sup>

The Bar Association stated that ‘the inappropriateness of mandatory sentencing applies to serious offences including murder’:

There are a number of cases where a person has killed another person in severe extenuating circumstances but where the very limited defences of provocation and self-defence are not available. These offences should be able to be dealt with according to their seriousness. Indeed, some offences amounting to murder involve more extenuating circumstances than killings which do amount to manslaughter only.<sup>358</sup>

In respect of the operation of mandatory sentences, LAQ noted the impact of mandatory sentencing on certain provisions such as serious violent offence declarations and the offence of fail to stop.<sup>359</sup> LAQ observed that the mandatory sentence for the offence of murder:

[H]as resulted in a range of partial defences being developed to allow a court to have regard to the circumstances of a killing and to ensure a person is sentenced for their level of criminality. In our view this could be more effectively resolved by removing the mandatory life sentence for murder as is the case in several other Australian jurisdictions. Significant resources are put into the running, prosecuting and defending of murder cases throughout Queensland. A court’s inability to take into account on a case by

<sup>353</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 2.

<sup>354</sup> Submission 15 (Queensland Law Society) 2.

<sup>355</sup> Ibid 3.

<sup>356</sup> Submission (Queensland Law Society) 2–3.

<sup>357</sup> Preliminary submission (Bar Association of Queensland) 31 August 2018, 2–3.

<sup>358</sup> Ibid 3.

<sup>359</sup> Submission 6 (Legal Aid Queensland) 6.

case basis a person's level of criminality having regard to all the circumstances of a case and their personal attributes has led to pleas of guilty to a murder charge occurring rarely.<sup>360</sup>

Sisters Inside stated that 'mandatory sentences are unfair and undermine the efficient administration of the criminal legal system'.<sup>361</sup> They submitted that certain mandatory sentence provisions such as the cumulative penalty for failure to appear<sup>362</sup> and mandatory community service provisions<sup>363</sup> have 'a negative gendered impact, particularly on Aboriginal and Torres Strait Islander women'.<sup>364</sup> In addition, Sisters Inside noted that the mandatory sentence for murder with its amended 2019 definition<sup>365</sup> (regarding death caused by an act done, or omission made, with reckless indifference to human life) may disproportionately affect women.<sup>366</sup>

If CCOs were adopted as a sentencing option in Queensland, Queensland Corrective Services noted that:

It may also be appropriate to consider the removal of other specific orders, including Safe Night Out, Graffiti Removal, Alcohol Fuelled Violence and Fine Option Orders. The removal of these orders and potential inclusion of specific additional conditions that reflect the philosophy of each would provide the courts a greater ability to tailor a CCO to the needs of the offender and circumstances surrounding their offending. This also assists in reducing sentencing complexities.<sup>367</sup>

Victim-advocacy group FACA called for more mandatory sentences and mandatory minimum sentences for certain offences such as for the rape or killing of a child.<sup>368</sup>

The QPU supported mandatory sentencing and recommended mandatory provisions be introduced for offences where there is an assault on police and emergency service workers, but, as discussed above in 5.7.1, would support an exceptional circumstances exception.<sup>369</sup>

### The Council's view

The Council's position is that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the Act, or in reducing recidivism.<sup>370</sup> This is because, as a matter of principle, it assumes that every offence and every offender are the same, which is patently not the case. The Council is mindful that, if CCOs are introduced, mandatory provisions such as community service and graffiti removal orders may limit the availability of this order, as will the presumption that imprisonment is not a last resort for certain offences.<sup>371</sup>

The Council endorses the comments of the Bar Association of Queensland regarding how judicial discretion can maximise the effectiveness of public funds, which in turn can increase community safety:

The Association supports maximising the discretion available to judges in sentencing matters. That can be achieved by having multiple options, including community based options and permitting combined alternatives, available to a sentencing Judge. This will permit a sentence that is most suited to the circumstances of the particular offence and the subjective circumstances of the offender.

<sup>360</sup> Ibid 5–6.

<sup>361</sup> Submission 7 (Sisters Inside) 2.

<sup>362</sup> *Bail Act 1980* (Qld) s 33(4).

<sup>363</sup> *Penalties and Sentences Act 1992* (Qld) pt 5 div 2 subdiv 2.

<sup>364</sup> Submission 7 (Sisters Inside) 3.

<sup>365</sup> *Criminal Code* (Qld) s 302(1)(aa), introduced in the *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 3.

<sup>366</sup> Submission 7 (Sisters Inside) 3.

<sup>367</sup> Submission 11 (Queensland Corrective Services) 9.

<sup>368</sup> Submission 4 (Fighters Against Child Abuse Australia) 8–11.

<sup>369</sup> Submission 10 (Queensland Police Union of Employees) 1, 3–4.

<sup>370</sup> See, for instance, Queensland Law Society (n 82) 2: 'The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism' (citing Sentencing Advisory Council (Victoria) (n 63) 2. See also Law Council of Australia (n 82) 13–15.

<sup>371</sup> See *Penalties and Sentences Act 1992* (Qld) s 9(2A).

The availability of appropriate community based penalties in lieu of imprisonment when this is appropriate will likely mean that less gaol terms are imposed which in turn will mean that resources saved can be reinvested to create additional rehabilitation options. *Paradoxically, community safety can be enhanced by investing in effective community based options. By limiting the time offenders spend in prison, resources can be used to improve educational and treatment programs in prisons. That results in less crowded and better resourced prisons contributing more effectively to rehabilitation.*<sup>372</sup>

The Council also notes that mandatory provisions create additional complexity in sentencing.

In the recent decision of *R v Sprott; Ex parte Attorney-General*<sup>373</sup> the Court of Appeal highlighted how the SVO regime can constrain sentencing discretion:

But for the distorting effect of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld), which introduced the regime under which prisoners sentenced to 10 years or more must serve at least 80 per cent of the sentence before becoming eligible for parole, this was a case which might have been dealt with by the imposition of a sentence of 10 to 12 years accompanied by a parole eligibility date after about four years. But that option was unavailable. Crow J was keenly aware that this placed obstacles in the way of imposing a just sentence, something that it was nevertheless his Honour's duty to achieve, whatever might lie in the way. Consequently, as I understand his Honour's sentencing remarks, his Honour determined upon a course that would give effect to principles of general deterrence and denunciation but which would also give appropriate weight to the mitigating factors which, in this case, his Honour considered to lay at the heart of the matter.<sup>374</sup>

As discussed above, the Council has previously raised similar concerns in the context of its review of sentencing for criminal offences arising from the death of a child. The Council remains concerned about the distorting effect of mandatory sentencing provisions, the lack of certainty in some cases about their intended operation, and their potential for injustice.

The Council also notes the submission from QCS in respect of its issues in calculating complex sentencing structures, and their concern that this can be particularly problematic for cases that involve SVOs, mandatory cumulative sentences (such as failing to appear), and mandatory directions.<sup>375</sup>

As noted in Appendix 4, mandatory sentencing provisions are found across various pieces of legislation including those dealing with criminal offences and sentencing, weapons, transport and bail.

The Council does not consider it appropriate to make recommendations regarding the removal of specific forms of mandatory sentencing provisions in the absence of a proper review of their intended objectives and impact. It has not been possible for the Council to undertake such a review within the timeframes available, given the breadth of issues the Council was asked to inquire into as part of the current Terms of Reference.

The Council therefore recommends the Queensland Government should initiate a separate review to consider the operation of current mandatory sentencing provisions, with a view to identifying specific provisions requiring repeal or amendment. The Council suggests the proper grounds for making such a finding are likely to include that these provisions are:

- failing their intended objectives;
- resulting in a distortion of sentencing, charging or prosecutorial practices;
- increasing the complexity of sentencing;
- disproportionately impacting on people experiencing disadvantage; and/or
- otherwise operating unfairly.

Subject to the outcomes of this review, the Council recommends the removal of specific forms of mandatory community service orders once the new CCO model is fully implemented. In the Council's view, retaining these special forms of orders would be inconsistent with the Council's broader objectives in recommending

<sup>372</sup> Preliminary submission (Bar Association of Queensland) 31 August 2018, 1–2 (emphasis added).

<sup>373</sup> [2019] QCA 116 (14 June 2019).

<sup>374</sup> Ibid 10 [41] (Sofronoff P, Gotterson JA and Henry J agreeing).

<sup>375</sup> Submission 11 (Queensland Corrective Services) 25.

the introduction of the CCO model, to reduce sentencing complexity, and increase flexibility by allowing orders to be tailored to the individual circumstances of the offence and of the offender.

As discussed earlier in this chapter, the Council has further recommended that the proposal put forward by the QPU that would provide for a departure from mandatory sentencing provisions (other than those, the QPU suggests, which cannot be mitigated) in ‘exceptional circumstances’, should form part of the broader review of section 9 of the PSA recommended by the Council. This might either provide an interim or longer-term measure to address current issues with the operation of specific forms of mandatory sentencing provisions.

### RECOMMENDATIONS: MANDATORY SENTENCES

3. The Queensland Government should initiate a review of mandatory sentencing provisions in Queensland (summarised at Appendix 4 to this report) with a view to clarifying the operation of these provisions and considering their modification or repeal, as appropriate, taking into account:
  - (a) the original objectives of these provisions and whether these objectives are being met;
  - (b) the importance of judicial discretion in the sentencing process; and
  - (c) the need to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992* (Qld).

This review should give particular attention to the disproportionate impact of mandatory sentencing provisions on Aboriginal and Torres Strait Islander people, as highlighted by the Australian Law Reform Commission in its 2017 report *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, and other people experiencing disadvantage, as highlighted by stakeholders during this review.

4. Subject to the outcomes of the review of mandatory sentencing provisions as recommended by the Council (Recommendation 3), the mandatory community service order provisions (Part 5, Division 2, Subdivision 2) and graffiti removal order provisions (Part 5A) under the *Penalties and Sentences Act 1992* (Qld) should be repealed with the introduction of CCOs in Queensland.

## Chapter 6 Overview of proposed reforms

In the following chapters of this report, the Council sets out its proposed reforms to intermediate sentencing options and parole in Queensland.

The reforms, summarised in Table 6-1 and Figure 6-1 below, highlight the key elements of these reforms.

In some cases, such as home detention, the Council has identified that further work is required before a commitment can be made to introducing these orders. In other cases, such as the removal of intensive correction orders (ICOs) as an available sentencing order, and parole for short sentences of imprisonment, the Council has recommended monitoring the impacts of other reforms introduced before implementing these reforms.

Taking an incremental approach to reform, in the Council's view, is the best approach to ensuring any unintended system impacts do not eventuate or are contained to a manageable extent with a view to ensuring that Queensland's suite of intermediate sentencing orders operate as effectively as possible.

The most significant change proposed relates to the introduction of a new non-custodial community-based order – a community correction order (CCO) – which would replace existing probation orders and community-based orders and allow for courts to attach a broader range of conditions. Under the Council's recommendations, this order would be able to be made by a court when sentencing for a single offence either on its own, or in combination with a short period of imprisonment, a partially suspended sentence, or a wholly suspended sentence.

### 6.1 Intermediate sentencing and parole orders post the Council's reforms

Following adoption of the Council's recommended model, a court would have the following sentencing options available when sentencing for an offence falling within the mid-range of seriousness:

- imprisonment of 3 years or less (with the current requirement to set a parole release date being retained, unless the offence is a serious violent offence, or other circumstances apply, but introducing a dual discretion for courts to set either a parole release date or a parole eligibility date for sexual offences, and in circumstances where a parole order has been cancelled under section 209 of the *Corrective Services Act 2006* (Qld) (CSA);
- imprisonment combined with a new form of community-based order – a CCO – of up to 3 years, ordered in respect of one, or more than one, offence, provided any period of imprisonment to be served (excluding any time declared as time served) is no more than 12 months from the date of sentence (in which case the requirements of the CCO will commence on the person's release from custody);
- a partially suspended sentence combined with a CCO, ordered in respect of one, or more than one offence, provided the period of imprisonment to be served prior to suspension is no more than 12 months from the date of sentence;
- a partially suspended sentence of imprisonment;
- a wholly suspended sentence combined with a CCO, ordered in respect of one, or more than one offence;
- a wholly suspended sentence;
- an ICO of up to 12 months (in the short term, with a view to abolishing ICOs in the longer term, or its reform if it is retained after evaluation); and
- a CCO of up to 3 years, with or without a conviction being recorded.

Further details about these orders and the Council's reform proposals are contained in chapters 7 to 12.

The Council further recommends that courts be provided with a formal statutory power to convict but not further punish. The rationale for legislating to provide for this sentencing option is discussed in Chapter 14.

In addition to these orders, courts will continue to have access to available lower-level sentencing options including fines and good behaviour bonds. As discussed in Chapter 1 of this report, these orders did not fall within the scope of the review.

The changes proposed by the Council will significantly expand the sentencing options available to courts in sentencing — one of the primary intended objectives of the review. The changes will ensure courts have a broad suite of sentencing orders available to them, thereby allowing them improved scope to structure orders and conditions that meet the purposes of sentencing while also aiming to address underlying issues associated with the person's risk of reoffending.

A key principle of sentencing, as discussed in Chapter 5, is proportionality. This will continue to act as a limiting principle, to ensure that courts do not impose overly onerous orders or conditions, taking into account the seriousness of the current offence for which the person is being sentenced.

**Table 6-1: Imprisonment and community-based sentencing orders in Queensland: current and proposed**

| Existing order  | Council reform proposal   |
|---|---|
| <p><b>Imprisonment with <u>parole eligibility date</u> — 'Board ordered parole'</b><br/> <b>Part 9, Div 3 <i>Penalties and Sentences Act 1992</i> (Qld) (PSA) (ss 160–160H)</b><br/> <b>Ch 5, Part 1 CSA (ss 176–215)</b></p> <p>No minimum term of imprisonment for which a parole eligibility date can be set. However, for the majority of sentences of 3 years or less, the court <u>must</u> set a parole release date, rather than an eligibility date (see below).</p> <p>If no parole eligibility date set, parole eligibility date is day after the person has served 50% of the period of imprisonment (CSA, s 184) — with stated exceptions.</p> <p>Board ordered parole applies to:</p> <ul style="list-style-type: none"> <li>offender declared convicted of a 'serious violent offence' (SVO) under Part 9A PSA: requirement to serve 80% of the head sentence or 15 years, whichever is less (CSA, s 182);</li> <li>sexual offences listed in sch 1, CSA (including sentence of 3 years or less);</li> <li>any offence if the term of imprisonment is over 3 years (but not if a life sentence is imposed);</li> <li>where a court ordered parole order has been cancelled during the person's period of imprisonment;</li> <li>offenders convicted of a prescribed offence with a serious organised crime circumstance of aggravation who would otherwise have been eligible for court ordered parole.</li> </ul> | <p><u>Introduce</u> dual discretion to set either a parole release or eligibility date for term of imprisonment of 3 years or less <u>for a sexual offence</u>.</p> <p><u>Remove</u> current barriers to setting a parole release date, rather than an eligibility date, where an offender has had a court ordered parole order cancelled under s 209 of the CSA.<sup>376</sup></p> <p><u>Monitoring of reforms</u> to determine if parole should be removed for short sentences of 6 months or less. Post-introduction of Council-recommended reforms, alternative options available to a court would include:</p> <ul style="list-style-type: none"> <li>a CCO;</li> <li>a short term of imprisonment ordered with a CCO; or</li> <li>a suspended sentence with a CCO.</li> </ul> <p>Some legislative exceptions to the proposed removal of parole for short sentences — e.g. imprisonment ordered to be served on breach of a suspended sentence.</p> <p><u>Further review</u> to determine if <b>home detention</b> should be introduced as a sentencing option in Queensland, as recommended by the Queensland Productivity Commission in its <i>Draft Report Imprisonment and Recidivism</i> (February 2019).</p> |
| <p><b>Imprisonment with <u>parole release date</u> — 'court ordered parole'</b></p> <p>Court <u>must</u> set a parole release date if:</p> <ul style="list-style-type: none"> <li>the term of imprisonment is 3 years or less; and</li> <li>it is not a declared serious violent offence or sexual offence; and</li> <li>the offender has not had court ordered parole order cancelled under s 205 (Board cancels parole) or s 209 CSA (automatic statutory cancellation when sentenced to imprisonment for offence committed on parole); and</li> </ul>  | <p>As above</p>   |

<sup>376</sup> For a discussion of the operation of section 209 of the *Corrective Services Act 2006* (Qld), see section 11.5.2.

| Existing order   | Council reform proposal   |
|--|---|
| <ul style="list-style-type: none"> <li>the offender has not been convicted of a prescribed offence with a serious organised crime circumstance of aggravation.</li> </ul> <p>Court can fix <u>any day</u> as the date of release, including day of sentence and final day of sentence (PSA, s 160G).</p> <p>The majority of offenders in Queensland (79.4%; n=13, 592/17,107) are managed under court ordered parole. A significant proportion (about 44%) commence parole directly from court without having served any pre-sentence custody.</p>   |   |
| <p><b>Suspended sentence</b><br/> <b>Part 8, PSA (ss 143–151A)</b><br/> <b>Maximum term: 5 years</b><br/> <b>Maximum operational period: 5 years</b></p> <p>Court can suspend a term of imprisonment in whole or in part.</p> <p>Court <u>cannot</u> attach conditions but can impose other orders that involve supervision or community work (as an example) when sentencing for two or more offences. For example a probation order was made in:</p> <ul style="list-style-type: none"> <li>4.8% of court events in Magistrates Courts where wholly suspended sentence was imposed; and</li> <li>15.1% of court events in Supreme and District Court where a wholly suspended sentence was imposed.</li> </ul> <p>On breach, a court <u>must</u> order the offender to serve the whole of the suspended imprisonment, unless of the opinion it would be unjust to do so — PSA, s 147(2).</p> <p><u>No discretion</u> in the case of minor offence committed during the operational period of the order not to have the breach dealt with.</p> <p>Legislative guidance on the factors to which a court must have regard, including whether the subsequent offence is ‘trivial’ — PSA, s 147(3).</p> | <p><b>Suspended sentence</b></p> <p><u>Retain</u> suspended sentences.</p> <p><u>Introduce</u> ability to order a community-based order (probation and/or community service order, or CCO if introduced) when imposing sentence for a single offence.</p> <p><u>Introduce</u> new power of court on breach of a suspended sentence to order the person to serve part of the suspended imprisonment, rather than the whole sentence suspended if not unjust to do so, and new powers to fine and/or take no further action.</p> <p><u>Simplify</u> legislative criteria that guide what court must consider when determining if it is ‘unjust’ to activate the suspended imprisonment on breach (including to remove the reference to whether the new offence was ‘trivial’).</p> <p><u>Introduce</u> discretion not to initiate breach proceedings where original order made by the District or Supreme Court, and new offence is sentenced in a Magistrates Court.</p> |
| <p><b>Intensive correction order</b><br/> <b>Pt 6 (ss 111–119), Pt 7 (ss 120–142) PSA</b><br/> <b>Maximum term: 12 months</b></p> <p>Sentence of imprisonment served by way of intensive correction in the community.</p> <p>Includes range of general requirements:</p> <ul style="list-style-type: none"> <li>reporting to and receiving visits from an authorised corrective services officer at least twice each week</li> <li>performing community work (up to 12 hours per week); and</li> <li>attending programs.</li> </ul> <p>Unless the court or a corrective services officer otherwise directs, the person must attend programs for one-third of the time and perform community service for two-thirds of the time.</p> <p>On breach, power to revoke the order and commit the offender to prison for any portion of sentence remaining at the time of breach.</p>   | <p><b>Intensive correction order</b></p> <p><u>Retain</u> ICOs for an interim period to assess use of new CCO prior to considering removal.</p> <p>Subject to the outcomes of this review, if ICOs are retained, consider amendments to increase flexibility drawing on reform models adopted in other jurisdictions, including:</p> <ul style="list-style-type: none"> <li>To reduce the number of mandatory (core) conditions to which a person on the order is subject, in line with the Council’s proposed model for community correction orders;</li> <li>To allow for a range of conditions that can be ordered as additional conditions;</li> <li>To allow for the frequency of reporting to be matched to an offender’s level of risk and need, rather than legislatively prescribed;</li> <li>To allow for any attendance at counselling, appointments and programs to be counted towards satisfying the community service component of the order.</li> </ul>  |

| Existing order   | Council reform proposal   |
|--|---|
| <p><b>Community service order (with or without conviction)</b><br/> <b>Pt 5, Div 2 (ss 100–108D), Pt 7 (ss 120–142) PSA</b><br/> <b>Minimum hours: 40 hours</b><br/> <b>Maximum hours: 240 hours</b></p> <p>Duration: to be completed within 12 months, or other time allowed by court</p> <p>Can be ordered with a probation order for a single offence (PSA, s 109).</p> <p><i>General requirements:</i></p> <ul style="list-style-type: none"> <li>(a) not commit another offence during the period of the order;</li> <li>(b) report to an authorised corrective services officer at the place, and within the time, stated in the order;</li> <li>(c) must report to, and receive visits from, an authorised corrective services officer as directed by the officer;</li> <li>(d) perform, in a satisfactory way, community service as directed by an authorised corrective services officer for the number of hours stated in the order, at the time directed;</li> <li>(e) notify every change of the offender's place of residence or employment within 2 business days after the change occurs;</li> <li>(f) not leave or stay out of Queensland without permission; and</li> <li>(g) comply with every reasonable direction of an authorised corrective services officer.</li> </ul> | <p><u>Remove</u> community service order as a separate form of order. Instead, this becomes a condition of a CCO.</p> <p><u>Introduce</u> community correction order (CCO) (with or without conviction).</p> <p>Maximum period: 3 years (if community service only condition, order terminates on completion of hours)</p> <p>Maximum community service hours: 300 hours</p> <p>Can be ordered for a single offence alongside:</p> <ul style="list-style-type: none"> <li>• Term of imprisonment (up to 12 months) – requirements commence on release from custody;</li> <li>• Wholly suspended sentence, or partially suspended sentence (if no more than 12 months ordered to be served from the date of sentence prior to release).</li> </ul> <p><i>General requirements:</i></p> <p>More limited than current general requirements for community service order.</p> <ul style="list-style-type: none"> <li>• Not to commit an offence.</li> <li>• Appear before a court.</li> </ul> <p><i>Additional requirements:</i></p> <ul style="list-style-type: none"> <li>• Court must attach <u>at least one</u>.</li> <li>• Range of conditions including rehabilitation, treatment conditions, place restriction condition, non-association condition, community service condition, drug and alcohol abstinence condition, curfew, electronic monitoring, judicial monitoring, or any other condition court considers necessary.</li> </ul> <p>Offender or corrective services ability to apply (or court on its own initiative) to terminate the order (e.g. for good progress).</p> |
| <p><b>Probation order (with or without conviction)</b><br/> <b>Pt 5, Div 1 (ss 90–99), Pt 7 (ss 120–142) PSA</b><br/> <b>Maximum period: 3 years</b><br/> <b>Minimum period: 6 months, or 9 months if ordered as part of combined prison (up to 12 months)/probation order (PSA, s 92(1)(b) order)</b></p> <p><i>General requirements:</i></p> <ul style="list-style-type: none"> <li>(a) not commit another offence during the period of the order;</li> <li>(b) report to an authorised corrective services officer at the place, and within the time, stated in the order;</li> <li>(c) must report to, and receive visits from, an authorised corrective services officer as directed by the officer;</li> <li>(d) take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer;</li> <li>(e) notify every change of the offender's place of residence or employment within 2 business days after the change happens;</li> <li>(f) not leave or stay out of Queensland without the permission; and</li> <li>(g) comply with every reasonable direction of an authorised corrective services officer.</li> </ul>   | <p><u>Remove</u> probation as a separate form of order. Instead, supervision and other conditions become available conditions under a CCO.</p> <p>See further above.</p>  |

| Existing order  | Council reform proposal |
|---|-------------------------|
| <p><i>Additional requirements:</i></p> <ul style="list-style-type: none"> <li>(a) submit to medical, psychiatric or psychological treatment;</li> <li>(b) comply, during the whole or part of the period of the order, with the conditions that the court considers are necessary— <ul style="list-style-type: none"> <li>(i) to cause the offender to behave in a way that is acceptable to the community; or</li> <li>(ii) to stop the offender from again committing the offence for which the order was made; or</li> <li>(iii) to stop the offender from committing other offences.</li> </ul> </li> </ul> <p>Can be ordered with a community service order for single offence (PSA, s 109).</p> |                         |

The current and revised sentencing options are summarised in Figure 6-1 below.

## 6.2 System reform challenges

In addition to recommending reforms to intermediate sentencing orders, there is the challenge of how to overcome what one Scottish commentator has suggested is a ‘shared cultural understanding’ of what types of cases require a custodial sanction to be imposed and which do not.<sup>377</sup> The Victorian Court of Appeal identified one of the key challenges in the early years of the introduction of the new CCO as being ‘to re-examine the conventional wisdom about the types of offending which ordinarily attract a term of imprisonment’, which the court found ‘is essential if the CCO is to fulfil its potential as a sentencing option, in accordance with the legislature’s clearly-expressed intention’.<sup>378</sup>

Courts also face practical challenges in responding to particular types of offenders and offending. In some cases, an offender may have repeatedly failed to comply with the requirements of a community-based order, either due to an inability or unwillingness to comply. Services required to effectively support an offender in the community may be unavailable, stretched, or inadequate. Without these services, the person subject to the order may be at high and unacceptable risk of reoffending. In these circumstances, there may seem little option but to imprison. Prison in such cases may be viewed as ‘the dependable, credible and well-resourced default’.<sup>379</sup>

With these challenges in mind, the increased use of community-based orders is only likely to result from the broader availability of services and support, and higher levels of confidence by all those involved in the sentencing process (including prosecutors, defence practitioners, judicial officers and victims of crime) and of the wider community in their effectiveness and ability to meet the various purposes of sentencing.

Confidence will only be built on a foundation of a community corrections system that is resourced at a level that allows it to operate effectively and which is supported by a service and support system that has the capacity and capabilities to meet the needs of offenders in the community. Such an outcome requires an ongoing and continued government commitment to building a skilled and professional community corrections workforce, and staffing levels (both administrative and operational) that allow for meaningful engagement with people subject to their orders in the interests of managing them safely in the community. It also requires a sustained focus on enhancing the availability of housing and homelessness services, drug and alcohol services, mental health and disability support services, building pathways to employment through training and education, and cultural programs and support.

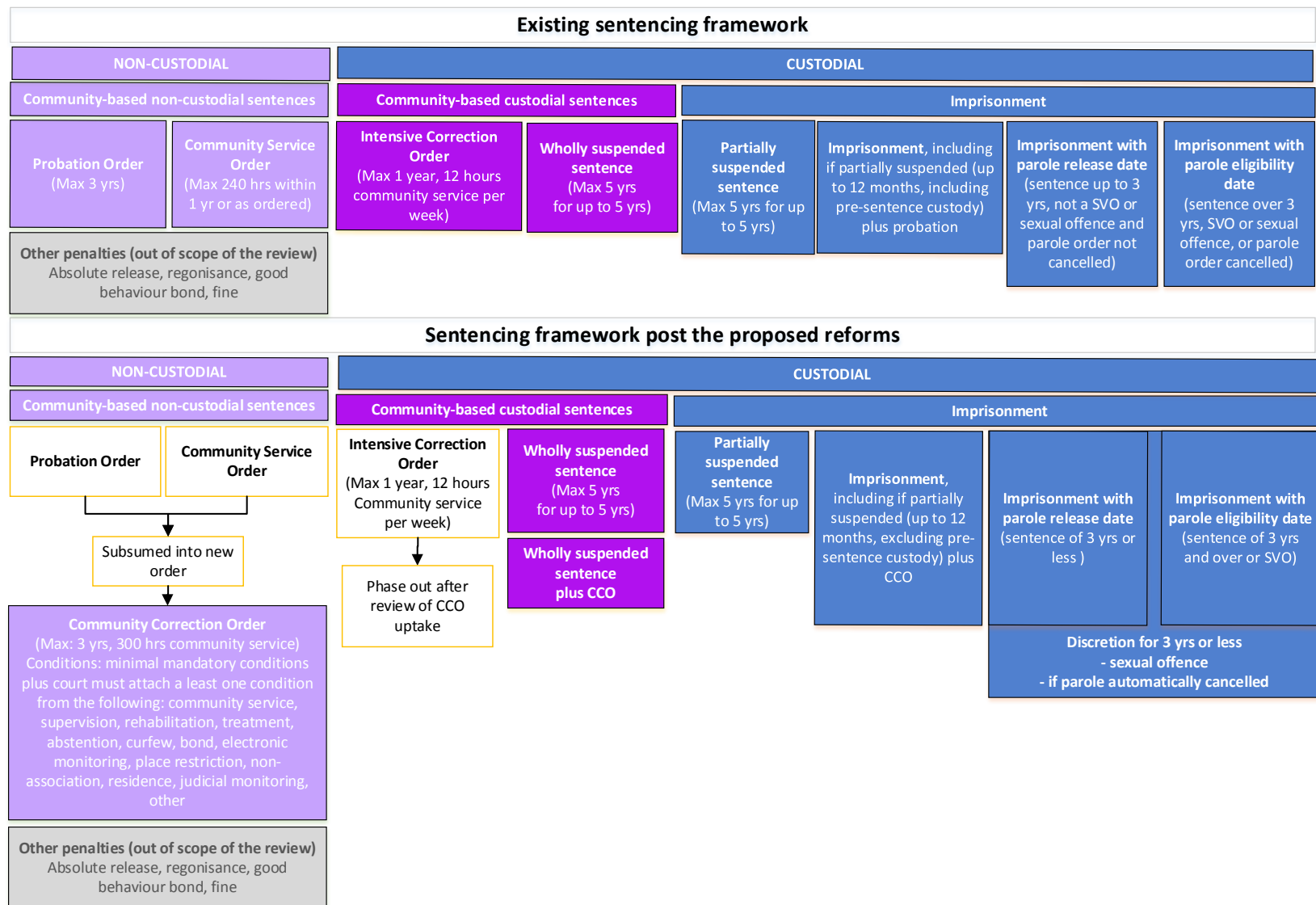
Implementation issues and challenges are discussed in Chapter 15 of this report. Service accessibility and availability issues are explored in Chapter 13.

<sup>377</sup> Neil Hutton, ‘Articulating the Custody Threshold?’ (2019) 82 *Law and Contemporary Problems* 1, 11.

<sup>378</sup> *Boulton v The Queen* (2014) 46 VR 308, 333 [103] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>379</sup> Cyrus Tata, ‘How can Prison Sentencing be Reduced in Scotland?’ (2016) 4(1) *Scottish Justice Matters* 23, 24.

Figure 6-1: Existing and new sentencing framework under proposed Queensland Sentencing Advisory Council reforms



## Chapter 7 Intensive Correction Orders

### 7.1 Intensive Correction Orders (ICOs) in Queensland

Intensive correction orders (ICOs) were created in Queensland by the *Penalties and Sentences Act 1992* (Qld) (PSA) when the legislation was first enacted. The second reading speech noted that ICOs:

- impose very strict conditions of surveillance and attendance ‘to ensure that the offender makes appropriate restitution—in one form or another—for the crime committed’;
- allow an offender to rehabilitate in the community and spare the community ‘the considerable expense of having a citizen unproductively imprisoned’;
- fill a ‘gap between straightforward community service at the lower end of the scale and imprisonment at the higher end of the scale’.<sup>380</sup>

#### 7.1.1 Order composition

ICOs in Queensland are substitutional, meaning they are a term of imprisonment served in the community. As such, a breach carries presumptive conversion into a finite term of imprisonment. They are created by Part 6 of the PSA (ss 111–119). Part 7 (ss 120–142) of the PSA deals with breaches.

Section 113(1) defines an ICO as both a sentence of imprisonment served in the community and a community-based order, the latter meaning ‘any community service order, graffiti removal order, intensive correction order or probation order’ (s 4). An offender sentenced to an ICO is taken not to have been sentenced to a term of imprisonment for the purposes of the provisions of an Act providing for disqualification for, or loss of, office or the forfeiture of benefits: section 113(2). An ICO is imprisonment,<sup>381</sup> although this has been said to involve ‘an element of statutory fiction’<sup>382</sup> or ‘a form of “double speak” involving the legislative fiction that someone is in prison when they quite plainly are not’.<sup>383</sup>

In substance, if not in form, an intensive correction order is a special form of probation order, with particular requirements, some of which do not sit altogether comfortably with the more general form of probation order ... or the requirements it imposes.<sup>384</sup>

The same judge (McPherson JA) gave a further description in another case:

A sentence under s 113 is really a partly disguised form of short-term probation designed to impose such close and continuous supervision of an offender that he (or she) has much less opportunity to re-offend within the stipulated period of 12 months. It is a useful method for dealing with young offenders, and it is used particularly where there is considered to be some prospect they will not re-offend.<sup>385</sup>

<sup>380</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 5 November 1992, 151 (Dean Wells, Attorney-General and Minister for Justice). See also Queensland, *Parliamentary Debates*, Legislative Assembly, 6 August 1992, Second Reading, 6303 (Dean Wells, Attorney-General and Minister for Justice).

<sup>381</sup> *R v Skinner, Ex parte A-G (Qld)* [2001] 1 Qd R 322, 325 [14] (de Jersey CJ, Davies and Pincus JJA) and *R v M; Ex parte A-G (Qld)* [2000] 2 Qd R 543, 550 [40] (Jones J).

<sup>382</sup> *R v M; Ex parte A-G (Qld)* [2000] 2 Qd R 543, 544 [3] (McPherson JA); see also *R v Skinner; Ex parte A-G (Qld)* [2001] 1 Qd R 322, 325 [15] (de Jersey CJ, Davies and Pincus JJA).

<sup>383</sup> *R v Taylor* (1999) 106 A Crim R 578, 581 (McPherson JA).

<sup>384</sup> *R v M; Ex parte A-G (Qld)* [2000] 2 Qd R 543, 544 [3] (McPherson JA) and see 550 [40] (Jones J).

<sup>385</sup> *R v Taylor* (1999) 106 A Crim R 578, 581 (McPherson JA).

The Court of Appeal has also noted that an ICO is a significant penalty:

An intensive correction order under the *Penalties and Sentences Act 1992* (Qld) is regarded as a period of imprisonment and involves the mandatory recording of a conviction ... In practical terms it is the final option before the imposition of an actual custodial sentence. It involves strict compliance with the onerous conditions set out in the *Penalties and Sentences Act 1992* (Qld) ... and is a very substantial curtailment on the respondent's freedom. It requires reporting at least twice weekly and participation in counselling and other programs for up to 12 hours a week for 12 months. It also requires that the respondent satisfactorily perform community service for up to 12 hours per week during the 12-month period of the order. Breach of the intensive correction order may result in re-sentence to a term of imprisonment for the original offence ... or an order to serve the remainder of the period of the intensive correction order in custody.<sup>386</sup>

The fact that such an order is a sentence of imprisonment is not, as Keane JA put it in *R v RY; Ex parte A-G* 'a matter of empty words'.<sup>387</sup> Rather it is a sentence of imprisonment which, as his Honour observed, 'affords an offender an opportunity to demonstrate genuine rehabilitation while at the same time leaving open the prospect of actual imprisonment if the order were not adhered to'.<sup>388</sup>

An ICO is a term of imprisonment of 12 months or less, with a conviction recorded and nine mandatory requirements<sup>389</sup> addressing reoffending, reporting and receiving visits (at least twice per week), counselling and programs directed by the court or department, community service,<sup>390</sup> confinement to community residential facilities (not more than 7 days at a time), notification of change of residence and employment, remaining in Queensland, and compliance with reasonable directions.

An authorised corrective services officer must not direct the offender to attend programs or perform community service for more than 12 hours in any week.<sup>391</sup>

The legislation assumes, subject to a court or corrections officer ordering or directing otherwise, that one-third of the time directed will be allocated to program attendance and the remainder to community service<sup>392</sup> meaning, read with s 114(2), an apparent theoretical maximum of 416 hours of community service over 52 weeks.

Additional requirements may be ordered: submission to medical, psychiatric or psychological treatment and compliance, for the whole or part of the order, with conditions necessary to cause behaviour acceptable to the community and stop reoffending (in the same or different ways).<sup>393</sup>

Before making an ICO, the court must explain, or cause to be explained, the purpose and effect of the order, possible consequences of contravention, and amendment and revocation options.<sup>394</sup>

Offender agreement to the making or amendment of (and compliance with) an ICO is a prerequisite.<sup>395</sup>

Queensland Corrective Services (QCS) provided a table outlining 12 programs available for offenders on community-based orders, including ICOs, at Appendix 5, while noting some difficulties with program availability in certain locations.

Figure 7-1 shows that the use of ICOs has reduced over time in both the higher courts and the Magistrates Courts.

<sup>386</sup> *R v Tran; Ex parte A-G (Qld)* (2002) 128 A Crim R 1, 4–5 [15] (McMurdo P and Douglas J) (citations omitted).

<sup>387</sup> *R v RY; Ex parte A-G (Qld)* [2006] QCA 437, 5–6 [27] (Keane JA, Williams JA and McMurdo J agreeing).

<sup>388</sup> *Ibid.*

<sup>389</sup> *Penalties and Sentences Act 1992* (Qld) s 114.

<sup>390</sup> An authorised corrective services officer must not direct the offender to attend programs or perform community service for more than 12 hours in any week: s 114(2). If this were applied only to community service, it would technically result in a maximum of 624 hours over 52 weeks. A community service order cannot exceed 240 hours in 52 weeks: s 103(2)(a).

<sup>391</sup> *Penalties and Sentences Act 1992* (Qld) s 114(2).

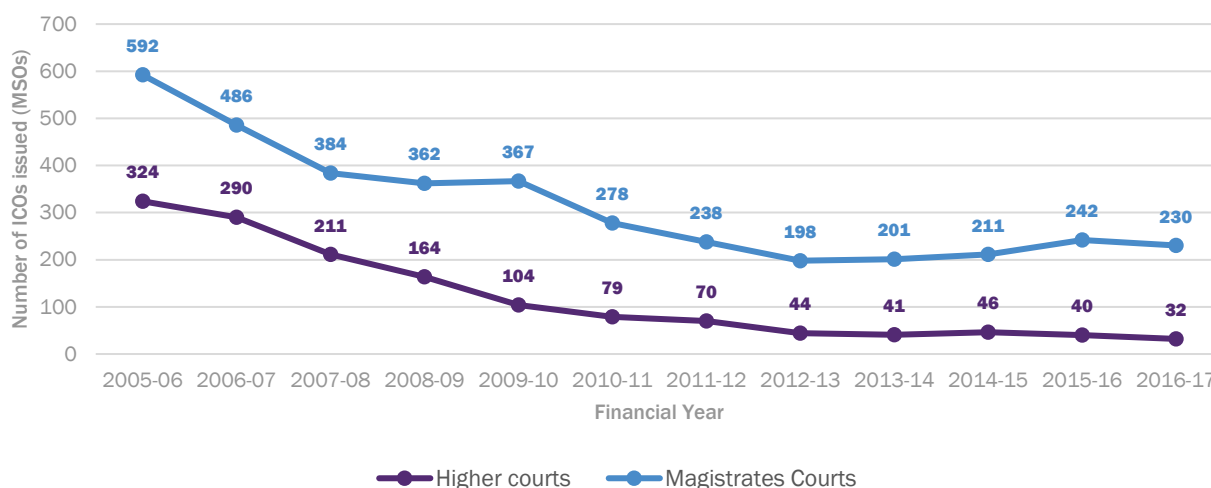
<sup>392</sup> *Ibid* s 114(2A).

<sup>393</sup> *Ibid* s 115.

<sup>394</sup> *Ibid* s 116.

<sup>395</sup> *Ibid* s 117.

Figure 7-1: Change in the number of sentencing events involving an ICO, 2005–06 to 2016–17



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

### 7.1.2 Shared provisions with probation

The general requirements of probation orders (s 93) and ICOs (s 114) are substantially the same (except that ICOs have extra provisions regarding reporting/visit frequency, community service, and community residential facility attendance). The additional requirements provisions of both orders (s 94, probation; s 115, ICOs) are identical.

### 7.1.3 Pre-sentence reports (PSRs) and risk assessments by QCS

There is no mandatory requirement for a pre-sentence report (PSR). However, a sentencing court considering imposing an ICO may order a written report to be completed by Probation and Parole.<sup>396</sup>

Further, QCS may provide a brief oral pre-sentence report (depending on court, magistrate or a corrective services officer's availability) at Magistrates Court sentencing hearings. This is not as in-depth as a written PSR but will include an assessment as to an offender's suitability for a community-based order such as an ICO.

An immediate risk assessment is undertaken when an offender first reports directly to a probation and parole office (required within two business days of sentencing). A risk of reoffending (RoR) score is calculated within the first five days, once all of the relevant information has been received.

The RoR assessment is calculated at the beginning of a correctional episode with QCS. It is generally not recalculated, unless there has been a break in supervision (i.e. not in custody or under Probation and Parole supervision) or a significant change in risk profile has occurred.

There are two methods used to calculate a RoR score; one for prison (RoR-PV), and another for Probation and Parole (RoR-PPV). It comprises four or six items (depending on whether administered in custody or on parole). The six-item version consists of: age at the date of assessment, highest educational qualification, employment status, number of offences for which sentenced currently, number of convictions in the last 10 years, and whether or not there is a conviction for breaching a 'justice order' (such as breach of parole, breach of bail or breach of a domestic violence order).<sup>397</sup> Each answer is given a numerical value and these numbers are then added, with a score assigned ranging from 1 to 20, if administered in the community, or 1 to 22, if administered in custody.<sup>398</sup>

<sup>396</sup> *Penalties and Sentences Act 1992* (Qld) s 15; *Corrective Services Act 2006* (Qld) s 344. This is distinct from an 'independent' report by a psychologist, psychiatrist or other medical practitioner obtained by the defence on the instructions of the defendant.

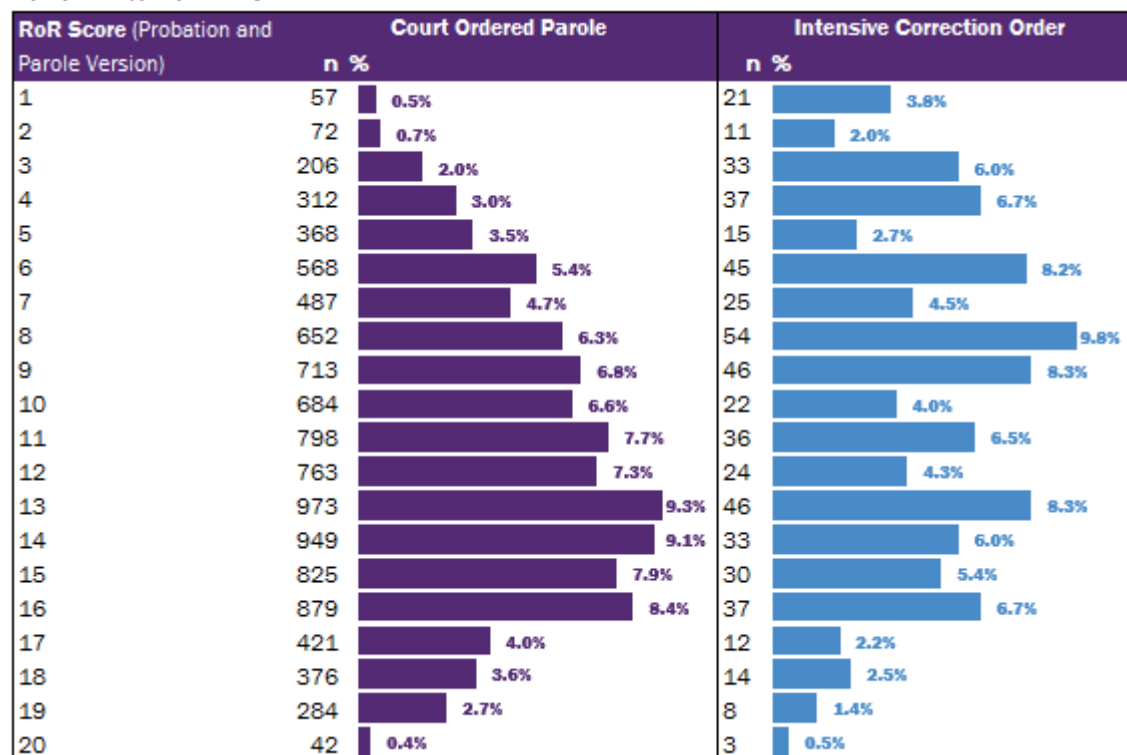
<sup>397</sup> Queensland Parole System Review (n 10) 12 [73].

<sup>398</sup> *Ibid.*

The following analysis uses the Probation and Parole RoR scores to compare cohorts of offenders on court ordered parole to those on an ICO.

The average RoR score for offenders on an ICO (9.7) is slightly lower than offenders on court ordered parole (11.5). Figure 7-2 shows the spread of RoR scores for offenders on court ordered parole compared to offenders on ICOs. The average RoR score for ICOs is lower than for court ordered parole, with 37 per cent of those on ICOs having RoR scores greater than 11, compared to 52 per cent on court ordered parole.<sup>399</sup>

**Figure 7-2: Risk of reoffending scores (Probation and Parole version) for ICOs and court ordered parole, 2016–17 to 2017–18**



Source: Queensland Corrective Services — Integrated Offender Management System (IOMS) database.

### 7.1.4 Order combinations

Multiple ICOs can be made where a court sentences an offender to two or more terms of imprisonment at the same time for multiple offences, provided that the total period sentenced does not exceed 1 year: s 118(2). If terms of imprisonment (including ICOs)<sup>400</sup> are imposed for multiple offences, separate terms must be imposed for each.<sup>401</sup>

An ICO can be imposed cumulatively upon an activated term of a suspended period of imprisonment (for instance, a 12-month ICO and a 2-year prison term), because activating a suspended sentence in whole or part involves ‘dealing’ with it (making an order pursuant to a sentence already imposed), as opposed to sentencing afresh.<sup>402</sup>

<sup>399</sup> For a discussion of the Queensland Parole Review findings in relation to the limitations of the RoR as these apply to parole decisions, see Queensland Parole System Review (n 10) 12–13 [73]–[74]. There have been concerns raised about the lack of published validation for either version, and a suggested reduction in validity for use with male Aboriginal and Torres Strait Islander offenders. In its most recent Annual Report, QCS advised it has partnered with KPMG and Swinburne University to review and replace existing risk and need assessments with validated assessment tools for prisoners in custody and under supervision in the community: Queensland Corrective Services (n 310) 31.

<sup>400</sup> *R v CAI* [2008] QCA 359, 3 (Muir JA, Holmes JA and Chesterman J agreeing).

<sup>401</sup> *R v Crofts* [1999] 1 Qd R 386, 387 (Fitzgerald P, Davies JA and Moynihan J).

<sup>402</sup> *R v Skinner, Ex parte A-G (Qld)* [2001] 1 Qd R 322, 324 [12] (de Jersey CJ, Davies and Pincus JJA).

However, an ICO cannot be imposed as a means of activating a suspended sentence in whole or part, for the same reason.<sup>403</sup> 'This has the unfortunate effect that the custodial and non-custodial options available to a sentencing judge such as ... intensive corrections orders are not available even where these would be the most suitable orders'.<sup>404</sup>

ICOs cannot be combined with probation. Probation can only be combined with actual imprisonment (i.e. not an ICO) of 1 year or less. The imprisonment cannot be suspended, and parole cannot apply.<sup>405</sup>

In *R v Hood*, Jerrard JA commented on the request by an offender for an (impermissible) combination of a partially suspended sentence (suspended after 9 months) followed by an 18-month ICO:

Regrettably, an order in those terms is not available by reason of [PSA] s 112 ... which only permits a court to make an intensive correction order when sentencing an offender to a term of imprisonment of one year or less.<sup>406</sup>

A fine may be ordered in addition to, or instead of, any other sentence for which the offender is liable (s 45).

Community service under an ICO is to be cumulative with any other community service: s 141.

Table 7-1 shows the most common penalty types imposed at the same sentencing event as an ICO. For example, 23 per cent of sentencing events in Magistrates Courts where an ICO was imposed also involved a fine. More than half (57%) of sentencing events in Magistrates Courts involving an ICO had at least one other ICO imposed during the sentencing event.

**Table 7-1: Most common sentencing orders issued at the same court event as an ICO, 2005–06 to 2016–17**

| Penalty Type                    | Magistrates Courts | District and Supreme Courts |
|---------------------------------|--------------------|-----------------------------|
| Multiple ICOs                   | 57%                | 45%                         |
| Fine                            | 23%                | 1%                          |
| Convicted, not further punished | 15%                | 12%                         |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

### 7.1.5 Breach and revocation

#### Powers to amend, revoke and deal with an offender on breach

An ICO is terminated at the end of its period if the offender is sentenced or further sentenced for the offence for which the order was made, if the order is revoked under section 120(1) of the PSA or if the offender is committed to prison under section 127(1).<sup>407</sup>

A court, on application made by the offender, a corrective services officer or the Director of Public Prosecutions while the order is in force,<sup>408</sup> may amend or revoke an ICO if satisfied that the offender is unable to comply with the order because his or her circumstances have materially altered since it was made, or the circumstances were wrongly stated or were not accurately presented to the court, or the offender is no longer willing to comply with the order.<sup>409</sup> If the order is revoked, the court, in determining how to re-sentence the offender, must take into account the extent to which the offender had complied with the order prior to its revocation.<sup>410</sup>

<sup>403</sup> *R v Muller* [2006] 2 Qd R 126, 130 [7] (Williams JA), 139–40 [47]–[48] (Jerrard JA) and 143 [62] (Atkinson J); applying *R v Waters* [1998] 2 Qd R 442 — see 445 (Pincus JA) and 446 (McPherson JA) and *R v Skinner, Ex parte A-G (Qld)* [2001] 1 Qd R 322, 324–5 [12] (de Jersey CJ, Davies and Pincus JJA).

<sup>404</sup> *R v Muller* [2006] 2 Qd R 126, 143 [62] (Atkinson J).

<sup>405</sup> See *Penalties and Sentences Act 1992* (Qld) ss 160A(2), 160A(6)(b).

<sup>406</sup> *R v Hood* [2005] 2 Qd R 54, 60 [23] (Jerrard JA).

<sup>407</sup> *Penalties and Sentences Act 1992* (Qld) s 119.

<sup>408</sup> *Ibid* s 122.

<sup>409</sup> *Ibid* s 120.

<sup>410</sup> *Ibid* s 121(2).

The process of amending or revoking the order is distinct from the courts' power to deal with an offender for contravening a requirement of an ICO which, when done without reasonable excuse, is an offence under section 123(1) (maximum penalty — 10 penalty units). A contravention need not be an offence against another Act or law and can occur outside Queensland.<sup>411</sup> A proceeding for a contravention may be taken, and the offender dealt with, even though the order has been terminated or revoked.<sup>412</sup>

There is a presumption that an offender before the court did contravene the requirement in a community-based order as alleged in a complaint or statement purporting to be that of an authorised person, until the contrary is proved.<sup>413</sup> Sections 125(2) and 126(2) set out powers of a court that can be exercised in addition to, or instead of, dealing with the offender under section 123(1) for contravention of a requirement of the ICO. These include, any, or a combination of, admonishment and discharge and ordering payment and enforcement of an unpaid amount ordered under the order. The imposition of a fine or other order in this context does not affect the continuation of the ICO.<sup>414</sup>

Sections 125(4)(a) and 126(4) allow courts to deal with the offender for the offence for which the ICO was made in any way in which it could deal with the offender if the offender had just been convicted by it of that offence. However, a disqualification imposed under the original order cannot be changed or revoked.<sup>415</sup>

In addition, in dealing with the offender for the offence for which the ICO was made, a court may revoke the order and commit the offender to prison for the portion of the term of imprisonment that was unexpired on the day the relevant offence against section 123(1) was committed, regardless of whether the order is still in force.<sup>416</sup> Such imprisonment must be served immediately and concurrently with any other term, unless the court otherwise orders.<sup>417</sup>

### Completion rates for ICOs

Table 7-2, provided by QCS, sets out the completion rates for ICOs, which have increased over the past 12 years, from 57 per cent in 2006–07 to 71 per cent in 2017–18.

The increase in completion rates coincides with the introduction of court ordered parole. While the reasons for the higher rates of completion are unclear and, as discussed further below, could reflect a number of factors, it is possible this could be at least partly due to some higher-risk offenders being made subject to court ordered parole rather than being placed on an ICO. The data in Figure 7-2 above show that currently, offenders on ICOs, on average, have a slightly lower RoR score than those subject to court ordered parole.

**Table 7-2: Successful completion rates — intensive correction orders**

| Financial year | Percentage completed |
|----------------|----------------------|
| 2006–07        | 57%                  |
| 2007–08        | 68%                  |
| 2008–09        | 64%                  |
| 2009–10        | 69%                  |
| 2010–11        | 66%                  |
| 2011–12        | 68%                  |
| 2012–13        | 67%                  |
| 2013–14        | 67%                  |
| 2014–15        | 71%                  |
| 2015–16        | 67%                  |
| 2016–17        | 70%                  |
| 2017–18        | 71%                  |

Source: Queensland Corrective Services — IOMS database.

<sup>411</sup> Ibid s 123(2).

<sup>412</sup> Ibid s 132.

<sup>413</sup> Ibid s 137.

<sup>414</sup> Ibid ss 125(3), 126(3).

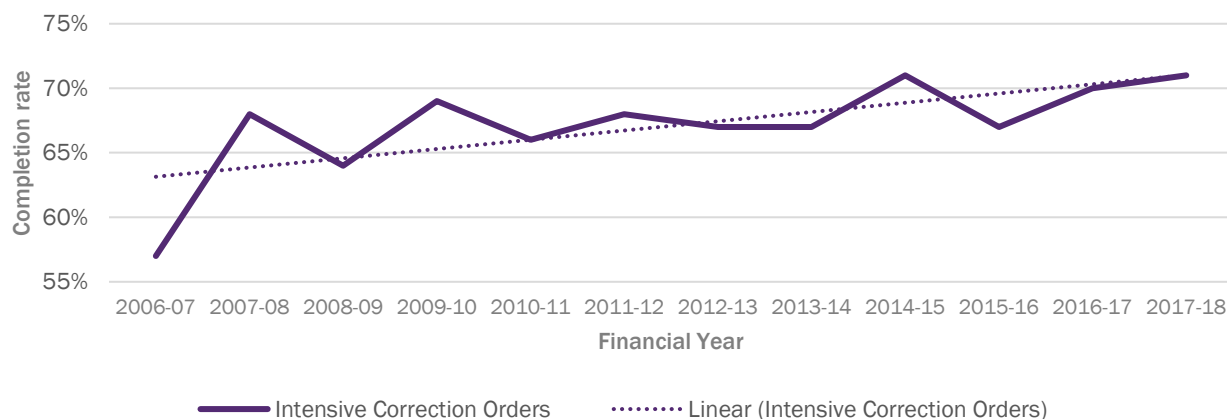
<sup>415</sup> Ibid ss 125(4)(a), 126(4), 126A(2).

<sup>416</sup> Ibid s 127(1).

<sup>417</sup> Ibid s 127(3).

Figure 7-3 below provides a graphical representation of the data in the table above.

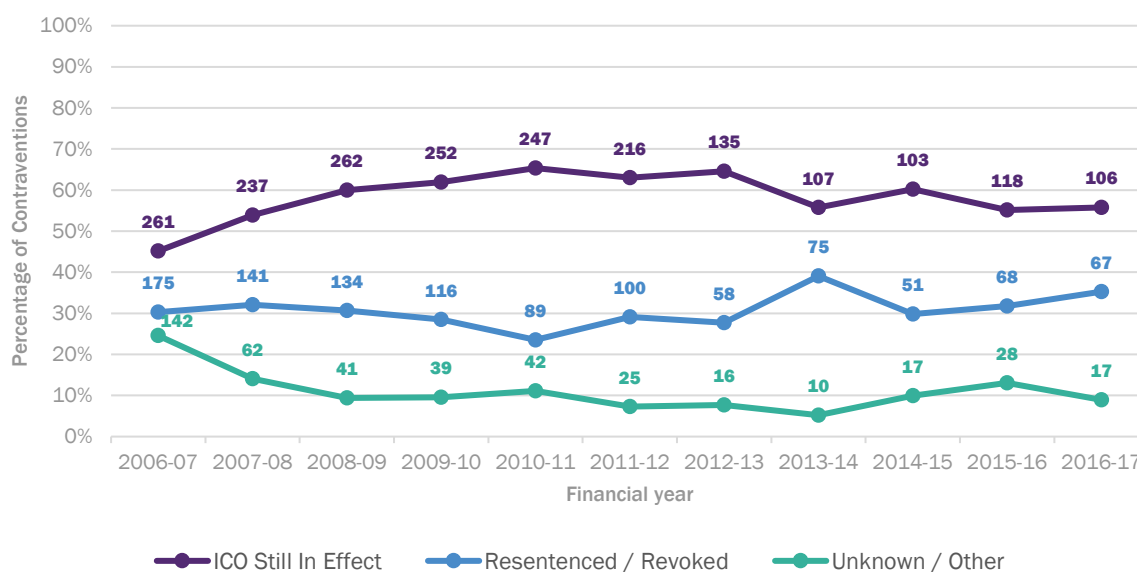
**Figure 7-3: Successful completion rates — intensive correction orders**



Source: Queensland Corrective Services — IOMS database.

QCS has also provided data on contraventions of ICOs, detailing the final court outcome as a result of the breach. Figure 7-4 reveals that when an ICO is breached, in the majority of cases (over 50%), the ICO remains in effect. In about 30 per cent of breaches, the ICO was revoked, or the offender was re-sentenced. These figures have remained relatively stable over the past 10 years. The Council notes that there are potential problems with the quality of court outcome data drawn from the Integrated Offender Management System (IOMS) database before the electronic transfer of court records (ETCR) initiative from 2015; prior to this, entry of finalised court outcomes was a manual process.

**Figure 7-4: Contraventions of ICOs by the final court result outcome, 2006-07 to 2016-17**



Source: Queensland Corrective Services — IOMS database.

### Factors affecting reported completion rates of community orders

The Commonwealth Government's Report on Government Services cautions that, while high or increasing percentages of combined community order completions are desirable, completion rates in that report should be interpreted with caution:

The indicator is affected by differences in the overall risk profiles of offender populations, and risk assessment and breach procedure policies. High-risk offenders subject to higher levels of supervision have a greater likelihood of being detected when conditions of orders are breached. High breach rates could therefore be interpreted as a positive outcome reflecting the effectiveness of more intensive

offender management. Alternatively, a high completion rate can mean either high compliance or a failure to detect or act on breaches of compliance.<sup>418</sup>

The breadth of conditions available, and the resources required to monitor them, mean that completion rates can be influenced by myriad factors.

Breach rates can reflect a range of factors apart from offender compliance with order conditions. For example, enforcement practices (level of care in monitoring compliance with conditions and decisions made as to initiating formal breach proceedings) can significantly impact on completion rates.<sup>419</sup> One report noted that significant case manager workloads caused difficulty in promptly managing offenders who did not comply with conditions.<sup>420</sup>

A Victorian review of contravention of community correction orders (CCOs) explored the relationship between identified factors and likelihood of offender contravention, 'either by further offending or by failing to comply with another condition ("contravention by non-compliance")'.<sup>421</sup> Three groups of factors were identified:

1. Offender-related factors (as at sentence): including age, gender, principal offence, and prior convictions.
2. Offence-related factors: offence type for the principal (most serious) offence that received the CCO.
3. Order-related factors: including CCO type, length, conditions, and sentencing court.<sup>422</sup>

CCOs imposed in the Magistrates' Court and higher courts were analysed separately in the discussion of individual factors, because of 'considerable differences between offenders and offences sentenced to CCOs at each court level'.<sup>423</sup>

Other factors identified by this review as potentially influencing a person's propensity to contravene an order, but not recorded in the data, included 'homelessness, addiction, a chaotic or dysfunctional lifestyle and the timely availability of suitable programs to address the causes of the offending'.<sup>424</sup>

## 7.2 Community service – widening the scope?

In Queensland, 'community service' is defined as an activity declared to be community service under section 270(1) of the CSA.<sup>425</sup> Section 270 permits the chief executive to:

- declare, in writing, an activity to be community service for that Act or the PSA;
- appoint an appropriately qualified person (a community service supervisor) to supervise offenders.<sup>426</sup>

QCS advised the Council<sup>427</sup> that its sentencing guidelines generally support use of community service as a method of delivering rehabilitation services so as to minimise the risk of reoffending. Programs and services can be established to assist offenders to find a sense of belonging and connectedness within their communities. QCS can offer individuals subject to 'reparation orders' enrolment in specific courses and

<sup>418</sup> Australian Government, Productivity Commission, *Report on Government Services 2019* (2019) 8.24, Box 8.12 'Completion of community orders'.

<sup>419</sup> Sentencing Advisory Council (Victoria) (n 2) 60 [3.58].

<sup>420</sup> Victorian Auditor-General, *Managing Community Correction Orders: Victorian Auditor-General's Report* (Report No. 15: 2016–17, 2017) 31.

<sup>421</sup> Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders* (2017) 41 [5.1].

<sup>422</sup> Ibid [5.3].

<sup>423</sup> Ibid [5.4].

<sup>424</sup> Ibid 18 [2.10].

<sup>425</sup> *Corrective Services Act 2006* (Qld) sch 4 and *Penalties and Sentences Act 1992* (Qld) s 4.

<sup>426</sup> *Corrective Services Act 2006* (Qld) s 271 permits delegation by the chief executive of a function under that Act to an appropriately qualified person (the delegate) and the delegate may sub-delegate the delegated function to an appropriately qualified person.

<sup>427</sup> Email from Project Director, Statewide Operations, Queensland Corrective Services, 2 November 2018.

programs which are declared to be community service projects by the appropriate delegate after review and approval. These are intended to:

Address behavioural change in order for them to acquire new skills and increase their employability, social worth and connect ... The current guideline allows for up to 50% of the total hours ordered to be applied to education/training and programs.<sup>428</sup>

However, this guideline is not 'routinely' applied to the community service aspect of ICOs, because section 114(2A) of the PSA expressly recognises a split between programs and community service: it presumes that one-third of the time directed will be spent attending programs, and two-thirds will be spent performing community service. Program attendance is therefore generally not credited towards the standard ICO community service obligation. QCS noted that:

While there is flexibility for an authorised corrective services officer to make exceptions to the above, the current provisions are restrictive in terms of the rehabilitative nature of community supervision. It is rare for an individual who receives an ICO to have needs that require such intense regularity and further, at times impedes the individualisation of assessment outcomes developed by Probation and Parole.<sup>429</sup>

In some other jurisdictions, the legislation itself expressly acknowledges that programs and treatment can be counted as part of community service, addressing concerns that offenders with disabilities and/or complex needs may not be considered suitable for ICOs because of their inability to perform traditional forms of community service.

The NSW definition of 'community service work', which applies a condition of an ICO,<sup>430</sup> is: 'any service or activity approved by the Minister, and includes participation in personal development, educational or other programs'.<sup>431</sup>

Victoria's CCO scheme allows a court to determine that some or all hours satisfactorily undertaken for a treatment and rehabilitation condition can be counted as hours for an unpaid community work condition.<sup>432</sup>

New provisions introduced in Tasmania determine that, where an offender on a CCO with a community service condition attends an educational or other program as directed, the time spent attending that program is taken to be performance of community service under the order.<sup>433</sup>

Northern Territory community custody orders carry a statutory condition requiring performance of community work.<sup>434</sup> This refers back to an 'approved project', which means a rehabilitation program or work, or both, approved by the Commissioner.<sup>435</sup>

Conversely, community work in NZ cannot be ordered as part of an intensive supervision order, which can include wide-ranging special conditions incorporating therapeutic and reintegrative programs and placement into the care of ethnic, cultural, religious and other groups.<sup>436</sup> Separately, when considering imposing community service, the court must give 'particular consideration to whether the sentence is appropriate having regard to the offender's character and personal history, and to any other relevant circumstances'.<sup>437</sup> A sentence of community work is inappropriate if the court is satisfied that:

- (a) the offender has alcohol, drug, psychiatric, or intellectual problems that indicate that it is unlikely that he or she would complete a sentence of community work; or

---

<sup>428</sup> Ibid.

<sup>429</sup> Ibid.

<sup>430</sup> See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3, 73A(2)(d).

<sup>431</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 3.

<sup>432</sup> *Sentencing Act 1991* (Vic) s 48CA.

<sup>433</sup> *Sentencing Act 1997* (Tas) s 42AT(3).

<sup>434</sup> *Sentencing Act 1995* (NT) s 48E.

<sup>435</sup> Ibid ss 3, 34, 48E and *Correctional Services Act 2014* (NT) s 167.

<sup>436</sup> See *Sentencing Act 2002* (NZ) s 54H.

<sup>437</sup> Ibid s 56(1)(b).

(b) for any other reason it is unlikely that the offender would complete a sentence of community work.<sup>438</sup>

A NZ probation officer may direct (with offender consent), hours of community work not exceeding 20 per cent of an order of at least 80 hours, to be spent in training in basic work and living skills, which are counted as community work, unless the offender fails, without reasonable excuse, to complete them.<sup>439</sup>

An alternative to widening the definition of 'community service' in Queensland is a conversion scheme. A potential model for such a scheme already exists in Queensland in Part 3B of the *State Penalties Enforcement Act 1999* (Qld). Work and development orders (WDOs) require a person to undertake any or all of the following to satisfy all or part of the enforceable amount of the person's State Penalties Enforcement Register (SPER) debt (s 32G):

- unpaid work for an approved sponsor
- medical/mental health treatment under an approved sponsor's plan provided by a health practitioner
- the following as decided by an approved sponsor:
  - an educational, vocational or life skills course
  - financial or other counselling
  - drug or alcohol treatment
  - a mentoring program (if person under 25)
  - a culturally appropriate program (if the person is an Aboriginal or Torres Strait Islander person living in a remote area).

To be eligible, the person must be unable to pay because of financial hardship, a (prescribed) mental illness, cognitive or intellectual disability, homelessness, a (prescribed) substance use disorder, or they are experiencing domestic and family violence (s 32H).

An approved sponsor is a person or entity approved by the registrar (s 32F). The approved sponsor may apply to the registrar for the order with the eligible person's agreement (s 32J) and must undertake an eligibility assessment (s 32K).

The QCS Annual Report 2017–18 states that 'stage 1 of the WDO scheme commenced in October 2017 and QCS continues to support the rollout of the scheme as the sole sponsor available to provide community service as a WDO option. As at 30 June 2018, there were 1,634 people on WDOs'.<sup>440</sup>

### 7.3 ICO use has declined as court ordered parole has increased

As outlined earlier in Chapter 2 of this report (see section 2.2.3), ICOs have declined steadily since their introduction in the 2005–06 financial year. The latest QCS Annual Report identifies there were 152 ICOs active in Queensland as of 30 June 2018 (down from 166 in 2017, 191 in 2016, 181 in 2015 and 156 in 2014).<sup>441</sup>

Table 7-3 reveals that only 0.2 per cent (3,789) of sentencing events in the Magistrates Courts and 2.8 per cent (1,444) of sentencing events in the higher courts resulted in an ICO.

**Table 7-3: Proportion of ICOs by offenders, events, offences and penalties, 2005–06 to 2016–17**

| Court Type                  | Adult offenders | Sentencing events | Offences | Penalties |
|-----------------------------|-----------------|-------------------|----------|-----------|
| District and Supreme Courts | 3.3%            | 2.8%              | 1.5%     | 1.6%      |
| Magistrates Courts          | 0.5%            | 0.2%              | 0.4%     | 0.5%      |

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

<sup>438</sup> Ibid s 56.

<sup>439</sup> Ibid ss 66A, 66C.

<sup>440</sup> Queensland Corrective Services (n 310) 32.

<sup>441</sup> Queensland Corrective Services (n 310) 122, Table 12.

The median duration of ICOs in the Magistrates Courts was 0.7 years and 1 year in the District and Supreme Courts (Table 7-4).

**Table 7-4: Length and count of ICO penalties, 2005–06 to 2016–17**

| Court Type                  | ICO Sentencing Events | Average duration | Median duration |
|-----------------------------|-----------------------|------------------|-----------------|
| District and Supreme Courts | 1,444                 | 0.9 years        | 1 year          |
| Magistrates Courts          | 3,789                 | 0.7 years        | 0.7 years       |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Table 7-5 shows that the number of ICOs imposed decreased by 90 per cent in the higher courts, from 324 sentencing events involving an ICO in 2005–06 to 32 in 2016–17 and by 61 per cent in the Magistrates Courts (from 592 sentencing events in 2005–06 to 230 in 2016–17).

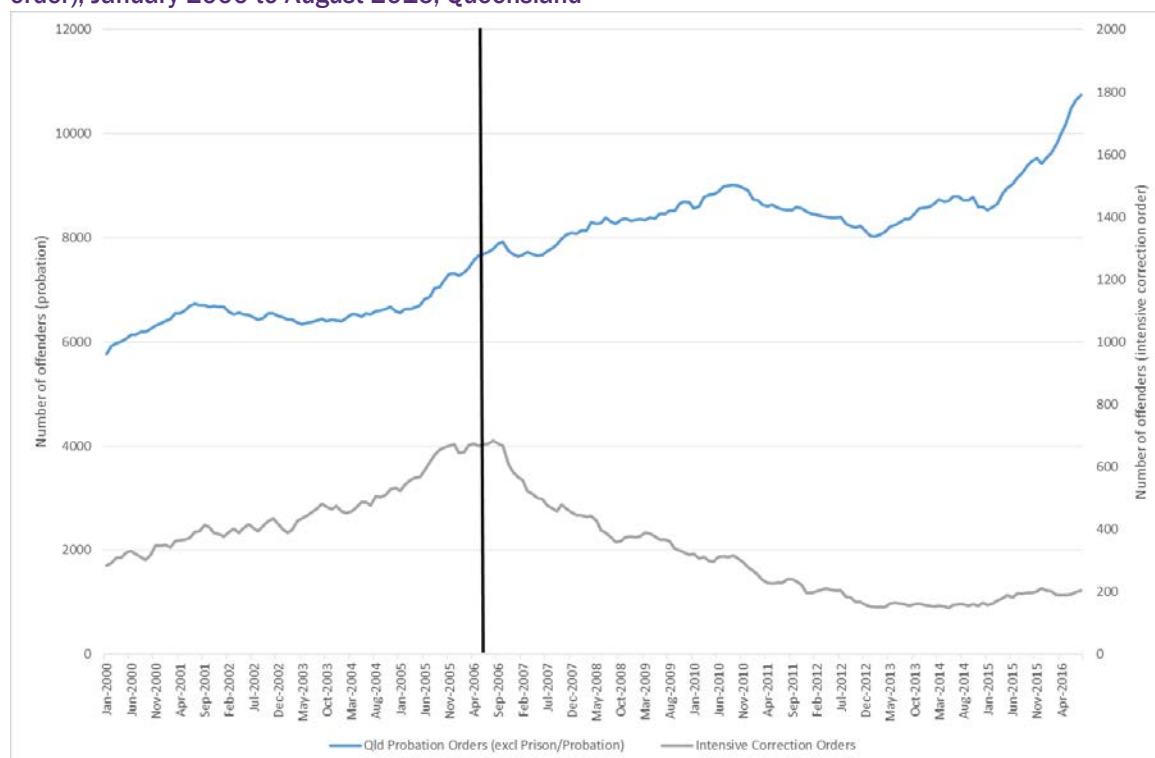
**Table 7-5: Change in ICOs over time, 2005–06 to 2016–17**

| Court Type                  | Number of sentencing events involving an ICO |         |          | ICOs as a proportion of all custodial sentences |         |
|-----------------------------|--|---------|----------|---|---------|
|                             | 2005–06                                      | 2016–17 | % Change | 2005–06   | 2016–17 |
| District and Supreme Courts | 324  | 32      | ▼ -90%   | 8.9%  | 0.8%    |
| Magistrates Courts          | 592  | 230     | ▼ -61%   | 7.4%  | 1.5%    |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Figure 7-5 below shows that the number of distinct offenders on ICOs (as their most serious order) roughly doubled from 2000 to 2005, but steadily declined after the introduction of court ordered parole in August 2006 (the black line). This trend did not apply to probation orders.

**Figure 7-5: Number of distinct offenders on probation and intensive correction orders (as most serious order), January 2000 to August 2016, Queensland**



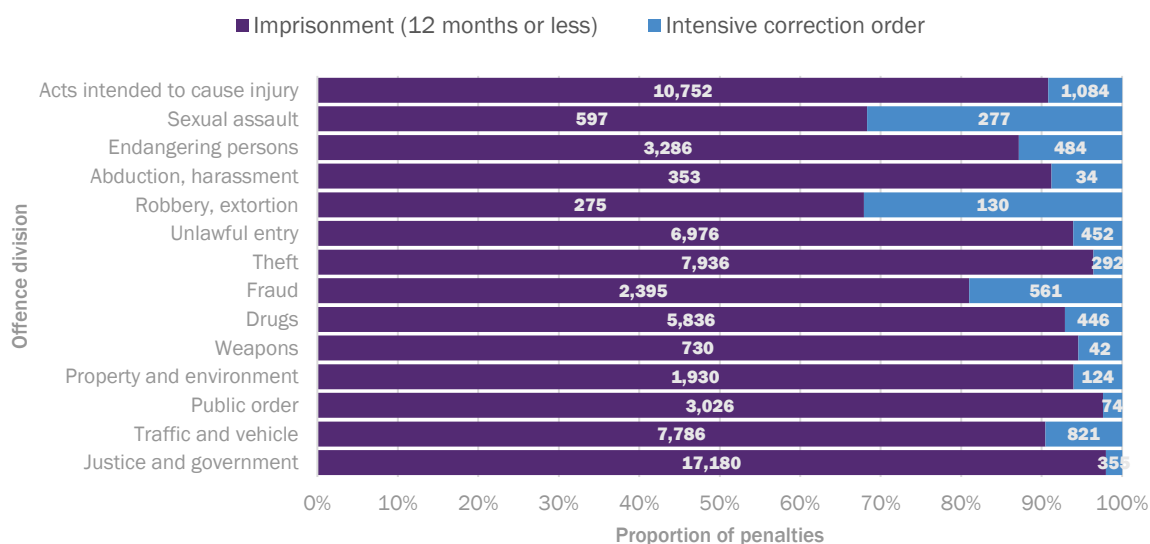
Source: Freiberg et al, *Queensland Drug and Specialist Courts Review — Final Report* (2016) 170 [11.6], Figure 27.

Data source: QCS administrative data.

Note: Number of offenders represents the number of offenders on the last day of the month. The black line represents the introduction of court ordered parole.

Figure 7-6 below compares offenders sentenced to an ICO compared to those sentenced to a period of imprisonment of 12 months or less. Of note, offences of sexual assault, robbery and extortion, and fraud receive a higher rate of ICOs (when compared to short sentences of imprisonment) compared to other offences.

**Figure 7-6: ICOs compared with periods of imprisonment of 12 months or less by offence division, 2005–06 to 2016–17**



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

## 7.4 Parole – a different system

Parole orders differ from ICOs in terms of the applicable durations (0–3 years, over 3 years) and relevant offences (court ordered parole cannot be imposed for a sexual offence; this limitation does not apply to ICOs).<sup>442</sup>

There are different powers as regards the sentencing court, the Parole Board Queensland (the Parole Board), and the department.

In a submission to the Council, QCS observed that: ‘In practice, ICOs in Queensland are seen as being inflexible and restrictive, particularly in relation to the ability to impose an ICO, the core conditions required and how the breach process is managed’.<sup>443</sup> Comparatively, court ordered parole allows QCS to respond to risk by, for example, increasing or decreasing supervision of individuals.

In further advice, QCS noted that ICOs sometimes do not allow sufficient flexibility to effectively respond to the diverse range of risks that different offenders represent. Its offender management framework is designed to target more resources towards high-risk offenders, achieved through a graduated supervision response based on six levels of service (LOS). Generally, offenders with a higher risk of reoffending are given an enhanced or intensive LOS, meaning they will have a reporting frequency of weekly to monthly. By contrast, ICOs have a legislated twice-weekly reporting requirement, even though in 2017–18 the majority of offenders sentenced to an ICO would have been assigned a standard LOS based on their RoR score, attracting a monthly to three-monthly reporting frequency for other orders. QCS noted that:

- ICO reporting conditions ‘are more stringent than the majority of [court ordered parole] and Board Ordered Parole orders’.<sup>444</sup>

<sup>442</sup> *Penalties and Sentences Act 1992* (Qld) ss 160A(6), 160B–160D.

<sup>443</sup> Submission 11 (Queensland Corrective Services) 23.

<sup>444</sup> Memorandum from General Manager, Community Corrections, Queensland Corrective Services to Policy Team, Queensland Sentencing Advisory Council, 16 October 2018.

- Research indicates that over servicing offenders presenting with lower-risk levels can increase their reoffending risk.<sup>445</sup>
- It could also be argued that twice-weekly reporting gives insufficient time for offender reflection on previous case management sessions and to commence behavioural change, which can lead to case management sessions becoming compliance focused, which may potentially run contrary to the intent of supervision.<sup>446</sup>

A court can only order a parole release or eligibility date. Unlike ICOs, breaches of parole do not concern the court as these are managed by the Parole Board.

The CSA mandates various standard conditions of a parole order,<sup>447</sup> including that the prisoner must carry out the chief executive's lawful instructions.<sup>448</sup> There are also direction powers of corrective services officers regarding restricting prisoner movement and monitoring prisoner location<sup>449</sup> and limited powers of the chief executive to temporarily amend parole orders<sup>450</sup> and request an immediate suspension from the Parole Board.<sup>451</sup>

The Parole Board has much wider powers regarding amending, removing or inserting further conditions.<sup>452</sup> It may also amend, suspend or cancel a parole order.<sup>453</sup> Suspension or cancellation means a return to custody; a warrant can be issued for the prisoner's arrest.<sup>454</sup> A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.<sup>455</sup>

<sup>445</sup> See, for example, Christopher T Lowenkamp and Edward J Latessa, 'Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders' (2004) *Topics in Community Corrections* — 2004 6 referring to Donald A Andrews and James Bonta, *The Psychology of Criminal Conduct* (Cincinnati, OH: Anderson Publishing Co, 1998); Donald Andrews et al, 'Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-analysis' (1990) 28(3) *Criminology* 369; James Bonta, Suzanne Wallace-Capretta, and Jennifer Rooney (2000), 'A Quasi-experimental Evaluation of an Intensive Rehabilitation Supervision Program' (2000) 27(3) *Criminal Justice and Behavior* 312; Christopher T Lowenkamp and Edward J Latessa, *Evaluation of Ohio's Community Based Correctional Facilities and Halfway House Programs* (University of Cincinnati, 2002). 'When taken together, these meta-analyses and individual studies provide strong evidence that more intense correctional interventions are more effective when delivered to higher-risk offenders, and that they can increase the failure rates of low-risk offenders ... intensive supervision reduces recidivism for higher-risk offenders but increases the recidivism rates of lower-risk offenders': Ibid.

<sup>446</sup> Memorandum from General Manager, Community Corrections, Queensland Corrective Services to Policy Team, Queensland Sentencing Advisory Council, 16 October 2018.

<sup>447</sup> Be under the chief executive's supervision, carry out the chief executive's lawful instructions, give a test sample if required of blood, breath, hair, saliva or urine, report and receive visits as directed, notify of a change of address or employment within 48 hours and not to commit an offence (*Corrective Services Act 2006* (Qld) s 200(1)). Leaving Queensland requires approval (*Corrective Services Act 2006* (Qld) ss 212, 213).

<sup>448</sup> For a discussion of the breadth of the chief executive's lawful instructions, see 11.10.2 and 11.15.1, 2. A full discussion of executive powers regarding parole is at 11.4.1.

<sup>449</sup> See *Corrective Services Act 2006* (Qld) s 200A.

<sup>450</sup> On the basis that the prisoner has failed to comply with the order, poses a serious and immediate risk of self-harm, or poses an unacceptable risk of committing an offence (*Corrective Services Act 2006* (Qld) s 201). The amendment can be cancelled by the Parole Board at any time (s 202).

<sup>451</sup> *Corrective Services Act 2006* (Qld) ss 208A–208C; on grounds of failure to comply, serious and immediate risk of harm to another, unacceptable risk of committing an offence, preparation to leave the State without approval, or posing a risk of carrying out a terrorist act.

<sup>452</sup> Ibid ss 200(3) and 205(1).

<sup>453</sup> Ibid s 205(2), 208 on the grounds of failing to comply with the order, posing a serious risk of harm to another or an unacceptable risk of committing an offence, or preparing to leave Queensland without permission. These three actions are also available for Board ordered (as opposed to court ordered) parole where the Parole Board receives information after granting parole which would have resulted in it making a different parole order or not making one (s 205(2)(b)). The Parole Board can amend or suspend a parole order if the prisoner is charged with an offence (*Corrective Services Act 2006* (Qld) s 205(2)(c)). The Parole Board may also suspend or cancel a parole order if the Board reasonably believes the prisoner subject to the order poses a risk of carrying out a terrorist act (*Corrective Services Act 2006* (Qld) s 205(2)(d)).

<sup>454</sup> Ibid s 206.

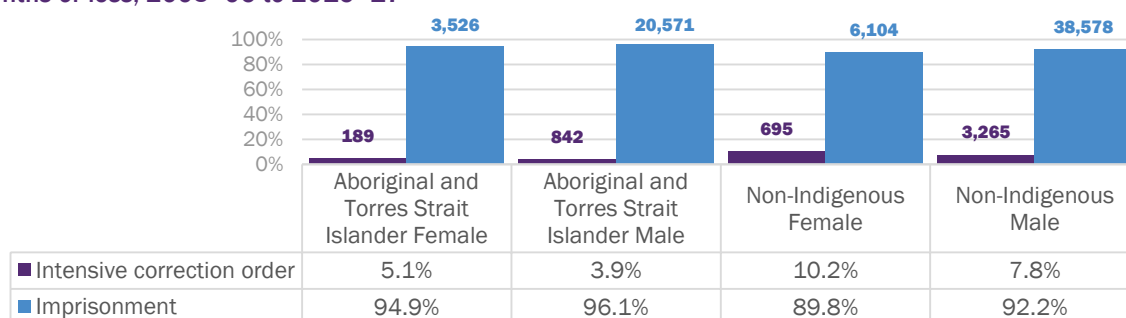
<sup>455</sup> Ibid s 209 and see *Penalties and Sentences Act 1992* (Qld) s 160E.

## 7.5 Who are ICOs used for?

Figure 7-7 below allows a comparison between demographic groups, showing the proportion of ICOs imposed compared to sentences of imprisonment of 12 months or less. It shows, for example, that 5.1 per cent of Aboriginal and Torres Strait Islander women who received a term of imprisonment of 12 months or less were sentenced to an ICO. This is in comparison to the 94.9 per cent of Aboriginal and Torres Strait Islander women who were instead sentenced to a period of imprisonment of 12 months or less.

It shows that Aboriginal and Torres Strait Islander people are less likely to receive an ICO and more likely to receive a period of imprisonment of 12 months or less, compared to their non-Indigenous counterparts. Similarly, women are more likely to receive an ICO (instead of a sentence of imprisonment of 12 months or less) compared to men.

**Figure 7-7: Proportion of sentences resulting in an ICO, compared with terms of imprisonment of 12 months or less, 2005–06 to 2016–17**

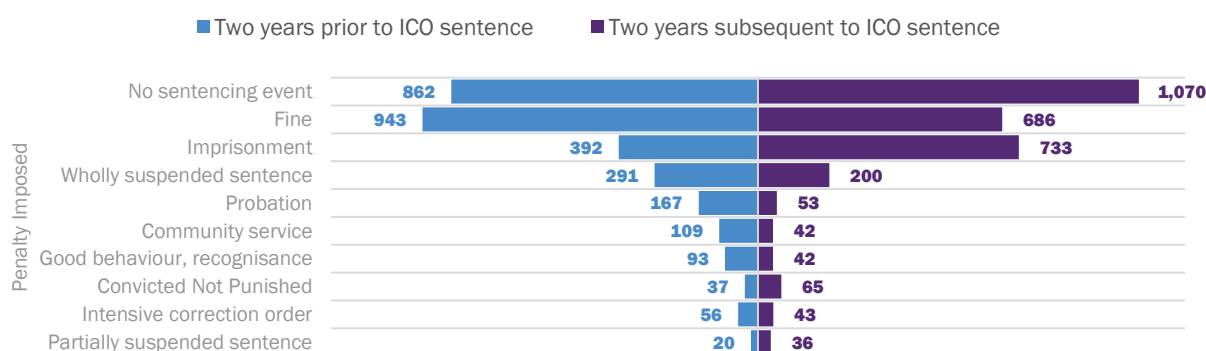


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Figure 7-8 below shows the prior and subsequent offending within two years of an ICO sentencing event. Most offenders who are sentenced to an ICO had either not been subject to any sentencing event in the prior two years (862 cases) or had received a fine (943 cases).

There were 1,070 cases in which the offender was not subject to a sentencing event in the two years subsequent to their ICO sentence. Those who were sentenced within the next two years were most likely to receive a sentence of imprisonment (733 cases), followed by a fine (686 cases).

**Figure 7-8: The most serious penalty imposed before and after an ICO sentencing event, 2005–06 to 2016–17**

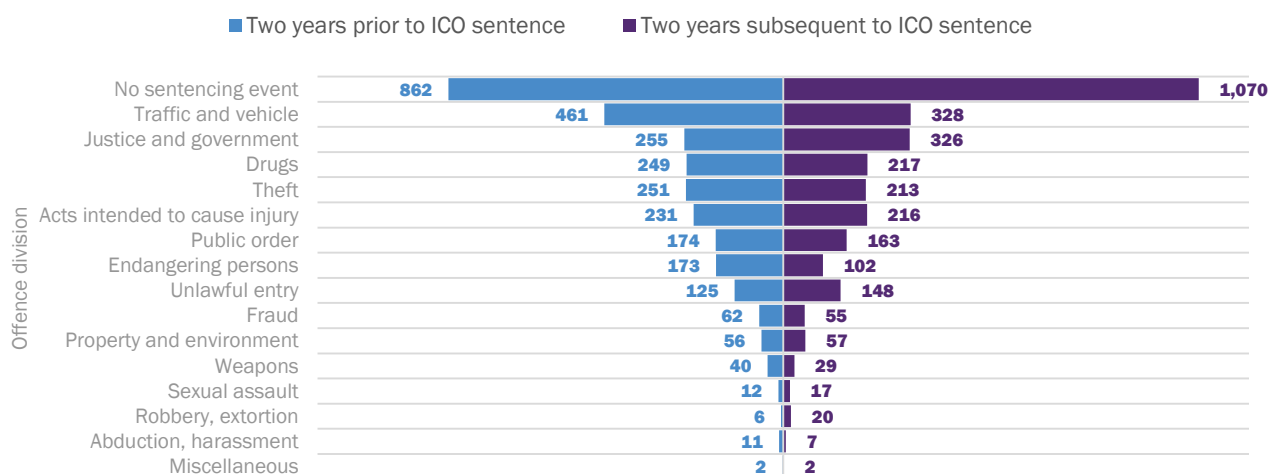


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Figure 7-9 shows the most serious offence for which an offender was sentenced in the two years before and after receiving an ICO.

**Figure 7-9: The most serious offence committed before and after an ICO sentencing event, 2005–06 to 2016–17**

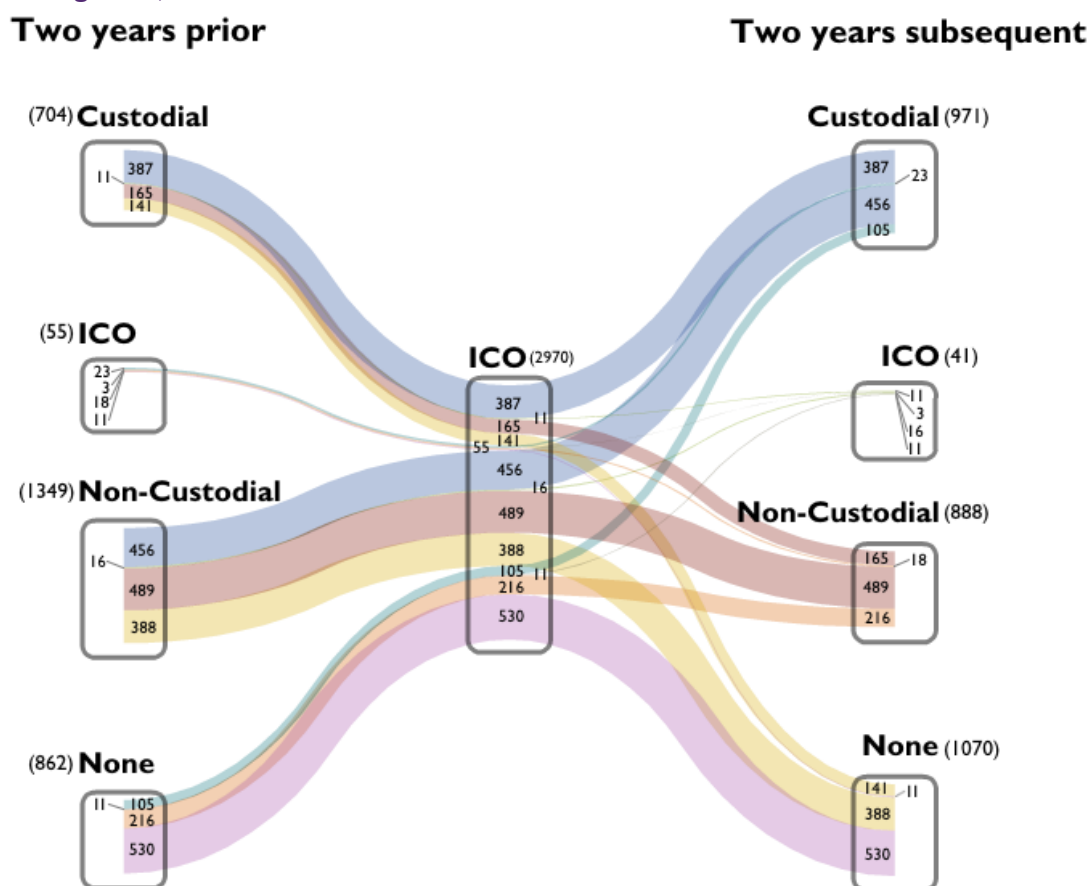


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: The sentencing event date does not reflect the date of the offence for which the person is being sentenced. It is possible for a person to be sentenced for other offences that were committed prior to the ICO being imposed, after the date on which the person was sentenced to an ICO.

Figure 7-10 shows the 'sentencing pathway' of offenders who were sentenced to an ICO. It tracks each offender who received an ICO and shows the most serious sentence imposed in the two years prior to the ICO, and the most serious sentence imposed in the two years after the ICO. For example, a group of 530 offenders had not been sentenced either in the two years prior to the ICO sentence or in the two years following the ICO sentence. A second group of 584 offenders 'graduated' from either no sentencing event, or a sentencing event that resulted in a non-custodial order or an ICO to a sentence of imprisonment in the two years following their ICO.

Figure 7-10: ICO pathways, showing penalties imposed two years prior and two years subsequent to an ICO sentencing event, 2005–06 to 2016–17<sup>456</sup>



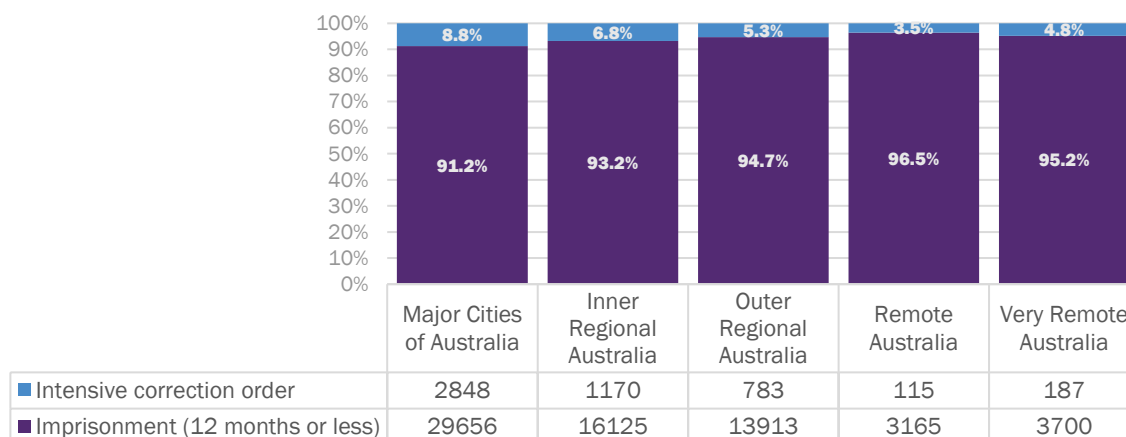
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

### 7.5.1 Remoteness

Offenders residing in regional and remote areas are much less likely to receive an ICO in contrast to sentences of imprisonment of 12 months or less — see Figure 7-11.

<sup>456</sup> Includes offenders sentenced to an ICO between 1 July 2007 and 30 June 2015. This period is four years shorter than the Council's 12-year data period to allow for two years of prior sentences and two years of subsequent sentences. For each ICO, the most serious prior penalty and the most serious subsequent penalty were included.

**Figure 7-11: ICOs by remoteness area, compared to periods of imprisonment of 12 months or less, 2005–06 to 2016–17**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

## 7.6 2016 Queensland Drug and Specialist Courts Review

The final report of the Queensland Drug and Specialist Court Review identified the limited use of ICOs and outlined relevant stakeholder views on the effectiveness of current sentencing orders available in Queensland:

- The 12-month duration of the order was too short.
- There were some concerns about the level of supervision and referral to programs to address the underlying causes of offending (as with probation orders, where magistrates had limited confidence that specific conditions attached to orders were actually observed or delivered as there is no court monitoring of the order).
- As a result, court ordered parole was being used as an intermediate order with imprisonment as the default. This had resulted in net widening for offenders who would otherwise have been placed on a community-based order.
- Delay in District Court breach hearings was a problem: these may take up to six to 12 months if the offence is first heard in a Magistrates Court. There was no swift and certain punishment for breaches of community-based orders ordered in the higher courts.
- There was support from some magistrates to see a return to the making of specific orders about the courses, treatments and/or programs that offenders should complete rather than making a general order for QCS to determine what is suitable for the offender.<sup>457</sup>

The report identified two 'fundamental problems' in the use of probation and ICOs:

- Structure: 'there is a need for a more detailed and structured order that provides a similar framework for alcohol and other drug offenders whose offences are less serious, and whose risk is lower, than those offenders who would be appropriate for a Drug Treatment Order'.
- Delivery of services: 'it is essential that appropriate treatment services be provided to people on community-based orders'.<sup>458</sup>

<sup>457</sup> Freiberg et al (n 96) 169 [11.5].

<sup>458</sup> Ibid 169 [11.6].

In the report authors' view:

- 'judicial officers should have a broader range of sentencing options for alcohol- and drug-related offences in the moderate range, in particular, ones that may allow for judicial monitoring, in line with evidence of its importance and efficacy in therapeutic jurisprudence literature'; and
- '[e]ither more, or more appropriate, conditions should be added to probation and ICOs or a new order could be created'.<sup>459</sup>

## 7.7 Other jurisdictions

Details regarding analogous orders in other Australian jurisdictions and Canada are outlined in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-jurisdictional Analysis*, which can be found on the Council's website.

In brief, differences between ICOs in other jurisdictions include:

- the maximum term of the order (12 months in Queensland and the NT, but up to four years in the ACT when certain criteria are met);
- how much flexibility there is in the conditions attached (for example, the new form of ICO in NSW has minimal core conditions, but with a supervision condition that allows the person to be directed to participate in relevant programs, including treatment programs, as mandatory, versus the conditions in Queensland and the NT, which are quite rigid);
- the types of additional conditions that can be ordered (for example, ICOs in NSW expressly provide for home detention, electronic monitoring and curfew conditions, and community service as an additional (but not mandatory) condition, while in WA, community service cannot be ordered);
- the scope of administrative powers on breach (for example, in the ACT, the Sentence Administration Board, which is the equivalent to the Parole Board in Queensland, has the power to suspend or cancel the order without the need to return the matter to court).

### 7.7.1 New South Wales

NSW first introduced ICOs in 2010, at the same time as it abolished periodic detention. It did so in response to a NSW Sentencing Council report, which had recommended that periodic detention be replaced by 'intensive correction orders'.<sup>460</sup>

In a 2013 report, the NSW Law Reform Commission (NSWLRC) recommended that ICOs (and home detention and suspended sentences) be replaced with a new community detention order (combining home detention

<sup>459</sup> Ibid 171 [11.6].

<sup>460</sup> The amendments were made by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW). The report was the NSW Sentencing Council, *Review of Periodic Detention* (2007) – Council conclusion at 196 [9.5]. The Government noted various findings of the Council regarding the negatives of periodic detention: it was not uniformly available throughout the State; facilities were underutilised; there had been a significant downward trend in courts making the orders; completion rates were low (just under a third of periodic detainees failed to complete their orders, with Indigenous detainees four times more likely to have unsuccessful outcomes); the rehabilitative value was questionable (39 per cent of all offenders had another proven offence within the following two years, increasing to 55 per cent for Aboriginal offenders); it provided no case management or therapeutic or rehabilitative support for offenders and it had a negative impact in relation to employment and family duties: New South Wales, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24427–8 (John Hatzistergos, Attorney General, Minister for Citizenship, Minister for Regulatory Reform, and Vice-President of the Executive Council). While the possible introduction of weekend detention/periodic detention was raised by some stakeholders during the Council's review (for example, Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 3 and Submission 4 (Fighters Against Child Abuse Australia) 12), the Council notes this option, similar to home detention, would require significant additional investigation to ensure its likely benefits would outweigh any potential disadvantages of introducing such an option.

and ICOs).<sup>461</sup> Instead, the latest amendments,<sup>462</sup> in force from 24 September 2018, reformed ICOs and introduced CCOs, but did abolish home detention orders, community service orders, suspended sentences and good behaviour bonds. Other amendments introduced re-integration home detention from 28 May 2018.<sup>463</sup>

The advantages of ICOs noted by the NSWLRC were that ICOs:

- are cheaper than imprisonment;
- allow an offender to remain in employment and maintain contact with family;
- avoid potential contaminating effects of imprisonment, particularly for first-time offenders;
- allow offenders to retain housing;
- can combine benefit to the community (through community service work) with rehabilitation and an element of punishment.<sup>464</sup>

The NSWLRC view was that ICOs were, at that time:

Underused and not targeted to those offenders who might benefit most. For these sentences to be effective, the courts and the community must have confidence that they are serious sentences that can provide interventions that make a difference to an offender's level of reoffending.<sup>465</sup>

There was stakeholder advice that ICOs were still not available in some rural and remote areas and, even where technically available, limited local opportunities for community service work and appropriate rehabilitation programs were barriers to their use (e.g. an offender from a rural area on an ICO could have difficulties complying with the order due to needing to travel to a larger town).<sup>466</sup>

While supporting the replacement of ICOs and home detention with the new proposed community detention order, as an interim measure, the NSWLRC recommended the current scheme be reformed to increase their use. Recommendations made by the NSWLRC included that:

- Corrective Services NSW should make home detention and ICOs available across NSW (as was Parliament's intention)<sup>467</sup> and provide information to courts and lawyers about the local availability of ICOs and of the necessary support services and programs.<sup>468</sup>
- The maximum length of the order should be extended from 2 to 3 years (in the higher courts) and stay at 2 years in local (magistrates) courts, with an extension to 3 years when sentencing for multiple offences.<sup>469</sup> [Recent amendments introduced a blanket increase in the maximum duration (for an aggregate sentence only) to 3 years.<sup>470</sup>]
- Courts should be able to set a non-parole period of up to 2 years as part of an ICO.<sup>471</sup> [This recommendation has not been implemented.]

<sup>461</sup> NSW Law Reform Commission (n 76) 246, Recommendation 11.1.

<sup>462</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) as amended by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

<sup>463</sup> New part 5A of the *Crimes (Administration of Sentences) Act 1999* (NSW) inserted by the *Parole Legislation Amendment Act 2017* (NSW).

<sup>464</sup> NSW Law Reform Commission (n 76) 199–200 [9.16]–[9.17].

<sup>465</sup> *Ibid* 195 [9.2].

<sup>466</sup> *Ibid* 201–2 [9.24].

<sup>467</sup> *Ibid* 201 [9.23] citing NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426, and 203, Recommendation 9.1(1).

<sup>468</sup> *Ibid* 203, Recommendation 9.1(2). Corrective Services NSW had advised that ICOs could be provided through all community corrections offices state-wide: 202 [9.26].

<sup>469</sup> *Ibid* 212, Recommendation 9.4(1)–(2).

<sup>470</sup> *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW). See *Crimes (Sentencing Procedure) Act 1992* (NSW) s 68.

<sup>471</sup> NSW Law Reform Commission (n 76) 212, Recommendation 9.4(3). The opposite applies — a court is not to set a non-parole period for an ICO. See s 7(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

- If the State Parole Authority revoked an ICO during the non-parole period, it should be empowered to commit the offender to full-time custody or home detention, with the offender able to apply to the authority for reinstatement of the ICO after one month.<sup>472</sup> [This recommendation has been adopted in part. The Authority can suspend the order for an interim period of up to 28 days,<sup>473</sup> and can also revoke the order, in which case it can be reinstated after the offender has served at least one month of full-time detention.<sup>474</sup>]
- It should be possible to satisfy the hours of community service work attached to an ICO by the offender engaging in a range of activities including literacy, numeracy, work-ready, educational or other programs according to the needs of the offender.<sup>475</sup> [This recommendation has since been adopted.<sup>476</sup>]
- Corrective Services NSW should be able to defer commencement of the work hours requirement of an ICO while the offender completes residential drug or alcohol treatment or another program. This should not increase the length of the order.

The NSWLRC acknowledged research indicating that 55 per cent of ICO assessments resulted in an ICO being imposed, with the most common cause of negative suitability assessment being alcohol or other drug dependency (although Corrective Services was said to have since relaxed its approach).<sup>477</sup>

The mandatory community service requirement was identified as the key barrier to ICO suitability for offenders with a substance dependency or significant mental illness (e.g. there may be work safety issues). The likelihood of compliance could be compromised because of instability regarding housing, substance dependency, cognitive impairment, or mental illness.

The NSWLRC noted that when it recommended the introduction of ICOs, the NSW Sentencing Council did not envisage community service work being a mandatory ICO component.<sup>478</sup>

The NSWLRC noted that ICO conditions needed to be 'reworked and made more flexible'. It supported the concept of 'work-ready' programs where offenders serving ICOs could, before commencing the community service work requirement, undertake intensive drug treatment, work training education, and dedicated workshops to enable offenders who would otherwise be unsuitable for community service work to complete work under direct Corrective Services supervision.<sup>479</sup>

The NSW Sentencing Council carried out a statutory review of ICOs in 2016.<sup>480</sup> It supported the NSWLRC's recommendations and did not put forward further recommendations as the NSW Government was considering the NSWLRC report at the time. It did comment that 'the ICO scheme is underused and not targeted to those offenders who might benefit most'.<sup>481</sup>

Much of the content of this statutory review was updated in the Sentencing Council's 2016 Annual Report.<sup>482</sup> The three leading causes of breaches leading to revocation from 2014–2016 were consistent (and close in number) in each year: community service, be of good behaviour and not commit any offence, and comply with reasonable directions.<sup>483</sup>

<sup>472</sup> NSW Law Reform Commission (n 76) 211–12 [9.61] and Recommendation 9.4(4).

<sup>473</sup> See *Crimes (Administration of Sentences) Act 1999* (NSW) s 91(7) and discussion above.

<sup>474</sup> *Ibid* ss 2, 164–5.

<sup>475</sup> NSW Law Reform Commission (n 76) 217, Recommendation 9.6.

<sup>476</sup> See *Crimes (Administration of Sentences) Act 1999* (NSW) s 3 and discussion above.

<sup>477</sup> NSW Law Reform Commission (n 76) 214 [9.72] citing Clare Ringland, 'Sentencing Outcomes for Those Assessed for Intensive Correction Order Suitability' (Crime and Justice Statistics Bureau Brief No. 86, NSW Bureau of Crime Statistics and Research, 2013) and 214 [9.73].

<sup>478</sup> *Ibid* 215 [9.75] citing NSW Sentencing Council, *Review of Periodic Detention, Report* (2007) 161–2.

<sup>479</sup> *Ibid* 216 [9.80].

<sup>480</sup> NSW Sentencing Council, *Intensive Correction Orders: Statutory Review Report* (2016).

<sup>481</sup> *Ibid* 23.

<sup>482</sup> NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2016* (2017).

<sup>483</sup> *Ibid* [5.29] 58, Table 5.7.

In contrast to most other jurisdictions, the use of ICOs in NSW has been steadily increasing. Data from Corrective Services NSW shows that there has been steady growth each year in the number of offenders sentenced to an ICO, almost tripling from 738 in 2010–11 to 2,166 in 2017.<sup>484</sup> There has been a substantial growth in the number of ICOs registered with Corrective Services NSW each year, from 1,229 to 5,996 (a 388% increase over the seven years, including a 97% increase since 2015).<sup>485</sup>

Following the introduction of new ICO scheme, in *R v Pullen*,<sup>486</sup> the NSW Court of Criminal Appeal commented:

The new statutory scheme provides some additional flexibility to sentencing judges in that it decreases the number of mandatory conditions attached to ICOs and allows the Court to impose further conditions which are appropriate in the circumstances of the particular case.<sup>487</sup>

In *Pullen*, it was argued by the Crown that an ICO under the new scheme was more lenient because of the removal of the mandatory conditions which applied under the old scheme.<sup>488</sup> The Court of Appeal accepted, to a small extent, the Crown's submission but noted:

The statement in *R v Pogson*; *R v Lapham*; *R v Martin*<sup>489</sup> that ICOs involve substantial punishment was to a significant extent premised on the existence of onerous mandatory conditions which imposed significant restrictions upon an offender's liberty ... That remains the case with the new scheme as persons subject to an ICO are required to comply with multiple mandatory obligations which are attached to the standard conditions. There are also additional obligations which are prescribed by regulation which attach to the additional conditions that may be imposed ... The degree of punishment involved in an ICO, and therefore its appropriateness in a particular case, must now be assessed having regard to the number and nature of conditions imposed. In some cases, as a result of the significant number of obligations prescribed by the regulations, an ICO will be more onerous than it was under the previous scheme.<sup>490</sup>

The Court of Appeal concluded that:

The result of these amendments is that in cases where an offender's prospects of rehabilitation are high and where their risk of reoffending will be better managed in the community, an ICO may be available, even if it may not have been under the old scheme. The new scheme makes community safety the paramount consideration. In some cases, this will be best achieved through incarceration. That will no doubt be the case where a person presents a serious risk to the community. In other cases, however, community protection may be best served by ensuring that an offender avoids gaol. As the second reading speech makes plain, evidence shows that supervision within the community is more effective at facilitating medium and long term behavioural change, particularly when it is combined with stable employment and treatment programs.<sup>491</sup>

## 7.7.2 Australian Capital Territory

In March 2015, the ACT Parliamentary Standing Committee on Justice and Community Safety published a report on its inquiry into sentencing.<sup>492</sup> This followed Terms of Reference announced in May 2013 and an unfinished inquiry of a similar nature, which had lapsed in October 2008. The inquiry covered issues including sentencing practice in the ACT and alternative approaches.<sup>493</sup> Several stakeholders considered whether ICOs should be a sentencing option in the ACT (although the Victorian CCO model was discussed alongside the NSW ICO in this context). In its report, the committee welcomed:

<sup>484</sup> NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2017* (2018) as cited in Gelb, Stobbs and Hogg (n 28) 43.

<sup>485</sup> Ibid.

<sup>486</sup> [2018] NSWCCA 264.

<sup>487</sup> Ibid [63] (Harrison J, Johnson and Schmidt JJ agreeing).

<sup>488</sup> Ibid [64].

<sup>489</sup> (2012) 82 NSWLR 60, 84 [106] McClellan CJ at CL and Johnson J, RA Hulme and Button JJ agreeing) citing *Whelan v The Queen* [2012] NSWCCA 147 [120] (Schmidt J, Allsop P and Davies J agreeing).

<sup>490</sup> [2018] NSWCCA 264 [66] (Harrison J, Johnson and Schmidt JJ agreeing) (references omitted).

<sup>491</sup> Ibid [89].

<sup>492</sup> ACT Standing Committee on Justice and Community Safety, *Inquiry Into Sentencing* (Report No. 4, 2015).

<sup>493</sup> Ibid iii.

The potential for intensive corrections orders to be introduced as a sentencing option in the ACT. In the Committee's view, the potential aggregation and extension of the scope of supervision orders available to ACT courts is likely to be a positive step in responding to the ACT's acknowledged high levels of recidivism, so long as sufficient resourcing is applied.<sup>494</sup>

It recommended legislative amendments to introduce an ICO regime and further, that the Government 'accurately assess resource requirements' for an ICO regime, and 'ensure that adequate resources are applied to any future intensive orders regime'.<sup>495</sup>

The inquiry report noted advice from Dr Lorana Bartels that, in the context of conditions favourable to reform in the ACT, the jurisdiction 'did not have "the tyranny of distance", in contrast to jurisdictions such as NSW [and Queensland] and, as a result, in terms of "access to the courts and access to treatment", "you do not have people who are hundreds of kilometres from anything"'.<sup>496</sup>

In the same evidence, Dr Bartels had also told the Inquiry that:

We simply cannot keep building new prison beds. So we need to ensure we are thinking intelligently and creatively about justice and sentencing. We need to make sure our focus is and remains on things that research shows us really do help to cut involvement in crime: drug and alcohol treatment, counselling and mental health, housing, education, employment and transport.<sup>497</sup>

The ACT Government had earlier announced in March 2014 that it would end periodic detention and consider whether 'community correction orders' would succeed them.<sup>498</sup> It responded to the inquiry by announcing a Justice Reform Strategy with a focus on sentencing, including the adequacy of existing sentencing options.<sup>499</sup> The Attorney-General appeared before the Committee for its inquiry, and stated that the purpose of the Government's strategy was to:

recognise that, in many instances, people who are ending up in prison perhaps should not be there. But because of the nature of their offending behaviour and because of the way sentencing laws are currently constructed, they are being sent to prison.<sup>500</sup>

The Government's March 2016 response to the Inquiry Report noted that it had already:

Presented the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015 to the Legislative Assembly in the November [2015] sittings as part of the work of the Justice Reform Strategy. The intention of this Bill is to follow on from the *Crimes (Sentencing) Amendment Act 2014*, by abolishing periodic detention and introducing a new sentencing option. The new Intensive Corrections Order scheme commenced on 2 March 2016. The new Intensive Correction Order while being a sentence of imprisonment is an alternative sentence to full-time custody.<sup>501</sup>

In July 2016, the Government published the second-stage report regarding its Justice Reform Strategy, which included an update on work undertaken to implement the new ICO regime.<sup>502</sup> The report noted the considerable work undertaken to prepare for introduction of the new reforms, including development of an evaluation framework and program logic by the Australian Institute of Criminology.<sup>503</sup>

As at 30 June 2018, there were 69 offenders serving an ICO in the ACT.<sup>504</sup>

<sup>494</sup> Ibid 104 [4.164].

<sup>495</sup> Ibid 105 [4.166]–[4.169], Recommendations 4 and 5.

<sup>496</sup> Ibid 391 [9.7].

<sup>497</sup> Evidence to Standing Committee on Justice and Community Safety, ACT Legislative Assembly, Canberra, 26 May 2014, 146 (Dr Lorana Bartels, Associate Professor of Law, University of Canberra).

<sup>498</sup> ACT Standing Committee on Justice and Community Safety (n 492) 97–98 [4.132]–[4.135].

<sup>499</sup> Ibid 391 [9.3], 393–5 [9.16]–[9.24].

<sup>500</sup> Ibid 394 [9.21].

<sup>501</sup> Legislative Assembly for the ACT, *Government Response to the Standing Committee on Justice and Community Safety's Report on the Inquiry Into Sentencing* (2016) 7.

<sup>502</sup> ACT Government, *Justice Reform Strategy – Second Stage Report* (2016).

<sup>503</sup> Ibid 14 [10.12]–[10.13].

<sup>504</sup> ACT, Justice and Community Safety and Directorate, *Annual Report 2017–18* (2018) 91.

### 7.7.3 South Australia

South Australia introduced ICOs from 30 April 2018 through the *Sentencing Act 2017* (SA). Community and stakeholder consultation was split into two parts: ‘issues such as the fundamental purposes of sentencing, and the universal factors to be taken into account in sentencing’ and ‘proposed further enhancements to the sentencing principles and options available to a court’.<sup>505</sup>

Key features of the South Australian legislative ICO regime include:

- The purpose of South Australian ICOs is to provide an alternative sentencing option where a court is considering imprisonment of 2 years or less and considers ‘there is a genuine risk the defendant will re-offend if not provided with a suitable intervention program for rehabilitation purposes’.<sup>506</sup>
- The court is not to impose an ICO on a defendant unless ‘the court considers that, given the short custodial sentence that the court would otherwise have imposed, rehabilitation of the defendant is more likely to be achieved by allowing the defendant to serve the sentence in the community while subject to strict conditions of intensive correction’ (with the protection of the community the paramount consideration).<sup>507</sup>
- An ICO can be ordered when a court has imposed a sentence of imprisonment of two years or less; considers that the sentence should not be suspended; and there is ‘good reason’ for the defendant serving the sentence in the community subject to intensive correction.<sup>508</sup>
- In assessing whether there is a ‘good reason’ for the person to serve the sentence in the community, the court ‘may determine that ‘even though a custodial sentence is warranted and there is a moderate to high risk of the defendant re-offending, any rehabilitation achieved during the period that would be spent in prison is likely to be limited compared to the likely rehabilitative effect if the defendant were instead to spend that period in the community while subject to intensive correction’.<sup>509</sup>

The South Australian legislation makes plain that the primary overall sentencing purpose is ‘to protect the safety of the community (whether as individuals or in general)’.<sup>510</sup> Amendments which came into effect in May 2019 expressly exclude certain offenders from being eligible – including adults sentenced for a serious sexual offence, a serious and organised crime offence, specified offences against police, and certain forms of repeat offending.<sup>511</sup>

The legislation also directs that ‘an ICO should not be made if the court is not satisfied that adequate resources exist for the proper monitoring of the defendant while subject to an intensive correction order by a community corrections officer’.<sup>512</sup>

### 7.7.4 Tasmania

In a 2016 report, the Tasmanian Sentencing Advisory Council (TSAC) recommended that ICOs not be introduced. It noted barriers to the use of or concerns with ICOs as:

- the rigorous nature of the suitability criteria excluded offenders with cognitive impairment, mental illness, substance dependency or homelessness or unstable housing;
- availability of ICOs in rural and remote areas;

<sup>505</sup> Government of South Australia, Attorney-General's Department, *Better Sentencing Options* (Web Page) <<https://www.agd.sa.gov.au/projects-and-consultations/transforming-criminal-justice/better-sentencing-options>>.

<sup>506</sup> *Sentencing Act 2017* (SA) s 79(1).

<sup>507</sup> *Ibid* ss 79(2)–(3).

<sup>508</sup> *Ibid* s 81(1).

<sup>509</sup> *Ibid* s 81(2).

<sup>510</sup> *Ibid* ss 3, 9, 79(3).

<sup>511</sup> *Ibid* s 81(3)(ab) inserted by *Sentencing (Suspended and Community Based Custodial Sentences) Amendment Act 2019* (SA).

<sup>512</sup> *Ibid* s 81(3)(b).

- mandatory community service work requirement;
- the substitutional nature of the sanction;
- insufficient resources to support the sanction, causing sentencers to lose confidence in it.<sup>513</sup>

No submissions supported the introduction of ICOs. The TSAC recommended that CCOs should be introduced instead.

### 7.7.5 Victoria

Victoria had ICOs from April 1992 until the CCO replaced them, and other community-based orders, in January 2012.<sup>514</sup> In an April 2008 report,<sup>515</sup> the Victorian Sentencing Advisory Council (VSAC) had recommended major changes to the ICO scheme, which appear to have influenced the subsequent CCO regime. The VSAC made numerous recommendations:

- Recast ICOs as non-custodial sentencing, targeting offences of medium to high seriousness and medium to high-risk/needs offenders.
- Permit broader sentencing combinations – with immediate imprisonment not exceeding 3 months, and with a community-based order.
- Particular purposes of ICOs should be to reduce the likelihood of reoffending through rehabilitation and reintegration and to allow for adequate punishment in the community.
- Increase duration from 12 months to 2 years (in all courts).
- Make pre-sentence report: mandatory.
- Have a supervision period: completing the more intensive aspects (supervision, work and other program conditions) shortly after imposition of sentences of 6 months or more, during an initial supervision period of lesser time than the total term. For the remainder of the order, the level of contact and supervision is reduced, the offender being subject only to the remaining core conditions of the order until it expires.
- Other ways of fulfilling community service: where it is a core condition, permitting it to be performed through participation in services as part of a justice plan, or directed to be satisfied, in whole or part, by completing an ‘activity requirement’ if the court is satisfied that the offender’s personal circumstances make this desirable. Approved activities would include reparation, educational, employment-related and life-skills activities.
- Additional discretionary program conditions (i.e. assessment and treatment, live at specified place, vocational programs):
  - Criterion: a court cannot attach any more program conditions than are necessary to achieve the order’s purpose or purposes.<sup>516</sup>
- Additional discretionary special conditions (i.e. non-association, curfew):
  - Criterion: significant risk of further offending and the condition would reduce the likelihood, which could not be achieved by any less restrictive condition or combination of conditions.
- These could apply for the duration of the order, or a shorter period as ordered.

<sup>513</sup> Sentencing Advisory Council (Tasmania) (n 80) 83 [7.5.5] (footnotes omitted). See also 84 [7.5.10] and Recommendation 31.

<sup>514</sup> Through the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

<sup>515</sup> Sentencing Advisory Council (Victoria) (n 2) Chapter 6 Intensive Correction Orders. Recommendations are at 136–40.

<sup>516</sup> VSAC noted a Victorian provision prohibiting the imposition of any more program conditions than necessary to achieve the purpose/s for which the order is made. It noted some stakeholders are concerned that courts may add a raft of conditions to try to ‘cover all bases’ when the conditions are not necessary to achieve the purpose or purposes sought in the context of the legislative phrase ‘any other conditions the court considers necessary or desirable’: Old section 38(3) of the *Sentencing Act 1991* (Vic) cited at 128 [6.112].

VSAC also suggested the establishment of a Community Corrections Board to oversee management of offenders on community sentences.<sup>517</sup>

VSAC noted that ICOs had only ever been used in a very small proportion of cases, at least in part due to structural problems and a possible lack of court confidence in their effectiveness.<sup>518</sup>

It discussed differences in therapeutic and surveillance purposes: participation in intensive supervision programs involving higher levels of contacts and supervision was in itself not associated with lower rates of recidivism. However, when combined with treatment, results were more promising, especially when targeted at high-risk offenders.<sup>519</sup> Pure surveillance-based supervision approaches were therefore at best a means of punishment and monitoring compliance, rather than effecting any long-term behavioural change.<sup>520</sup>

Further, more intensive supervision resulted in higher levels of technical breaches — most likely as a result of higher levels of surveillance and detection. Depending on the response to breaches, high breach rates may affect the potential of these forms of orders to divert offenders from prison.<sup>521</sup>

## 7.8 Evidence of effectiveness

The QUT Review undertaken for the purposes of this reference found:

- No difference in the effectiveness of ICOs when compared with supervised suspended sentences.
- Good evidence that ICOs are more effective at reducing recidivism than either periodic detention or short terms of imprisonment, especially among offenders classified as high risk.
- No evidence of the effectiveness of ICOs among vulnerable cohorts.
- Reoffending following an ICO appears to be more likely among men, Aboriginal and Torres Strait Islander offenders, those with criminal histories, and those classified as high risk.<sup>522</sup>

A 2017 NSW study used propensity score matching to compare reoffending within two years following ICOs and short terms of imprisonment of up to 2 years.<sup>523</sup> Over one-third (36%) of those who received an ICO and 60 per cent of those who had spent time in prison had reoffended within 2 years. The results from the strongest of their models showed that there was a 27 per cent reduction in the odds of reoffending for people who received an ICO compared with people who had been sentenced to imprisonment.

Supplementary analyses on offenders with a medium to high risk of reoffending and prisoners who had served a term of imprisonment of 6 months or less found:

- a 20 to 30 per cent reduction in the odds of reoffending for medium to high-risk offenders who received an ICO compared with a term of imprisonment;
- an estimated 25 to 43 per cent reduction in the odds of reoffending associated with an ICO for offenders in all risk categories;
- an estimated 33 to 35 per cent reduction for offenders in medium to high risk categories who had received an ICO compared with those who had been imprisoned.<sup>524</sup>

The authors of this study conclude that their results:

further strengthen the evidence base suggesting that supervision combined with rehabilitation programs can have a significant impact on reoffending rates, and further, that programs targeting offenders at high

<sup>517</sup> Sentencing Advisory Council (Victoria) (n 2) Chapter 11.

<sup>518</sup> Ibid 130 [6.125].

<sup>519</sup> Ibid 116 [6.45].

<sup>520</sup> Ibid 116 [6.46].

<sup>521</sup> Ibid 116 [6.47], footnotes omitted.

<sup>522</sup> Gelb, Stobbs and Hogg (n 28) xiii.

<sup>523</sup> Ibid 120, citing Johanna Wang and Suzanne Poynton, 'Intensive Correction Orders Versus Short Prison Sentence: A Comparison of Reoffending' (Crime and Justice Bulletin No. 207, NSW Bureau of Crime Statistics and Research, 2017).

<sup>524</sup> Wang and Poynton (n 523) cited in Gelb, Stobbs and Hogg (n 28) 121.

risk of reoffending produce larger reductions in reoffending than those targeting offenders at medium or low risk.<sup>525</sup>

There is no evidence of the effectiveness of ICOs among vulnerable cohorts, other than the finding that Aboriginal and Torres Strait Islander status increases the likelihood of reoffending.<sup>526</sup>

Aboriginal and Torres Strait Islander offenders are also under-represented among those who receive an ICO, possibly due (in part) to accessibility: offenders in this cohort are more likely to live in remote areas, and some ICO facilities may lack reliable and appropriate public transport options.<sup>527</sup>

## 7.9 Consultation and submissions

In preliminary consultations with key stakeholders, there was no call to repeal Queensland's ICO provisions. ICOs have largely been described as useful, or at least potentially so, in the right circumstances. ICOs were described as being of use for offenders deserving of a short period of actual custody yet with personal circumstances justifying diversion to intensive supervision. This involves balancing retribution, deterrence and rehabilitation.

The Council's initial consultation questions regarding ICOs were:

- Do ICOs still serve a useful purpose and should they be retained?
- What improvements could be made to increase their use, flexibility and effectiveness?

There was some difference of opinion regarding whether the duration of an ICO should be extended from 12 months to 3 years. On one side, retaining the 12-month ceiling was supported on the basis that a longer period would more appropriately fall under the Parole Board's expertise regarding consideration of release.

Flexibility and resources were the strongest points made by most stakeholders:

- ICOs are not currently flexible enough, meaning they are not realistic sentencing options for the vast majority of offenders. The fixed components, such as community service, are too rigid.
- Without proper resourcing of courses and programs, imposing an ICO risks setting offenders up to fail. Some stakeholders commented that residential rehabilitation might be used to a greater degree.

QCS provided a case study from the ACT ICO model, noting that it provides 'swift and certain' sanctions,<sup>528</sup> which can include imprisonment for a number of days. QCS highlighted the distinction with the Queensland model, where breaches:

Must be returned to court for action, providing limited opportunity for QCS to act in response to emerging risks and persistent non-compliance. Swift and certain programs aim to hold offenders accountable while assisting them to succeed in completing their order in a rehabilitative way. They recognise that a combination of minor breaches often results in a disproportionate final sanction or sentence.<sup>529</sup>

The Council identified three options in its Options Paper for consultation, noting that each must be considered in the context of the existing forms of orders and the broader package of reforms proposed by the Council:

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

<sup>525</sup> Ibid cited in Gelb, Stobbs and Hogg (n 28) 121.

<sup>526</sup> Gelb, Stobbs and Hogg (n 28) 123 [4.3.3].

<sup>527</sup> Ibid 121–2 citing Clare Ringland, 'Intensive Correction Orders Versus Other Penalties: Offender Profiles' (Crime and Justice Bulletin No. 163, NSW Bureau of Crime Statistics and Research, 2012) 8.

<sup>528</sup> Based on the Hawaii Opportunity Probation with Enforcement (HOPE) program.

<sup>529</sup> Preliminary information from Queensland Corrective Services, approved for publication by email of 19 November, 2018.

Stakeholders expressed a range of views regarding these options, with the views of some contingent upon what CCO model is adopted for introduction in Queensland. For example, Legal Aid Queensland (LAQ) submitted it would support Option 2 (abolition): 'if the features of an ICO were to be incorporated into the proposed Community Corrections Order (CCO) in such a way that did not restrict a court's discretion to impose lower level supervision orders within the CCO, or lead to a practice where a defendant was effectively set up to fail'.<sup>530</sup> LAQ suggested:

Ideally this CCO model would allow for a new and improved ICO with flexibility on community service and reporting, the length of the order, discretion on the recording of a conviction and implications for contravention. It could allow for graded versions of an ICO to allow for broader options and consequences for breaches, rather than imprisonment.<sup>531</sup>

However, in the event a CCO was introduced 'within a more limited and less flexible framework', LAQ supported Option 3 (reform).<sup>532</sup> Reforms recommended by LAQ included: extending the 12-month period of the order; providing greater flexibility for reporting and community service; and giving a court discretion whether or not to record a conviction.<sup>533</sup>

The Queensland Law Society (QLS) also supported the abolition of ICOs, in combination with the introduction of an expansive CCO model.<sup>534</sup>

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel who attended a special meeting of the Panel following the release of the Council's Options Paper, strongly supported Option 2 (the abolition of ICOs) on the basis that the order does not operate effectively for Aboriginal and Torres Strait Islander people.<sup>535</sup> Panel members submitted the current form of order was too inflexible, resulting in a high risk of these orders being breached. The comment was made that Aboriginal and Torres Strait Islander people would 'rather do prison time' than be subject to the intensive and restrictive conditions of an ICO.

In contrast to the majority of other legal stakeholders, Sisters Inside did not support introduction of a CCO but, even if CCOs were to be introduced, it did not support removing ICOs as a sentencing option.<sup>536</sup> In indicating their support for the retention of ICOs, Sisters Inside pointed to:

- available data suggesting 'ICOs are a positive, successful sentencing option, with relatively high completion rates';
- the potential for abolition of ICOs to have 'a negative gendered impact, as women are more likely to be sentenced to ICOs compared to men', including for federal offences such as social security fraud, for which ICOs are available as a sentencing option by virtue of the operation of section 20AB(1AA)(c) of the *Crimes Act 1914* (Cth);<sup>537</sup> and
- their view that ICOs may offer an appropriate sentence in some cases, with the benefit of allowing those subject to these orders to avoid actual imprisonment.<sup>538</sup>

Greater flexibility was, however, supported, which they suggested could be achieved 'with minor legislative amendments that allow greater judicial discretion and monitoring in respect of the components of ICOs'.<sup>539</sup>

The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, in a preliminary submission to the Council, noted the unique nature of ICOs, commenting: 'In our experience, Intensive Correction Orders are ordered

---

<sup>530</sup> Submission 6 (Legal Aid Queensland) 3.

<sup>531</sup> Ibid.

<sup>532</sup> Ibid.

<sup>533</sup> Ibid.

<sup>534</sup> Submission 15 (Queensland Law Society) 29.

<sup>535</sup> 'Talking points for Advisory Panel Members: Council meeting 18 June', summarising views of panel members who attended an extraordinary meeting of the panel on 17 May 2019.

<sup>536</sup> Submission 7 (Sisters Inside) 3.

<sup>537</sup> Submission 7 (Sisters Inside) 3 citing Scarlet Wilcock, 'Policing Welfare: Risk, Gender and Criminality' (2016) 5(1) *International Journal for Crime, Justice and Social Democracy* 113, 114 to support the proposition that almost twice as many women as men are likely to be charged with social security fraud.

<sup>538</sup> Ibid.

<sup>539</sup> Ibid.

only rarely by the Courts but they are ordered in circumstances where the only appropriate sentence would be an Intensive Correction Order.’<sup>540</sup>

The Bar Association of Queensland, at an earlier stage of the review, was initially supportive of ICOs being retained, observing that these orders: ‘can serve a useful purpose ... for a very limited cohort of individuals — those who but for their particular circumstances would otherwise be sentenced to a short period of imprisonment, but could clearly benefit from intense supervision and support for specific issues’.<sup>541</sup> They further commented:

In the experience of the Association’s members who practise in criminal law, the requirement to do community service is itself a far more onerous condition than simply complying with conditions of parole, and the other requirements which can be imposed (such as counselling) are less likely to be pursued on a parole order.<sup>542</sup>

Reform suggestions included increasing the maximum term of the order beyond its current 12-month cap and integrating the order with a ‘live in rehabilitation’ component.<sup>543</sup>

However, in a later submission to the review, after considering the Council’s proposals for introduction of a Victorian-style CCO, it supported the replacement of probation, community service and ICOs with the new form of order.<sup>544</sup> It identified one of the benefits of this approach as being that ‘resources that were previously directed to compliance with these orders can be redirected to compliance with a CCO’.<sup>545</sup>

QCS raised concerns that in its current form, ICOs do not meet the intent of the order because they are inflexible and restrictive; QCS is unable to quickly respond to risk; and breaches do not often result in an offender receiving imprisonment. It submitted: ‘Other orders, such as [court ordered parole], could more effectively achieve this intent and provide a swift and certain response to risk’.<sup>546</sup>

## 7.10 The Council’s view

In summary, ICOs have been criticised as inflexible, constraining QCS’s ability to recognise improvements in an offender’s behavioural changes or to tailor service delivery to meet an offender’s needs or risk. At the same time, ICOs have been viewed by some as being valuable for offenders facing a real risk of being sentenced to imprisonment — offering them a last chance to serve their sentence in the community — because they are custodial orders served in the community, with both punitive (community work) and rehabilitative elements.

The Council’s preliminary preferred option, as outlined in its Options Paper, was to abolish ICOs. The Council supported the removal of ICOs as a sentencing option for the following reasons:

- With the exception of offences otherwise not eligible for court ordered parole (such as sexual offences), the same outcome as an ICO (immediate release of an offender on conditions) could be met by the court imposing a term of imprisonment with immediate release on parole.
- The Council’s support for the introduction of a new CCO would allow a broad range of conditions (including supervision, community work and program conditions) to be imposed, tailored to meet the purposes of sentencing and factors contributing to offending, with the option (unlike ICOs) of no conviction being recorded. This should mean greater certainty, variability, flexibility and discretion to allow more tailored orders that address risk and needs but avoid rigid application of aspects of orders that may not be required for every offender (a key criticism of ICOs).
- Providing courts with the ability to combine a suspended sentence of imprisonment with a community-based order (including a CCO if introduced) when sentencing a person for a single

<sup>540</sup> Preliminary submission (Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd), 6 July 2018, 3.

<sup>541</sup> Preliminary submission (Bar Association of Queensland), 13 July 2018, 5.

<sup>542</sup> Ibid.

<sup>543</sup> Ibid.

<sup>544</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 4.

<sup>545</sup> Ibid.

<sup>546</sup> Submission 11 (Queensland Correction Services) 23.

offence would provide courts with the power to impose a term of imprisonment at the same time as requiring the person to comply with supervision, program and community service requirements.

- ICOs are rarely used, and their use is falling, suggesting the circumstances where they are considered appropriate are very limited.

When these matters were considered together, the Council's view was that the availability of court ordered parole and the reforms recommended could achieve a similar purpose as an ICO but within a more flexible legislative framework.

During the final stage of the review, almost all stakeholders supported replacing ICOs with CCOs, provided that a properly resourced, full CCO model compatible with suspended sentences is implemented. However, stakeholders cautioned that ICOs could still occupy a crucial position between lower-level community-based sentencing orders and actual imprisonment, and they could serve as a useful order where short periods of actual imprisonment would otherwise be imposed.

As a result of stakeholder feedback, while the Council still prefers Option 2 in the long term, it recommends retaining ICOs (Option 1) for the reasons discussed below, as an interim measure with ongoing monitoring to determine whether they are still required as part of a reformed sentencing regime. Another important relevant factor is whether any reform is made regarding the availability of court ordered parole for short sentences of imprisonment.

Under the Council's proposals, ICOs would be retained, unchanged and in their current form, for the time being until a CCO scheme is developed, funded and implemented. Further assessment of ICO use at that time could lead to their phasing out as CCOs take up and the use of suspended sentences in combination with a CCO is also monitored. This will maintain the widest range of sentencing options possible over what is likely to be a long-term transitional reform process, should the Council's recommendations be accepted.

The Council's view is that ICOs, currently not widely used and criticised for their inflexibility, will likely be rendered largely redundant if CCOs are introduced and the power to make combined suspended sentence and CCOs for a single offence is introduced. It must be emphasised that this is stated in the context of a CCO model that is implemented in full, funded sufficiently, involving a base of limited mandatory conditions complemented by a wide range of optional conditions and combined with an ability to impose a suspended sentence with a CCO for the same offence. This is discussed in Chapter 8.

Monitoring the use of the new CCO will be important to ensure no potential gaps are created in the range of available sentencing orders.

An ICO is, at law, a term of imprisonment – a CCO is not. There is uncertainty about whether courts will use a CCO in place of an ICO or court ordered parole for serious offending (including for short sentences of 6 months or less) without express legislative direction or encouragement.

The unique role that ICOs can play in the Commonwealth jurisdiction was highlighted in stakeholder consultation: ICOs are useful given that sentences of imprisonment of 6 months or less for federal offences otherwise require the sentence to be served completely in custody, unless the court instead imposes a recognizance release order (similar to a suspended sentence). Because of legislative differences, the ability to combine a CCO with imprisonment would not translate to the Commonwealth jurisdiction.<sup>547</sup>

The Council notes that the ACT, NSW and SA retained ICOs following recent reviews, with Victoria the only jurisdiction to have abolished ICOs. Although the problems and low usage of ICOs and their lack of flexibility were some of the reasons for their abolition in Victoria (the substitutional nature of the sanction being another), following recent reviews, the ACT and NSW have chosen to retain and reform them. There is also evidence from NSW that ICOs can provide an effective form of intervention compared to short terms of imprisonment – particularly for offenders who are at medium to high risk of reoffending. However, there are some key differences between Queensland and NSW and the ACT:

<sup>547</sup> In particular, a sentence combining a term of imprisonment and a community-based order for a single Commonwealth offence is not permitted under the Commonwealth sentencing regime on the basis this would be inconsistent with Part IB of the *Crimes Act 1914* (Cth), which provides that where a court imposes a term of imprisonment with a form of conditional release other than parole, this must be in the form of a recognizance release order: *Atanackovic v The Queen* (2015) 45 VR 179, 205–6 [82]–[87] (Weinberg, Kyrou and Kaye JJA).

- NSW has abolished suspended sentences as a sentencing option, meaning that ICOs are intended, together with the new CCO, to fill the place that previously would have been occupied by suspended sentences; and
- the ACT and NSW do not have court ordered parole and do not allow for the release of an offender on parole at the date of sentence. This existing element in Queensland would remain, unless parole for short sentences is abolished. Arguably, any benefits of an ICO could be delivered through supervision and support provided to offenders subject to court ordered parole or, by combining a CCO with a suspended sentence for the same offence.

While reforming ICOs (Option 3), as has occurred in the ACT, NSW and SA, might also be considered, the Council is concerned this would increase the likely complexity of the sentencing framework, result in potential overlap in the types of sentencing orders available (particularly given the availability of court ordered parole in Queensland), and risk diverting resources from a CCO model, which will require extensive resources to operate effectively.

In the Council's view, the effort that would be involved in reforming the current ICO model would be better directed to the introduction of a new CCO model. This is consistent with the Council's preference for the introduction of broader, more flexible community-based orders with a wide range of available conditions that can meet a range of sentencing purposes, rather than overly rigid and inflexible orders that are suitable only for a small group of offenders.

Further, the Council considers that in light of its recommendation to introduce a CCO in Queensland, and to allow this order to be made in combination with a suspended sentence (whether for a single or multiple offences), these forms of orders would fill any potential gap left by the removal of ICOs as a sentencing option in Queensland. At the same time, this approach would have the advantage of allowing for greater flexibility as to the conditions imposed than an ICO offers, which can be better tailored to the individual circumstances of the offence and the offender.

The Council acknowledges the possibility, following the introduction of the proposed new sentencing reforms, that a decision is taken to retain ICOs on the basis that the new form of CCO and combination orders do not sufficiently function as viable alternatives to ICOs. Should ICOs be retained longer term, the Council supports amendments being made to provide greater flexibility in the conditions of the order and in its management, drawing on reform models adopted in other jurisdictions, including:

- to reduce the number of mandatory (core) conditions to which a person on the order is subject, in line with the Council's proposed model for CCOs;
- to provide for a range of conditions that can be ordered as additional conditions;
- to allow the frequency of reporting (currently a minimum of at least twice in each week that the order is in force) to be determined by QCS, based on the person's assessed level of risk and need;
- to allow for any attendance at counselling, appointments and programs to be counted towards satisfying the community service component of the order.

#### **RECOMMENDATIONS: INTENSIVE CORRECTION ORDERS**

5. Intensive correction orders (ICOs) should be retained as an interim measure, with a view to their repeal, subject to monitoring and analysis of the impact of proposed sentencing and parole reforms (see Recommendation 7).
6. There should be a transitional period of at least 2 years during which time ICOs and any new community correction order (CCO) – including used in combination with a suspended sentence – should operate concurrently.
7. The use of ICOs should be monitored and assessed within 3 years of the new CCO and other reforms coming into effect including for Queensland and Commonwealth offences, and the demographic profile of those receiving them. This monitoring and analysis should examine the use of ICOs in the context of:
  - the existing sentencing regime;
  - any new CCO;

- any legislative reforms to allow courts to combine a community-based order (including a CCO if introduced) with a suspended sentence when sentencing an offender for a single offence; and
  - any changes made to the parole regime, particularly changes to restrict the availability of parole for short sentences of imprisonment.
8. If retained longer term, ICOs should be reformed to increase their flexibility, drawing on reform models adopted in other jurisdictions, including:
- to reduce the number of mandatory (core) conditions to which a person on the order is subject, in line with the Council's proposed model for CCOs;
  - to provide for a range of conditions that can be ordered as additional conditions;
  - to allow the frequency of reporting (currently a minimum of at least twice in each week that the order is in force) to be determined by Queensland Corrective Services, based on the person's assessed level of risk and need;
  - to allow for any attendance at counselling, appointments and programs to be counted towards satisfying the community service component of the order.

## Chapter 8 Community Correction Orders

The Terms of Reference required the Council to consider flexible community-based sentencing orders used in other jurisdictions, such as the Victorian community correction order (CCO) regime, and to advise on appropriate options for Queensland.

A number of recent reviews have recommended that a CCO model be considered for adoption including: the 2016 Queensland Parole System Review;<sup>548</sup> the 2016 Queensland Drug and Specialist Courts Review;<sup>549</sup> the 2017 Australian Law Reform Commission (ALRC) inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples (*Pathways to Justice*);<sup>550</sup> and the Queensland Productivity Commission inquiry into imprisonment and recidivism.<sup>551</sup>

This chapter considers the use of CCOs in Victoria, and similar orders introduced in other Australian states and England and Wales; and provides a brief review of the current use of existing community-based orders in Queensland that such an order might replace. It explores how the Victorian CCO has been operating, including modifications made over time to limit duration and types of offences for which this order can be made.

It also presents the Council's recommendations for the adoption of a Queensland form of CCO and its proposed key elements.

### 8.1 What are CCOs?

CCOs are a single form of flexible intermediate community-based sentencing order.<sup>552</sup> In jurisdictions where they exist in Australia, they have replaced other orders that still exist in Queensland (for example, community service orders, probation orders, and suspended sentences). They include the potential for judicial monitoring as a condition of the order.

A CCO has been described as:

a non-custodial sanction with multiple elements capable of being tailored to the needs of individual offenders. It is a sanction that can contain both punitive elements such as loss of leisure time, and rehabilitative ones such as education and treatment. These have the goal of constraining the offender's time, behaviour and freedom of choice while still permitting the person to remain within the community.<sup>553</sup>

The rationale for the introduction of a single community-based sentencing order, in place of previously existing intermediate non-custodial orders generally, has been that it simplifies the range of sentencing orders, while providing flexibility to judicial officers in meeting the purposes of sentencing and responding to the individual needs of offenders and underlying causes of offending.

A key feature of CCOs are that they are a non-custodial community-based order that provide an alternative to imprisonment. CCOs are a sentencing order in their own right and are not substitutional (i.e. they are not treated at law as being a term of imprisonment served in the community). They have been said to provide 'a significant and proportionately punitive response to offences falling within the mid-range of seriousness' and as capable of fulfilling a number of sentencing purposes within the one order, including deterrence and rehabilitation.<sup>554</sup>

In other jurisdictions (Victoria, Tasmania and NSW) CCOs have been introduced as part of new regimes which also involved phasing out of suspended sentences. Conversely, England and Wales have both.

<sup>548</sup> Queensland Parole System Review (n 10) 97–8. The second proposal deserving consideration was introducing the ability to impose a combined suspended sentence and probation order as a sentence.

<sup>549</sup> Freiberg et al (n 96) Recommendation 8.

<sup>550</sup> Australian Law Reform Commission (n 21) 234, Recommendation 7-2.

<sup>551</sup> Queensland Productivity Commission (n 12) 152.

<sup>552</sup> Sentencing Advisory Council (Tasmania) (n 80) 85.

<sup>553</sup> Freiberg (n 127) 698 [11.10].

<sup>554</sup> Ibid 699 [11.15]. See also *Boulton v The Queen* (2014) 46 VR 308.

It has been submitted that what distinguishes these orders from other forms of community-based orders is that CCOs ‘have a wider range of available conditions, can be imposed for longer periods, and can contain [in Victoria] an “intensive compliance period”’.<sup>555</sup> Considered together, these features have been said to ‘consolidate characteristics of the previous intermediate sanctions and offer a flexibility that makes CCOs adaptable to a range of situations’.<sup>556</sup>

CCOs are available and named as such in Victoria (since January 2012), NSW (since September 2018) and Tasmania (since December 2018). England and Wales have had a community order since April 2005. These are the jurisdictions considered in this chapter.<sup>557</sup>

A CCO can often be imposed where, under the sentencing regimes they replaced, only imprisonment would have been suitable.

A cross-jurisdictional analysis of the key elements of the CCO and equivalent orders, including criteria for making these orders, order duration, conditions, and powers and procedures to vary and on breach can be found in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which is accessible on the Council’s website. In summary, some of the features of note are:

- Duration — Victoria: 2–5 years depending on the number of offences sentenced or 5 years in higher courts; Tasmania, NSW and England and Wales: 3 years.
- Mandatory conditions — required to differing degrees by each jurisdiction:
  - a set list focusing on reporting conditions and conditions to ensure compliance with the order such as reporting to/receiving visits from corrective services officers, notifying changes of address, seeking permission to leave the State, and complying with lawful directions (Victoria);
  - similar to the Victorian core conditions, plus one of either supervision or community service (Tasmania);
  - selecting at least one from a wide list and imposing a general requirement on offenders to keep in contact with their probation officer and advise of a change of residence (if no residence requirement) (England and Wales); and
  - good behaviour and court attendance requirements only (NSW — not reoffend, appear before court if required).
- **Further optional conditions:**
  - community service;
  - treatment and rehabilitation (England and Wales break these down into different condition types);
  - supervision (NSW does not allow home detention or electronic monitoring (EM); Victoria’s higher courts can order EM; England and Wales have a specific EM condition and EM is mandatory if curfew or exclusion requirement set);
  - contact and area restrictions (England and Wales have place restriction only);
  - curfew;
  - alcohol abstinence;
  - judicial monitoring (Victoria, Tasmania, England and Wales [through executive power to request this to occur]); and
  - a further catch-all, discretionary ‘appropriate’ condition (Victoria, Tasmania, NSW).

England and Wales also have program, prohibited activity, residence, foreign travel prohibition and attendance centre requirements (for young offenders) as optional requirements.

<sup>555</sup> Ibid 698 [11.10].

<sup>556</sup> Ibid.

<sup>557</sup> Two other jurisdictions have insufficiently analogous orders and so have not been included in the Council’s analysis of either ICOs or CCOs. New Zealand has ‘intensive supervision’ (*Sentencing Act 2002* (NZ) pt 2 sub pt 2; 6 months to 2 years, not imprisonment) but also supervision (ss 45–54A), community work (ss 55–69A) and community detention (ss 69B–69M). Western Australia has ‘intensive supervision’ (*Sentencing Act 1995* (WA) pt 10; 6 months to 2 years, not imprisonment) but also a community-based order (pt 9).

- Ability to tailor condition durations within the order period (Tasmania, NSW, England and Wales; Victoria has an intensive compliance period option).

The CCO has replaced most or all of the other forms of previously existing intermediate community-based orders. In NSW, the CCO was introduced alongside a strengthened form of ICO.

Now, in Victoria, Tasmania, NSW, and England and Wales, community service and probation are effectively conditions of a CCO or equivalent order as opposed to stand-alone orders.

## 8.2 The introduction of CCOs and equivalent orders – a chronological summary

### 8.2.1 England and Wales – *Criminal Justice Act 2003* (UK)

The first jurisdiction of those examined to introduce a broad form of community order in recent years was England and Wales with the introduction of a new sentencing framework under the *Criminal Justice Act 2003* (UK). The Criminal Justice Act implemented reforms outlined in the UK Government's 2002 White Paper *Justice for All*,<sup>558</sup> which drew on earlier recommendations made by the 2001 Halliday review.<sup>559</sup>

In setting out the rationale for introducing a single community sentence to replace individual community penalties, the Halliday review referred to the 'proliferation of community penalties' over the previous 10 years as having 'both complicated the statute book and increased the risks of inconsistent sentencing'.<sup>560</sup> It noted: 'In spite of the growth of community penalties, they are still not viewed as being sufficiently punitive', attributing this partly to the lack of clarity in relation to the penalties' stated aims.<sup>561</sup> The Halliday review proposed:

In order to match a non-custodial sentence to the assessed risks of reoffending, and the measures most likely to reduce those risks, courts should have the power to impose a single, non-custodial penalty made up of specified elements, including: programmes to tackle offending behaviour, treatment for substance abuse or mental illness; compulsory work; curfew and exclusion orders; electronic monitoring; and reparation to victims and communities. Supervision would be used to manage and enforce the sentence, and support resettlement. In deciding on the elements of the sentence, the court would be required to consider the aims of punishment, reparation and prevention of reoffending. The 'punitive weight' of the chosen ingredients should be no greater than would be commensurate with the seriousness of the offences under sentence, subject to any increased severity required for previous convictions.<sup>562</sup>

The new community order introduced under the *Criminal Justice Act* commenced operation on 4 April 2005<sup>563</sup> and provides for courts to impose up to 13 conditions (called 'requirements'). Conditions that can be attached to the order include unpaid work, participation in rehabilitation activities and programs, curfew conditions, electronic monitoring, residence conditions, and treatment conditions (including mental health and drug and alcohol treatment).

### 8.2.2 Victoria – *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic)

The introduction of the Victorian CCO followed an extensive review by the Victorian Sentencing Advisory Council (VSAC) of suspended sentences and changes to intermediate sentencing orders. This review resulted in multiple publications produced over several years.<sup>564</sup>

<sup>558</sup> Great Britain Home Office, *Justice for All – A White Paper on the Criminal Justice System* (The Stationary Office, 2002).

<sup>559</sup> John Halliday, Cecilia French and Christina Goodwin, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* ('the Halliday Report') (Home Office, 2001).

<sup>560</sup> Ibid vi [0.17].

<sup>561</sup> Ibid.

<sup>562</sup> Ibid vi [0.18].

<sup>563</sup> See *Criminal Justice Act 2003* (UK) s 336(3) SI 2005/950, art 2(1) sch 1 paras 7–8.

<sup>564</sup> Preliminary Information Paper 2005, Discussion Paper 2005, Interim Report 2005, Final Report Part 1 2006, Final Report Part 2, 2008.

While its interim report proposed that community-based orders and ICOs be amalgamated into a new generic community order (similar to that which existed in England and Wales), VSAC ultimately recommended retaining intensive correction orders (ICO) (while removing the substitutional aspect and increasing their maximum duration from 12 months to 2 years)<sup>565</sup> and community-based orders as separate forms of sentencing orders. In changing its position, VSAC referred to strong support from stakeholders for the retention of the Victorian form of community-based order. It also pointed to the benefits of retaining ICOs and community-based orders as separate orders on the basis it would avoid ‘the possible fast-tracking of offenders to prison and the potential for uncertainty and disparities in sentencing outcomes should a broader range of conditions be made available under a single form of community order’.<sup>566</sup>

VSAC recommended that community-based orders ‘be retained in their current form, with only minor changes’.<sup>567</sup>

VSAC’s final form of recommendations was ultimately not adopted, with the reforms introduced more closely resembling VSAC’s earlier proposal put forward in its interim report.

The Second Reading Speech for the Sentencing Amendment (Community Correction Reform) Bill 2011 (Vic), which introduced CCOs, mentioned VSAC’s Final Report — Part 2 (presenting the final recommendations discussed above), but only to the extent that the report had ‘noted that the overuse of suspended sentences in Victoria is at least partly due to the failings of intermediate sentencing orders’.<sup>568</sup> The speech otherwise describes the mechanics of a CCO reflecting VSAC’s approach from its interim report, ultimately not pursued in its Final Report — Part 2:

The current range of community-based sentences will be replaced with a single, flexible community correction order (CCO) that will strengthen community sentencing. The new order will deliver common-sense sentences targeted directly at both the offender and the offence.<sup>569</sup>

The creation of Victoria’s CCOs was the fulfilment of an election commitment of the Liberal–National Coalition Government elected in December 2010.<sup>570</sup> The 2011 amending Act also repealed most of two sentencing-related Acts which had been introduced by the previous Government.<sup>571</sup> One of these Acts had given effect to recommendations in VSAC’s Final Report — Part 2<sup>572</sup> regarding breaches of intermediate sentencing orders no longer constituting an offence and breach proceedings commencing promptly (although provisions dealing with the abolition of suspended sentences were retained).<sup>573</sup>

The Second Reading Speech for the 2011 Bill explained the rationale for the introduction of the new order on the basis that:

- ‘The existing range of community based sentences does not provide courts with sufficient flexibility to directly target the offender and the offence’.

<sup>565</sup> Sentencing Advisory Council (Victoria) (n 2) 136–140, Recommendation 5 regarding ICOs. ICOs were instead abolished.

<sup>566</sup> Ibid xxxvi and see also xxx.

<sup>567</sup> Ibid xxi. See 195, Recommendations 9-1 through 9-6 regarding community-based orders.

<sup>568</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, ‘Second Reading — Sentencing Amendment (Community Correction Reform) Bill 2011’, 15 September 2011, 3292 (Robert Clark, Attorney-General).

<sup>569</sup> Ibid 3291.

<sup>570</sup> See Judicial College of Victoria, *Overview of Sentencing Amendment (Community Correction Reform) Act 2011* (no date) 1.

<sup>571</sup> The *Sentencing Amendment Act 2010* (Vic) [assent date 19 October 2010] and the *Justice Legislation Amendment Act 2010* [assent date 8 June 2010]. See Victoria, *Parliamentary Debates*, Legislative Assembly, ‘Second Reading — Sentencing Amendment (Community Correction Reform) Bill 2011’, 15 September 2011, 3294 (Robert Clark, Attorney-General). A Labour government was in power from December 2006 until November 2010; a Liberal–National Coalition government was in power from December 2010 to November 2014.

<sup>572</sup> Sentencing Advisory Council (Victoria) (n 2) Recommendations 12-1 and 12-2, 255.

<sup>573</sup> Sections 9, 13, 18, and 20–22 of the *Justice Legislation Amendment Act 2010* (Vic) were repealed by s 99 of the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic). As to the former, the second reading speech included: ‘The bill continues this work by implementing the Sentencing Advisory Council’s recommendation that breach of an intermediate sentencing order should no longer constitute an offence. This unnecessary criminal offence has been repealed and instead an administrative procedure, similar to the one that currently applies to suspended sentences, will operate to bring the offender back before the court and allow the court to re-sentence him or her’: Victoria, *Parliamentary Debates*, Legislative Assembly, ‘Second Reading — Justice Legislation Amendment Bill 2010’, 11 March 2010, 872 (Rob Hulls, Attorney-General).

- While jailing an offender is the most serious punishment available, there must be ‘a flexible, practical approach to community based sentencing that can be tailored to suit the very wide range of offending which, while serious, does not warrant a sentence of imprisonment’.<sup>574</sup>

The Explanatory Memorandum described the CCO as:

a new sentence for the range of offenders who previously would have received a community-based order (CBO), intensive correction order (ICO) or combined custody and treatment order (CCTO). The CCO is also intended as an alternative sentencing option for offenders who are at risk of being sent to jail. The broad range of conditions that may be attached to a CCO will give courts flexibility to graduate their response to address the needs of offenders and set appropriate punishments.<sup>575</sup>

The Victorian Court of Appeal issued Victoria's first guideline judgment — *Boulton v The Queen*<sup>576</sup> — to establish greater certainty for courts in how the CCO was to be used, including its appropriate duration and what conditions should be attached. The Court further affirmed the appropriateness of the order for offenders who previously would have received a term of imprisonment. At the time of this decision, the legislation allowed for the court to set the length of the order up to the maximum penalty for the relevant offence. This case, and the principles outlined, are discussed further below.

### 8.2.3 New South Wales — *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 (NSW)*

The introduction of CCOs in NSW followed a 2013 NSW Law Reform Commission (NSWLRC) review of sentencing that found:

- existing community-based orders were structured in an overlapping, unnecessarily rigid way; and
- strong and flexible community-based options are essential to ensure that imprisonment is only used as a last resort.<sup>577</sup>

The NSWLRC proposed three new orders be introduced:

- a single CCO (to replace community service orders and section 9 [good behaviour] bonds);
- a single conditional release order that can be imposed with or without conviction to replace s 10(1)(b) bonds [discharge without recording conviction on good behaviour bond] and section 10(1)(c) orders [discharge without recording conviction on condition of participation in intervention program]; and
- a new ‘no penalty’ provision that can be imposed with or without conviction in place of section 10(1)(a) and section 10A orders.<sup>578</sup>

It also recommended that ICOs (and home detention and suspended sentences) be replaced with a new community detention order (combining home detention and ICOs).<sup>579</sup>

The NSWLRC envisaged a CCO would apply to a limited range of offences compared to the Victorian model:

It would take its place between the more serious proposed CDO [community detention order] and the less serious proposed conditional release order (CRO) ... Together they would cover the same range which the Victorian order addresses, but their separate existence would help to ensure that the court sets a sentence that is appropriate to the nature, circumstances and seriousness of the offence and the offender's subjective circumstances.<sup>580</sup>

<sup>574</sup> (n 568) 3292.

<sup>575</sup> Explanatory Memorandum, Sentencing Amendment (Community Correction Reform) Bill 2011 (Vic) 5.

<sup>576</sup> (2014) 46 VR 308.

<sup>577</sup> NSW Law Reform Commission (n 76) 289.

<sup>578</sup> Ibid 289 [13.1] and Recommendation 13.1. See 267–8 for explanations of the orders referred to by section numbers.

<sup>579</sup> Ibid Recommendation 11.1.

<sup>580</sup> Ibid 292 [13.14].

The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) gave effect to the NSWLRC's recommended reforms with some modifications:

- abolishing suspended sentences, good behaviour bonds, community service orders and home detention orders;
- enhancing ICOs (including permitting home detention conditions to be imposed); and
- creating community correction orders and conditional release orders (to replace community service orders and good behaviour bonds).<sup>581</sup>

In his Second Reading Speech, the NSW Attorney-General, Mark Speakman, identified the primary benefit of the new CCO order as being its flexibility:

The community correction order will be a more flexible order so that offenders can receive supervision to tackle their offending behaviour and be held accountable. Courts will be able to tailor the sentence to impose a range of conditions. As with the new intensive correction order, where offenders cannot work or where there is limited available work, other conditions can be imposed as part of a community correction order to hold the offender accountable.<sup>582</sup>

The NSW CCOs commenced operation on 24 September 2018.<sup>583</sup>

#### 8.2.4 Tasmania — *Sentencing Amendment (Phasing Out of Suspended Sentences) Amendment Act 2017* (Tas)

The final Australian jurisdiction to have introduced CCOs is Tasmania. In a 2016 report, *Phasing Out of Suspended Sentences — Final Report No. 6*, the Tasmanian Sentencing Advisory Council (TSAC) recommended the introduction of home detention and CCOs. The intention was that these new orders would be used in place of suspended sentences, which the Tasmanian Government had committed to phase out — and, in the case of CCOs, replace community service and probation.<sup>584</sup>

TSAC was 'encouraged by the innovative approach' taken in the Victorian guideline judgment, and endorsed the Court's comment that:

the advent of the CCO calls for a re-consideration of the traditional conceptions of imprisonment as the only appropriate punishment for serious offences. This in turn will require a recognition of both the limitations of imprisonment and of the unique advantages which the CCO offers.<sup>585</sup>

TSAC noted that the model proposed for a Tasmanian CCO had similarities to the Victorian CCO, but 'is not an identical order'.<sup>586</sup> Such an approach reflected the need 'to consider sentencing options that are suitable for the Tasmanian context and not simply to replicate approaches taken in other jurisdictions with different social, political and judicial contexts'.<sup>587</sup>

The new CCO was introduced as part of the *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas) and commenced operation on 14 December 2018.<sup>588</sup>

In introducing the Bill, the Minister for Justice, Elise Archer, described the key benefits of the CCO:

Community correction orders are likely to be an appropriate sentencing order, either alone or in combination with other orders, for a wide range of offending. These orders are likely to be imposed in a broader range of circumstances than either community service orders or probation orders. Depending on

<sup>581</sup> Explanatory Note, *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017* (NSW) 1.

<sup>582</sup> NSW, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017', 11 October 2017, 2 (Mark Speakman, Attorney-General).

<sup>583</sup> *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) assented to 24 October 2017, date of commencement 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 — commencement proclamation).

<sup>584</sup> Sentencing Advisory Council (Tasmania) (n 80), Regarding home detention, see Recommendations 14–29. Regarding CCOs, see Recommendations 32–46. See also pp. 39–43.

<sup>585</sup> Ibid 85 citing *Boulton v The Queen* (2014) 46 VR 308, 311 [5] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>586</sup> Ibid 95.

<sup>587</sup> Ibid.

<sup>588</sup> Proclamation under the *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas) 3 December 2018.

the length of the order and the specific conditions imposed, community correction orders can be a highly punitive sentencing option. Importantly, however, these orders will also help offenders address the factors that led to their criminal behaviour in the first place.<sup>589</sup>

### 8.2.5 National — Australian Law Reform Commission, 2017

The ALRC *Pathways to Justice* Report, recommended that, using the Victorian CCO regime as an example, state and territory governments should implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending.<sup>590</sup> It made this recommendation on the basis that:

Issues of accessibility and flexibility are interrelated, particularly in relation to offenders with complex needs. This is because inflexible community-based sentencing regimes are likely to either exclude offenders with complex needs or result in high rates of breach and revocation. Inflexible community-based sentencing regimes may also have the effect of preventing the imposition of treatment conditions that address the underlying causes of reoffending.<sup>591</sup>

Key issues drawn from the Commission's research and submissions to the inquiry highlighted by the ALRC in supporting greater flexibility include:

- 'Research has consistently shown that the level of intervention under a sentence served in the community should be proportionate to the risk level of the offender. To achieve this, the sentencing regime for sentences served in the community needs to be as flexible as possible so that an individual sentence can be tailored by the judicial officer'.<sup>592</sup>
- The inflexibility of existing community-based sentencing regimes may be increasing the use of sentences of imprisonment over other alternatives to full-time custody, with a suggestion that in Queensland, sentencing of imprisonment served entirely on parole (under court ordered parole) has increased as a result of both restrictions on, and the lack of flexibility of, existing community-based sentencing options. This perceived lack of flexibility of community-based orders in Queensland has potentially adverse consequences including increasing the size of the prison population, and the use of parole where an offender has spent no time in prison and therefore has no need for prison-to-community reintegration.<sup>593</sup>
- Support by many stakeholders for granting judicial officers greater flexibility to tailor community-based sentences, particularly to promote greater use of alternatives to full-time custody, and to allow for the imposition of treatment and programs that aim to address underlying criminogenic factors (with the ALRC noting the NSWLRC had made similar observations in its 2013 Sentencing report).<sup>594</sup>

## 8.3 Data sources

As CCOs are not a sentencing option in Queensland, data in this chapter were drawn from publications from other jurisdictions that have implemented CCOs as a sentencing option.

The data are limited to CCOs issued in Victoria.<sup>595</sup> NSW and Tasmania have only recently implemented CCOs and so data are not available from these jurisdictions. In England and Wales, data on 'community sentences' were obtained as a comparable order to CCOs.

<sup>589</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 'Second Reading — Sentencing Amendment (Phasing out of Suspended Sentences) Amendment Bill 2017', 19 October 2017, 44 (Elise Archer, Minister for Justice).

<sup>590</sup> Australian Law Reform Commission (n 21) 234, Recommendation 7.2.

<sup>591</sup> Ibid 234–5 [7.16].

<sup>592</sup> Ibid 246 [7.59].

<sup>593</sup> Ibid 246 [7.60]–[7.62].

<sup>594</sup> Ibid 247–8 [7.68]–[7.70].

<sup>595</sup> No data were available to allow a comparison of youth offenders as a cohort distinct from adult offenders. The Council has also scoped out juvenile sentencing orders from its review.

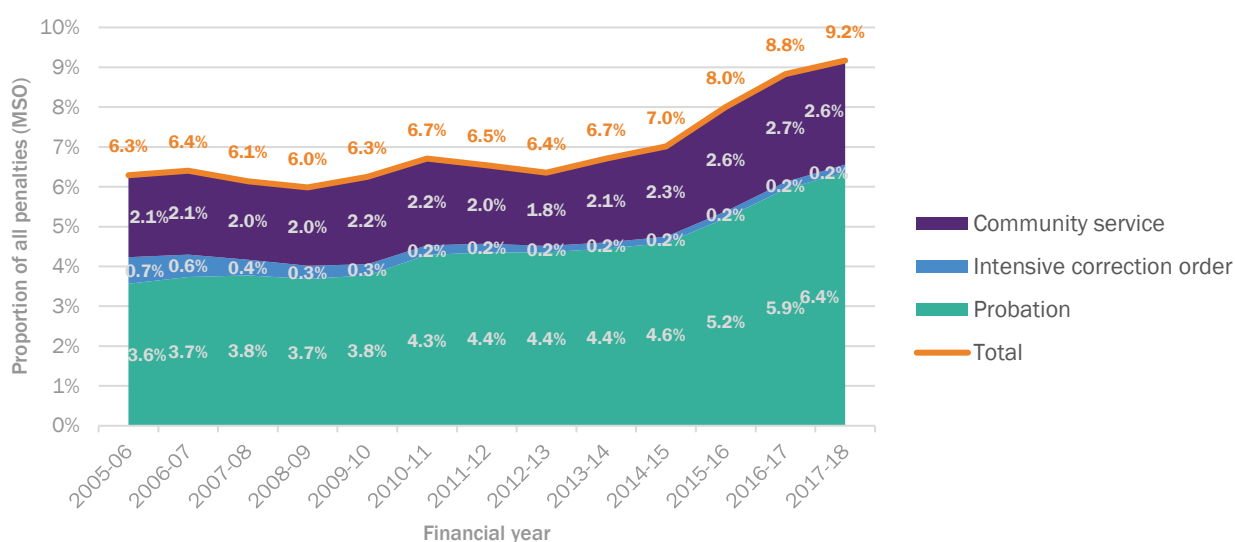
## 8.4 The potential impact of a Queensland CCO

If CCOs are introduced in Queensland, given the Council's position that suspended sentences should be retained, they could be used either in place of community service orders and probation (the model adopted in NSW, and similar to that existing in England and Wales), or in place of community service, probation and ICOs (as in Victoria).

These orders could also be used in sentencing a person convicted of a Commonwealth offence,<sup>596</sup> although a number of matters would need to be considered with respect to Commonwealth offenders. There would still be funding as well as operational agreements required between Queensland and the Commonwealth, as evidenced by gazettal arrangement or prescription in the regulations to allow for the management of Commonwealth offenders by state correctional staff. If a CCO has a supervision condition, this would allow a person sentenced for a Commonwealth offence to be supervised by a probation officer under section 20AB — instead of sections 19B or 20(1)(a) — of the *Crimes Act 1914* (Cth), which could be for a period of greater than 2 years without a bond). The breach provisions under section 20AC(6) of the *Crimes Act 1914* (Cth) would also apply instead of provisions under state legislation.<sup>597</sup>

Figure 8-1 illustrates the composition of community-based orders imposed for the most serious offence (MSO) in all Queensland courts from 2005–06 to 2017–18. In 2017–18, 9.2 per cent of sentencing orders were community-based orders. The majority of these were probation orders, followed by community service orders (6.4% and 2.6%, respectively). ICOs accounted for only 0.2 per cent of sentencing orders.

**Figure 8-1: Composition of community-based orders (MSO), 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

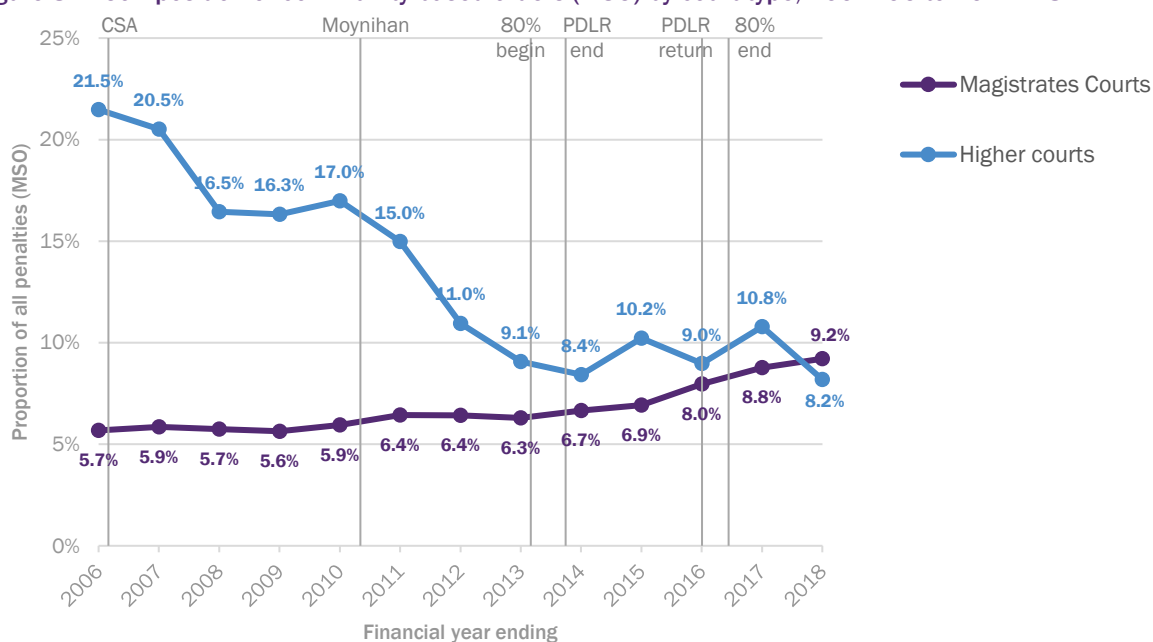
Note: MSO means 'most serious offence'.

The trend in use of community-based orders over time is different in the Magistrates Courts and higher courts (see Figure 8-2). In the Magistrates Courts, the use of community-based sentencing orders has increased steadily over the past decade, reaching a high of 9.2 per cent in 2017–18. However, in the higher courts, community-based sentencing orders accounted for 21.5 per cent of sentencing orders in 2005–06, with their use declining to 8.4 per cent in 2013–14. From 2013–14, the proportion of community-based sentencing orders in the higher courts was relatively stable, increasing to 10.8 per cent in 2016–17, before dipping back to 8.2 per cent in 2017–18.

<sup>596</sup> *Crimes Act 1914* (Cth) ss 20AB(1), 20AB(1AA)(a)(iii).

<sup>597</sup> For example, see *Sentencing Act 1991* (Vic) ss 83AD, 83AS.

Figure 8-2: Composition of community-based orders (MSO) by court type, 2005–06 to 2017–18<sup>598</sup>



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

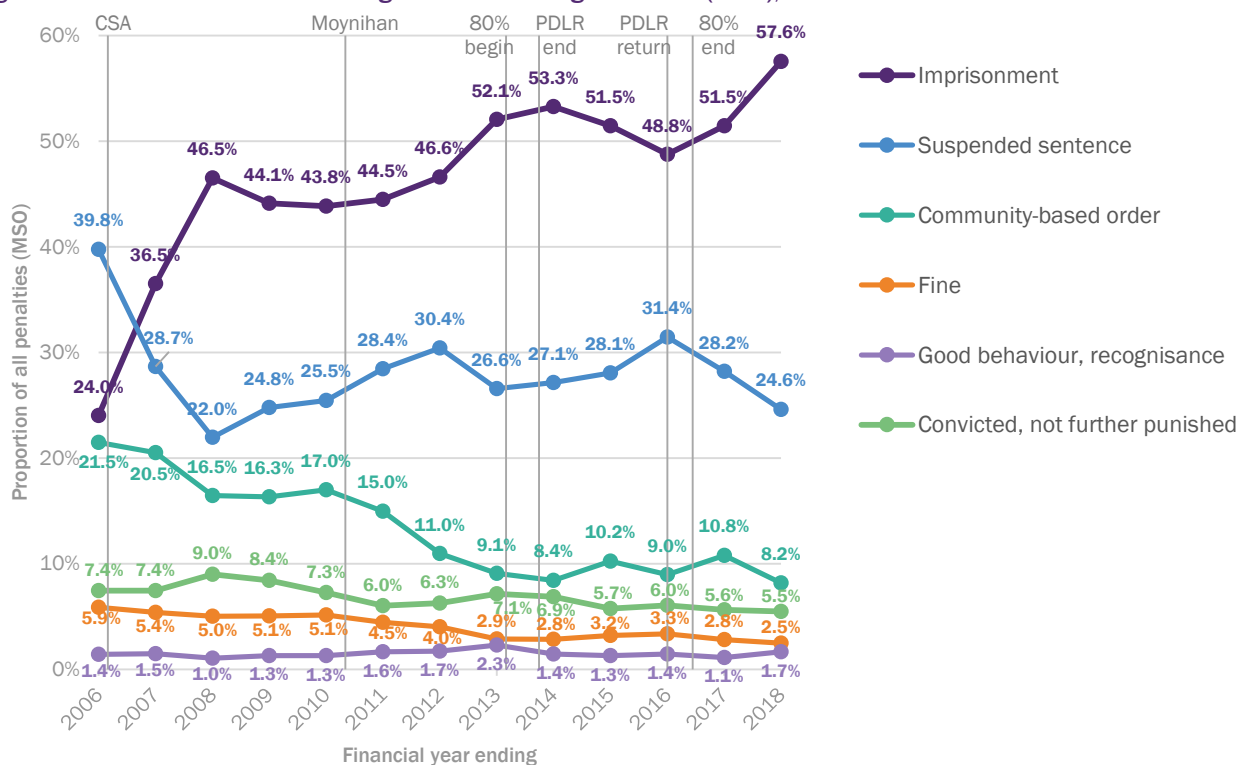
Note: The lines depict various reforms that could affect the data:

- 'CSA': *Corrective Services Act 2006* (Qld); parole regime (*Penalties and Sentences Act 1992* (Qld) pt 9, div 3). Commenced 28 August 2006.
- 'Moynihan': amendments commenced 1 November 2010. Magistrates Courts jurisdiction expanded: indictable offences in *Criminal Code* (Qld) and *Drugs Misuse Act 1986* (Qld). District Court's criminal jurisdiction increased: offences with maximum penalty of 20 years or less (up from 14 years or less).
- '80%' drug trafficking rule — commenced 29 August 2013; removed 9 December 2016. This required the court to order that drug traffickers sentenced to an actual term of imprisonment (not an ICO or a suspended sentence) must not be released until the person has served a mandatory minimum non-parole period of 80% of their sentence.
- 'PDLR': prison/detention last resort. Removed 28 March 2014; reintroduced 1 July 2016. *Penalties and Sentences Act 1992* (Qld) s 9(2)(a): imprisonment as last resort; preference for sentence served in community. Exceptions regarding violence, child sexual offending/child exploitation material remain.

<sup>598</sup> For amending legislation, see n 13.

Figure 8-3 shows that in the higher courts, the decrease in the proportion of community-based sentencing orders coincides with an increase in the proportion of custodial penalties. Imprisonment and suspended sentences accounted for a combined total of 63.8 per cent of penalties in 2005–06; this figure increased to 82.2 per cent in 2017–18.

**Figure 8-3: Breakdown of sentencing orders in the higher courts (MSO), 2005–06 to 2017–18**



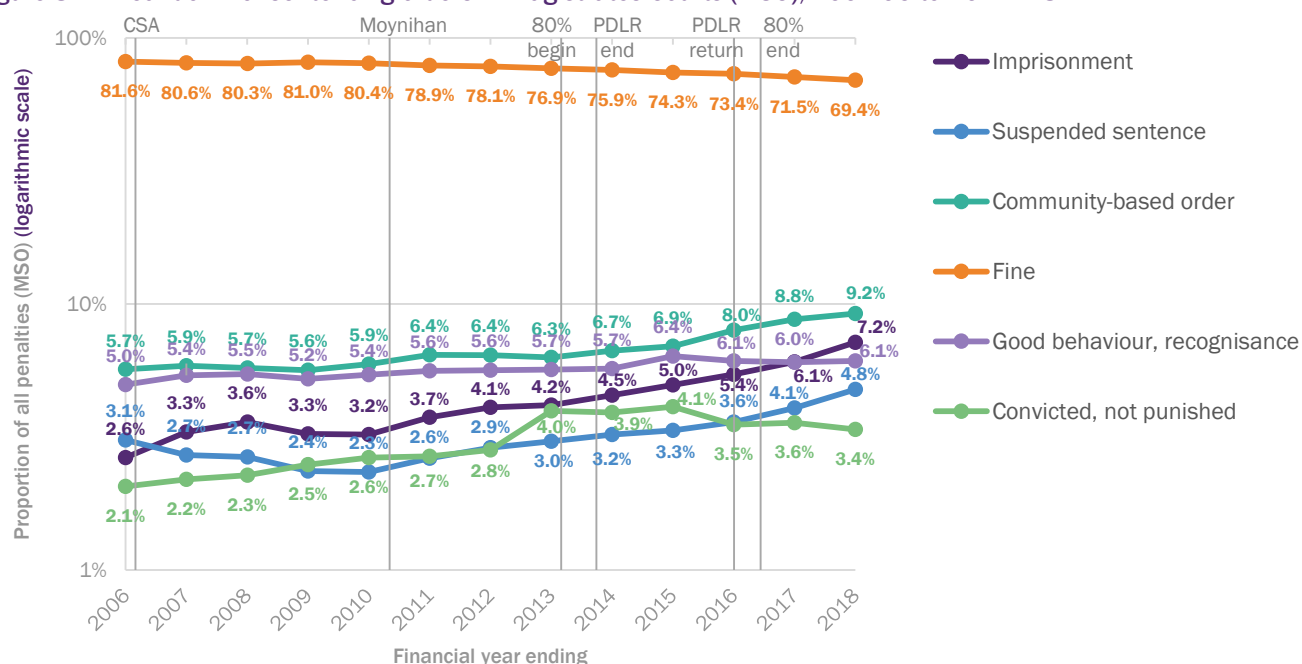
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Notes:

- 1) For an explanation of lines representing key legislative reforms, see Figure 8.2 above.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Figure 8-4 shows that in the Magistrates Courts, the proportion of fines issued (by MSO) decreased substantially, from 81.6 per cent in 2006–07 to 69.4 per cent in 2017–18. As a result, the proportional use of all other penalties increased over this period.

Figure 8-4: Breakdown of sentencing orders in Magistrates Courts (MSO), 2005-06 to 2017-18



Source: QGS0, Queensland Treasury — Courts Database, extracted November 2018.

Notes:

- 1) For an explanation of lines representing key legislative reforms, see Figure 8.2 above.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

## 8.5 The Victorian CCO model — Parts 3A and 3C Sentencing Act 1991 (Vic)

As the Victorian CCO is the best established and evaluated form of Australian CCO, analysis of it forms the main focus of this chapter. It is also the order that has gone through the greatest measure of reform and amendment since its introduction in 2012 — including the most recent restrictions on use (effective from 28 October 2018).

While it is the sole ‘mainstream’ community-based order available in that State, Victorian CCOs have nonetheless been pared back somewhat since introduction. Also, the other jurisdictions analysed (Tasmania, NSW, England and Wales) do not share Victoria’s legislated schedule of offences to which CCOs cannot apply.

### 8.5.1 Reforms to the CCO regime

VSAC recently summarised the history of changes made to the CCO regime over time as follows:

The CCO became available to the courts in Victoria on 16 January 2012. At the same time, a number of other orders were abolished, including the community-based order, the intensive correction order, the combined custody and treatment order and the home detention order. Since its introduction, the CCO has been affected by a number of amendments to the *Sentencing Act 1991* (Vic):

- The courts were encouraged in September 2014 to use a CCO in place of a suspended sentence.
- Initially, the maximum length of a CCO in the higher courts was equal to the maximum term of imprisonment available for the offence, but in March 2017 the maximum length of a CCO was set at five years for all offences.
- Initially, the maximum term of imprisonment that could be combined with a CCO was set at three months, but it was increased to two years in September 2014 and reduced to one year in March 2017.
- The courts’ use of CCOs was limited in March 2017 for two classes of serious offences, described as Category 1 offences and Category 2 offences [further limitations were added in October 2018].

In addition to these legislative changes, the Victorian Court of Appeal's first guideline judgment offered guidance to the courts on the purposes, strengths and limitations of the CCO.<sup>599</sup>

### 8.5.2 The guideline judgment — *Boulton v The Queen*

The Victorian Court of Appeal's guideline judgment on the proper use of CCOs — *Boulton v The Queen*<sup>600</sup> — highlighted a number of features of the CCO model. Some of the points made by the Court of Appeal in issuing this judgment were:

- CCOs may be appropriate for relatively serious offences that would previously have attracted a medium term of imprisonment.
- There is now a very broad range of cases in which it will be appropriate to impose a suitably structured CCO, either alone or in conjunction with a shorter term of imprisonment, including cases where imprisonment would formerly have been regarded as the only option.
- They offer courts the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and their dependants.
- A CCO should not be refused on the basis that the offence is of such seriousness that it has always resulted in imprisonment.
- The overarching principles for the imposition of the CCO are proportionality and suitability.
- In determining suitability, imprisonment must not become the default in difficult cases involving mental illness, drug addiction and/or homelessness with anticipated compliance difficulties. Such concerns should not bar a CCO where there is a positive assessment of suitability for treatment/rehabilitation conditions. The court should proceed on the assumption that — whatever difficulties of compliance there may be initially — they are likely to abate once the treatment process gets under way (accepting that relapses are common occurrences during the beginning stages of treatment).
- CCOs are likely to be a particularly important sentencing option for young offenders, given their flexibility to allow a court to fashion an order that simultaneously achieves the purposes of rehabilitation and punishment.

The Court declined to define any outer limits of any offences for which a CCO would be unsuitable (although legislation has since done so — see section 8.5.4 below).

### 8.5.3 Sentencing trends

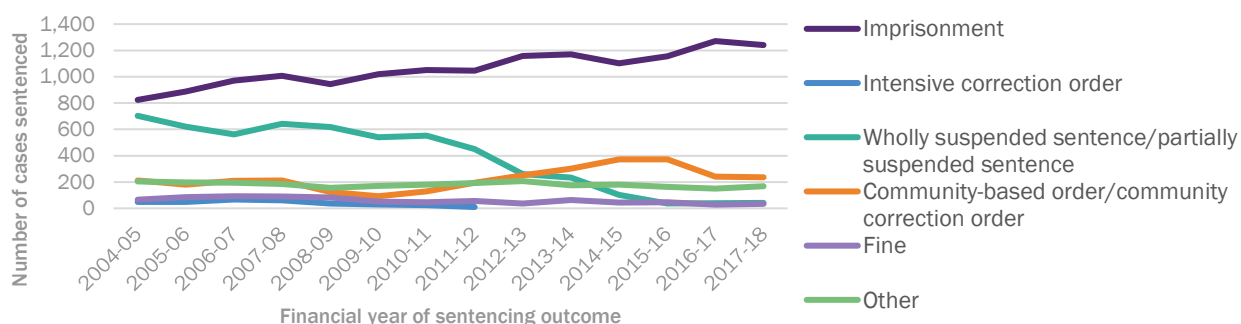
In early 2012, the CCO replaced a number of sentencing orders, including the ICO, home detention and the community-based order. Figure 8-5 and Figure 8-6 show the superseded community-based orders for sentences imposed prior to January 2012.

In 2017–18, CCOs were the second most frequently imposed sentence in the Victorian higher courts (13.7%), following sentences of imprisonment (72.1%). The percentage of cases sentenced to a CCO peaked at 20.9 per cent in 2015–16, before decreasing to 13.7 per cent in 2017–18.<sup>601</sup>

<sup>599</sup> Sentencing Advisory Council (Victoria), *Serious Offending by People Serving a Community Correction Order: 2017–18* (2019) 2–3 (citations omitted).

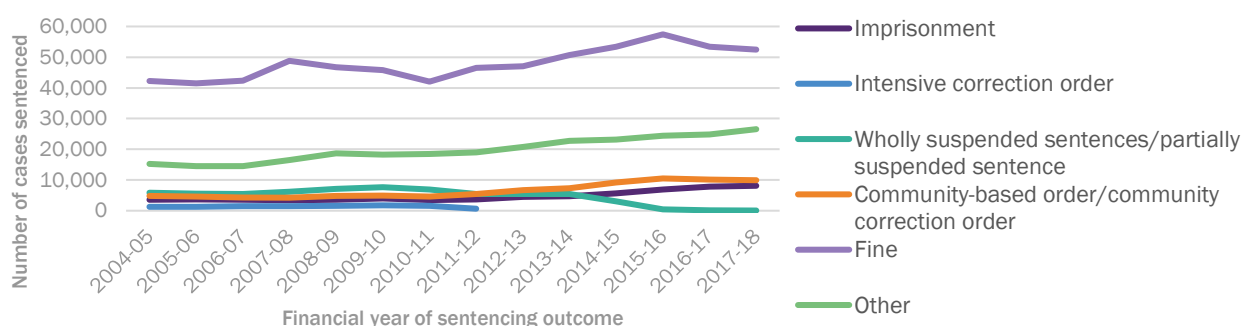
<sup>600</sup> (2014) 46 VR 308.

<sup>601</sup> Sentencing Advisory Council (Victoria), *Sentencing Outcomes in the Higher Courts* (2018) (Web Page, 2018) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/sentencing-outcomes-higher-courts>>.

**Figure 8-5: Sentencing outcomes in Victoria's higher courts, 2004–05 to 2017–18**

Source: Court Services Victoria, unpublished data, via Sentencing Advisory Council (Victoria).

In 2017–18, CCOs accounted for 10.2 per cent of all sentences in Victoria's Magistrates' Court.<sup>602</sup> When CCOs were introduced in Victoria in 2012, they accounted for 7.9 per cent of sentences — this proportion rose to 10.5 per cent in 2015–16 where it remained relatively stable until 2017–18.<sup>603</sup>

**Figure 8-6: Sentencing outcomes in Victoria's Magistrates' Court, 2004–05 to 2017–18**

Source: Court Services Victoria, unpublished data, via Sentencing Advisory Council (Victoria).

The average duration of Victorian CCOs increased steadily over the four years following their introduction in 2012 (see Figure 8-7). In the Magistrates' Court, average duration increased from 11.8 months in 2012 to 12.7 months in 2015.<sup>604</sup> In the higher courts, the average duration increased from 1.8 years to 2.3 years in 2015.<sup>605</sup>

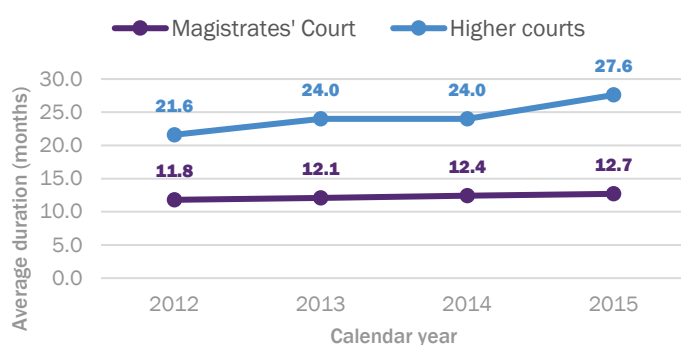
<sup>602</sup> The Magistrates' Court of Victoria is the equivalent of Queensland's Magistrates Courts. It is the first level of the Victorian court system. Sitting in 51 locations, it hears most matters that reach court. There is no jury and each matter is heard and determined by a judicial officer (a magistrate or judicial registrar): 'The Court System', *Magistrates' Court of Victoria* (Web Page) <<https://www.mcv.vic.gov.au/court-system>>.

<sup>603</sup> Sentencing Advisory Council (Victoria), *Sentencing Outcomes in the Magistrates' Court* (Web Page, 2018) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/sentencing-outcomes-magistrates-court>>.

<sup>604</sup> Sentencing Advisory Council (Victoria), *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) 16.

<sup>605</sup> *Ibid* 20.

Figure 8-7: Duration of community correction orders in Victorian courts, 2012–2015



Source: Court Services Victoria, unpublished data, via the Victorian Sentencing Advisory Council.

### 8.5.4 Restrictions on use

#### Category 1 offences

A Victorian court must make a custodial order for any 'Category 1' offence — committed on or after 20 March 2017: s 5(2G) — and after the 2014 guideline judgment. The Category 1 list contains:

- murder;
- causing serious injury intentionally in circumstances of gross violence;
- causing serious injury recklessly in circumstances of gross violence;
- rape/rape by compelling sexual penetration;
- incest (victim under 18)/incest — de facto (victim under 18);
- sexual penetration with a child under 12;
- persistent sexual abuse of a child under 16;
- sexual penetration of a child or lineal descendant under 18;
- sexual penetration of a step child under 18;
- trafficking in a large commercial quantity of a drug of dependence; and
- cultivation of a large commercial quantity of a narcotic plant.

Further offences committed on or after 28 October 2018 were added to this list from that date:

- causing serious injury intentionally, serious injury recklessly and injury intentionally or recklessly, if the victim was an emergency worker, custodial officer or youth justice custodial worker on duty and the offender knew or was reckless as to whether the victim was such a person;
- aggravated home invasion;
- aggravated carjacking; and
- a simpliciter or aggravated offence of intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving if, in the commission of the offence, such a person is on duty and is injured.<sup>606</sup>

<sup>606</sup> Amendments to the *Sentencing Act 1991* (Vic) s 3, as amended by the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73.

A new subsection<sup>607</sup> qualifies section 5(2G) by making a special-reason exemption for the five new Category 1 emergency worker offences only. These offences also carry a statutory minimum non-parole period or term of imprisonment, unless a court finds a special reason, which then mandates other sentence types as fixed alternatives, subject to assessment of causally linked impaired mental functioning.<sup>608</sup>

Relevantly, one of the mandated alternative sentences in this context is a new mandatory treatment and monitoring order (s 44A, effective 28 October 2018), being a CCO with mandatory judicial monitoring and either treatment and rehabilitation or justice plan<sup>609</sup> conditions, which cannot be cancelled.<sup>610</sup>

In addition, certain repealed sexual offences committed on or after 20 March 2017 and before 1 July 2017 have been added. These offences are analogous to the sexual offences already listed in the definition of Category 1 offence. This amendment came into effect on 26 September 2018.<sup>611</sup>

## Category 2 offences

There is also a list of 'Category 2' offences (committed on or after 20 March 2017 and a second tranche on or after 28 October 2018) for which imprisonment must be imposed,<sup>612</sup> unless a statutory exception is established (including because the person has impaired mental functioning — an exception that has been restricted in recent amendments):<sup>613</sup>

- manslaughter;
- child homicide;
- causing serious injury intentionally, other than a category 1 offence;
- kidnapping/kidnapping (common law);
- arson causing death;
- trafficking in a commercial quantity of a drug of dependence;
- cultivation of a commercial quantity of a narcotic plant;
- providing documents or information facilitating terrorist acts;
- aggravated offence of intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving, other than a category 1 offence; and
- aggravated offence of recklessly exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving.

As with the Category 1 offences, further offence types committed on or after 28 October 2018 have since been added:<sup>614</sup>

- armed robbery if the offender has a firearm or the victim suffers injury as a direct result of the offence, or the offence was committed in company;

<sup>607</sup> New s 5(2GA) introduced by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 75 — commenced 28 October 2018.

<sup>608</sup> Being beyond the scope of this report. See *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 78, amending *Sentencing Act 1991* (Vic) ss 10AA–10A. See also explanatory notes to the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic), 41–3.

<sup>609</sup> A 'justice plan condition' is a special condition available for offenders with an intellectual disability. It requires offenders to comply with a plan of available services designed to reduce the likelihood of reoffending, which is in accordance with principles and objectives set out under Part 2 of the *Disability Act 2006* (Vic).

<sup>610</sup> See *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 80.

<sup>611</sup> See *Sentencing Act 1991* (Vic), new s 3(1)(l), 'category 1 offence' and s 167(3), Explanatory Memorandum, *Justice Legislation Miscellaneous Amendment Bill 2018* (Vic), 40 (cl 72(2)) and *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73(2).

<sup>612</sup> *Sentencing Act 1991* (Vic) s 5(2H).

<sup>613</sup> See *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76.

<sup>614</sup> Amendments to the *Sentencing Act 1991* (Vic) s 3, as amended by the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 74.

- home invasion;
- carjacking;
- culpable driving causing death; and
- dangerous driving causing death.

Table 8-1 shows the outcomes of VSAC analysis over time of the five most common (principal) offence categories attracting CCOs.

**Table 8-1: Five most common principal offence categories for Victorian CCOs**

| January 2012 – June 2013 <sup>615</sup> |                              | 2014 – 2015 <sup>616</sup>                        |   |
|---|------------------------------|---|---|
| Higher courts                           | Magistrates' Court           | Higher courts                                     | Magistrates' Court                                |
| Assault (36.4%)                         | Assault (20.3%)              | Assault (30.8%)                                   | Assault (30.7%)                                   |
| Non-rape sexual offences (18.5%)        | Traffic (16.6%)              | Sexual offences (20.9%)                           | Traffic (19.2%)                                   |
| Robbery (14.2%)                         | Theft (15.7%)                | Robbery and burglary (19.6%)                      | Theft and deception (13.8%)                       |
| Aggravated burglary (7.1%)              | Justice procedures (13.3%)   | Drugs (cultivate, traffick or manufacture) (9.2%) | Drugs (cultivate, traffick or manufacture) (8.9%) |
| Drugs (court-mandated treatment) (4.1%) | Handling stolen goods (9.2%) | Theft and deception (8.1%)                        | Other (6.6%)                                      |

Source: Sentencing Advisory Council (Victoria), *Community Correction Orders Monitoring Reports*.

## 8.6 Evaluations of the Victorian CCO model

### 8.6.1 Victorian monitoring reports

The VSAC published a series of three monitoring reports in 2014,<sup>617</sup> 2015<sup>618</sup> and 2016<sup>619</sup> examining how CCOs had been used by Victorian courts.

The first monitoring report covered the 18 months following the introduction of CCOs in Victoria (January 2012 to June 2013). The report found that CCOs in the Magistrates' Court were primarily being used in place of the repealed community-based orders and ICOs. In the higher courts, CCOs were additionally being used in place of suspended sentences, to a limited extent.<sup>620</sup>

The second monitoring report covered the 18 months from January 2012 to December 2014. Following the abolition of suspended sentences in the Victorian Magistrates' Court from 1 September 2014, it found the Magistrates' Court was increasingly using CCOs in place of suspended sentences.<sup>621</sup>

Legislative changes were introduced in September 2014, increasing the maximum imprisonment term a CCO may be combined with from 3 months to 2 years. This change saw a drastic increase in the number of combined imprisonment and CCO sentences (a 62.3% increase in the Magistrates' Court, and a 238.9% increase in the higher courts, in the final quarter of 2014).<sup>622</sup>

The third monitoring report examined how Victorian courts used CCOs from their introduction in 2012, with a particular focus on the 2015 calendar year. The report found that from 2014 to 2015, the number of offenders who received a CCO as the head sentence increased by 36 per cent in the Magistrates' Court, and 15 per cent in the higher courts. Following the abolition of suspended sentences in the higher courts from

<sup>615</sup> Sentencing Advisory Council (Victoria), *Community Correction Orders Monitoring Report* (2014) 14, 36.

<sup>616</sup> Sentencing Advisory Council (Victoria) (n 604) 15, 19.

<sup>617</sup> Sentencing Advisory Council (Victoria) (n 615).

<sup>618</sup> Sentencing Advisory Council (Victoria), *Community Correction Orders Second Monitoring Report (Pre-Guideline Judgment)* (2015).

<sup>619</sup> Sentencing Advisory Council (Victoria) (n 604).

<sup>620</sup> Sentencing Advisory Council (Victoria) (n 615) viii.

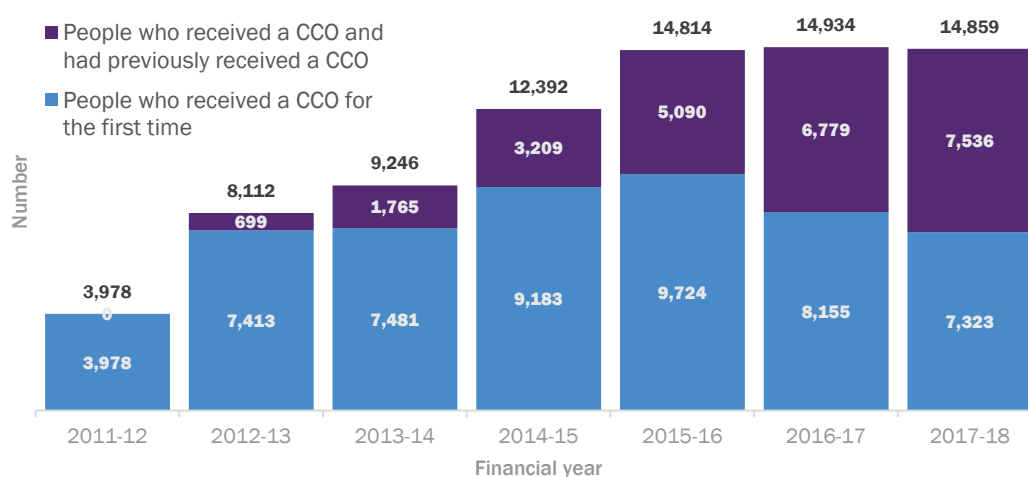
<sup>621</sup> Sentencing Advisory Council (Victoria) (n 618), 20.

<sup>622</sup> Ibid.

1 September 2014, the number of combined imprisonment and CCO sentences rose by over 370 per cent in the higher courts in 2015. The number of combined sentences imposed in the Magistrates' Court increased by 100 per cent in 2015.<sup>623</sup>

A separate report series published by VSAC reports on serious offences committed by people who received a CCO (discussed further below). Based on data from the most recent report, released in January 2019, the number of people who received a CCO increased in each financial year to 2015–16, before becoming relatively stable in 2015–16 at approximately 15,000 per annum.<sup>624</sup> However, as shown in Figure 8-8, the proportion of people receiving a CCO who have previously received a CCO is progressively increasing.

**Figure 8-8: Number of people who received a CCO from 16 January 2012 to 30 June 2018, by financial year and whether the person had previously received a CCO**



Source: Reproduced from Sentencing Advisory Council (Victoria), *Serious Offending by People Serving a Community Correction Order: 2017–18* (2019) 7, Figure 2.

### 8.6.2 Victorian Auditor-General's report

A February 2017 Victorian Auditor-General's report found that in 2014–15, daily CCO management costs per person were \$27.55 per day (just over \$10,000/year), substantially less than \$360.91 for a prisoner (or more than \$131,700/year).<sup>625</sup>

By way of comparison, Australian Government data for 2017–18 show that the real net operating expenditure per prisoner per day in Queensland in 2017–2018 was \$181.55 (in Victoria over this same period it was \$323.82). In contrast, the real net operating expenditure per offender per day for supervising an offender in the community in Queensland in 2017–18 was \$13.79 (in Victoria it was \$32.40).<sup>626</sup>

The Victorian data for 2014–15 showed that offenders on Victorian CCOs had a significantly reduced risk of reoffending (24.9% reoffended and went back through the correctional system within 2 years) compared to those imprisoned (53.7% reoffended and either returned to community corrections or prison within 2 years).

<sup>623</sup> Sentencing Advisory Council (Victoria) (n 604) x.

<sup>624</sup> Sentencing Advisory Council (Victoria) (n 599) 7.

<sup>625</sup> Victorian Auditor-General (n 420) 3.

<sup>626</sup> Productivity Commission (n 33) Table 8A.18. 'Prisoner' means a person held in full-time custody under the jurisdiction of an adult corrective services agency. This includes sentenced prisoners serving a term of imprisonment and unsentenced prisoners held on remand, in both public and privately operated prisons. 'Offender' means an adult person subject to a non-custodial order administered by corrective services, which includes bail orders if those orders are subject to supervision by community corrections: 8.28.

of release). However, those on CCOs tended to come from a lower-risk cohort, so the report cautioned that the link may not always be causal.<sup>627</sup>

The report also found:

- the number of offenders on CCOs almost doubled from 2013 to 2016 (to 11,730);
- a rise in high-risk offenders on CCOs (27%; no historical comparison available);
- strain on corrections staff;
- significant waiting times for accessing programs;
- between 2013–14 and 2015–16, the number of combined CCO imprisonment orders imposed on offenders increased by more than 400 per cent.<sup>628</sup>

It concluded that:

- Corrections Victoria had a comprehensive reform program addressing key challenges arising from a rapid overall increase in offenders on CCOs, including a fast-growing high-risk offender cohort.
- If implemented effectively, the reforms, along with a significant Corrections Victoria recruitment exercise, should reduce high caseloads and improve overall management of offenders.
- However, practices for managing offenders on CCOs were not effective, and much of the effort to fully implement these reforms lay ahead.
- There was a shortage of adequately trained staff to meet the increase in offenders on CCOs, business processes were inefficient, and a fragmented information management environment impeded timely decision-making and effective coordination.
- To better manage risks to community safety, Corrections Victoria needed to review its process for managing con-compliant offenders on CCOs, especially the process for taking offenders back to court for breaches of conditions.
- The growing number of higher-risk offenders on CCOs added extra complexity to a system already struggling with high growth and high caseloads.
- Corrections Victoria needed to better understand these more challenging cohorts, improve its risk assessment completion rates, and improve communication with Victoria Police about higher-risk offenders.<sup>629</sup>

### 8.6.3 Contravention of orders

In July 2017, VSAC published the report, *Contravention of Community Correction Orders*, which analysed offenders sentenced to a CCO from 1 July 2012 to 30 June 2013 (7,645 offenders).<sup>630</sup>

In the higher courts, 59 per cent of offenders complied with the CCO, compared to 49 per cent in the Magistrates' Court. A small group failed to comply with a term or condition of the CCO (13% in the higher courts, 15% in the Magistrates' Court); whereas a larger group contravened their CCO by committing a new imprisonable offence (28% in the higher courts, and 36% in the Magistrates' Court).<sup>631</sup> These findings are shown in Figure 8-9 below.

<sup>627</sup> Victorian Auditor-General (n 420) 2, citing Department of Justice and Regulation data.

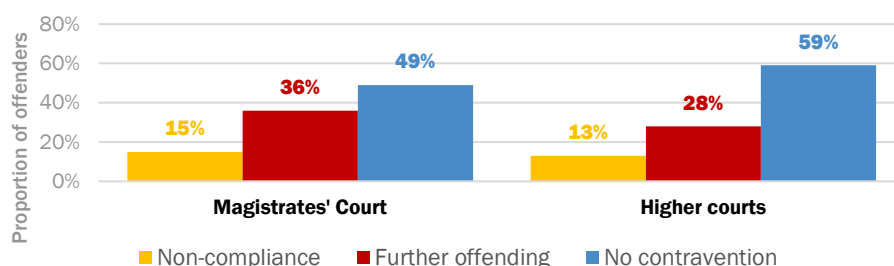
<sup>628</sup> Ibid.

<sup>629</sup> Ibid viii–ix.

<sup>630</sup> Sentencing Advisory Council (Victoria) (n 421).

<sup>631</sup> Ibid 31.

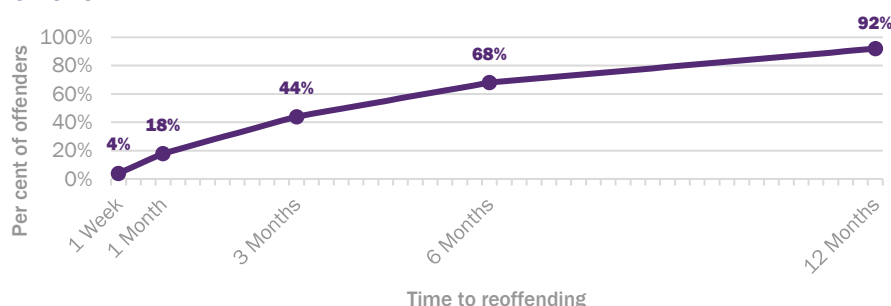
**Figure 8-9: Compliance with community correction orders in Victoria, July 2012 to June 2013**



Source: Court Services Victoria, unpublished data, via the Victorian Sentencing Advisory Council.<sup>632</sup>

Figure 8-10 shows that offenders who contravene a CCO by reoffending are much more likely to do so within the first few months. Almost half of all reoffending occurred within the first three months (44%; 4% in the first week, 18% in the first month, 68% in the first six months); almost all offenders who reoffended did so within the first year (92%).<sup>633</sup>

**Figure 8-10: Time to offending by offenders on a community correction order in Victoria, July 2012 to June 2013<sup>634</sup>**



Source: Court Services Victoria, unpublished data, via the Victorian Sentencing Advisory Council.

The VSAC 2017 report found that offenders with the following factors were more likely to commit an offence while on a CCO:<sup>635</sup>

- Offenders with prior convictions were much more likely to contravene their CCO by reoffending (five times more likely if sentenced in the higher courts, and three times more likely in the Magistrates' Court).
- Just under half (49%) of young adult offenders contravened their CCO by further offending, compared with 28 per cent of offenders aged 25 and over.
- In the Magistrates' Court, CCOs longer than 12 months were more likely to be contravened by reoffending; in the higher courts the likelihood of reoffending was increased for CCOs longer than two years.
- In the Magistrates' Court, CCOs with conditions other than community work were more likely to be contravened.
- In the Magistrates' Court, CCOs combined with a sentence of imprisonment were more likely to be contravened.

Of the 7,645 offenders who received a CCO in 2012–13, fewer than one in seven (13.6%; 1,042) were imprisoned for contravention of the order, with 92 per cent of these cases (n=959/1,042) involving the

<sup>632</sup> Ibid.

<sup>633</sup> Ibid 35.

<sup>634</sup> Ibid.

<sup>635</sup> Ibid 44–5.

person being imprisoned after a breach of the order by further offending. Where breach was of the conditions only, courts were more likely to make use of non-imprisonment orders, such as by imposing another CCO or a fine.

Based on these data, it appears that CCOs are operating relatively successfully in diverting offenders from prison.

More specific breakdowns of the report's findings are set out in Table 8-2 and the discussion below. The report analysed four types of court orders that are associated with the contravention of a CCO. These are broken down, with specific outcome types listed by jurisdiction.

**Table 8-2: Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders (2017)* – outcomes of contraventions**

| Court  | Outcome   |
|--|---|
| <b>1. Orders made in relation to the original CCO (was it confirmed, varied or cancelled?)</b>                                     |   |
| Magistrates' Court   | 56% of contravened CCOs were cancelled (and the original offence was resentenced), 23% were confirmed, 11% were varied, and 10% were cancelled with no further order. <sup>636</sup>  |
| Higher courts  | 40% of contravened CCOs were confirmed, 38% were cancelled and resentenced, 17% were varied, and 4% were cancelled with no further order. <sup>637</sup>  |
| <b>2. Resentencing of original offence (in cases where the CCO was cancelled)</b>  |   |
| Magistrates' Court   | 31% resulted in imprisonment, 28% in a wholly suspended sentence (although suspended sentences were later removed as a sentencing option in Victoria from 1 September 2014), <sup>638</sup> 20% in a fine, and 15% in a CCO. <sup>639</sup> |
| Higher courts  | 57% resulted in imprisonment, 25% in a CCO. <sup>640</sup>  |
| <b>3. Sentencing for new offences (in cases where the CCO was contravened through further offending)</b>                           |   |
| Magistrates' Court   | 32% resulted in imprisonment, 23% in a fine, 19% in a CCO, and 17% in a wholly suspended sentence. <sup>641</sup>   |
| Higher courts  | 32% resulted in a fine, 31% in imprisonment, and 19% in a CCO. <sup>642</sup>   |
| <b>4. Sentence for the offence of contravening a CCO (in cases where the offender was charged with this as a separate offence)</b> |   |
| Magistrates' Court   | 82% of cases were proven and dismissed, and 13% of cases resulted in a fine. <sup>643</sup>   |
| Higher courts  | 86% of cases were proven and dismissed. <sup>644</sup>  |

Taking all four types of court orders into consideration, the most severe outcomes imposed were as follows:

- In the Magistrates' Court, the most severe sentence associated with contravention by further offending was most commonly imprisonment (35%), followed by a CCO (27%),<sup>645</sup> a wholly suspended sentence (20%) or a fine (12%).<sup>646</sup>

<sup>636</sup> Ibid 62 [6.15], Figure 35.

<sup>637</sup> Ibid 69 [7.9], Figure 42.

<sup>638</sup> This analysis, therefore, would be most useful from a Queensland perspective, given that suspended sentences will remain in Queensland. Note, for instance, Sentencing Advisory Council (Victoria) (n 421) at page x: 'Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates' Court for all offences committed on or after 1 September 2014' and at xv, n 1: 'As suspended sentences are no longer available in Victoria, subsequent studies of contravention of CCOs will find a different distribution of sentence outcomes'.

<sup>639</sup> Ibid 63 [6.18], Figure 36.

<sup>640</sup> Ibid 70 [7.10], Figure 43.

<sup>641</sup> Ibid 65 [6.21]–[6.22], Figure 38.

<sup>642</sup> Ibid 71 [7.12], Figure 44.

<sup>643</sup> Ibid 66 [6.23], Figure 39.

<sup>644</sup> Ibid 72 [7.13], Figure 45.

<sup>645</sup> Note that if a CCO was the most severe sentence, it may indicate that the original CCO was confirmed.

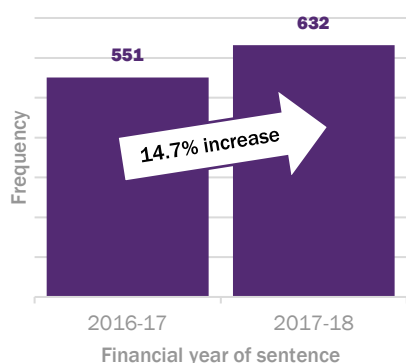
<sup>646</sup> Sentencing Advisory Council (Victoria) (n 421) 61 [6.10], Figure 34.

- The most severe sentence for contravention by non-compliance was a CCO (46%) followed by a fine (19%), a wholly suspended sentence (18%), imprisonment (7%) or the contravention being proven and dismissed (7%).<sup>647</sup>
- In the higher courts, the most severe sentence associated with contravention by further offending was most commonly imprisonment (49%), followed by a CCO (40%).<sup>648</sup>
- The most severe sentence for contravention by non-compliance was a CCO (63%) followed by the contravention being proven and dismissed (23%), followed by imprisonment (10%).<sup>649</sup>

Separate data are published by VSAC each financial year on the number of persons convicted during that year of a serious offence committed while subject to a community correction order.<sup>650</sup> To date, two reports have been released, covering the financial years 2016–17<sup>651</sup> and 2017–18.<sup>652</sup> In these reports, ‘serious offending’ includes both serious violent offences<sup>653</sup> and sexual offences.<sup>654</sup>

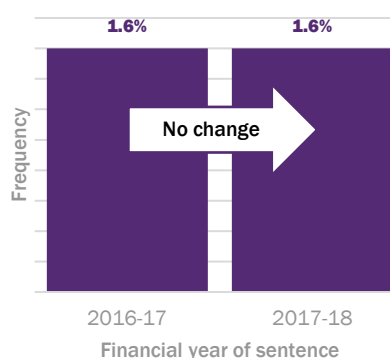
In the most recent report for 2017–18, VSAC found 632 offenders were sentenced for a serious offence that was committed while serving a CCO. This represented a 14.7 per cent increase from the previous year — see Figure 8-11. However, the estimated rate of CCO contravention by serious offending has remained stable at 1.6 per cent — see Figure 8-12. Although there was an increase in the number of contraventions, there was also an increase in the total number of people on a CCO.

**Figure 8-11: Number of people sentenced for a serious offence committed while serving a CCO, by financial year**



Source: Sentencing Advisory Council (Victoria).<sup>655</sup>

**Figure 8-12: Estimated percentage of CCO contravention by serious offending, by financial year of sentence for serious offence**



Source: Sentencing Advisory Council (Victoria).<sup>656</sup>

The most common serious offences committed on a CCO involved threats to kill or injure. The top three offences in 2017–18 were ‘make threat to kill’ (325 charges), ‘make threat to inflict serious injury’ (172 charges) and ‘aggravated burglary’ (154 charges) — see Figure 8-13.

<sup>647</sup> Ibid.

<sup>648</sup> Ibid 68 [7.3]–[7.4], Figure 41.

<sup>649</sup> Ibid.

<sup>650</sup> This is a statutory requirement under the *Corrections Act 1986* (Vic) s 104AA(2).

<sup>651</sup> Sentencing Advisory Council (Victoria), *Serious Offending by People Serving a Community Correction Order: 2016–17* (2018).

<sup>652</sup> Sentencing Advisory Council (Victoria) (n 599).

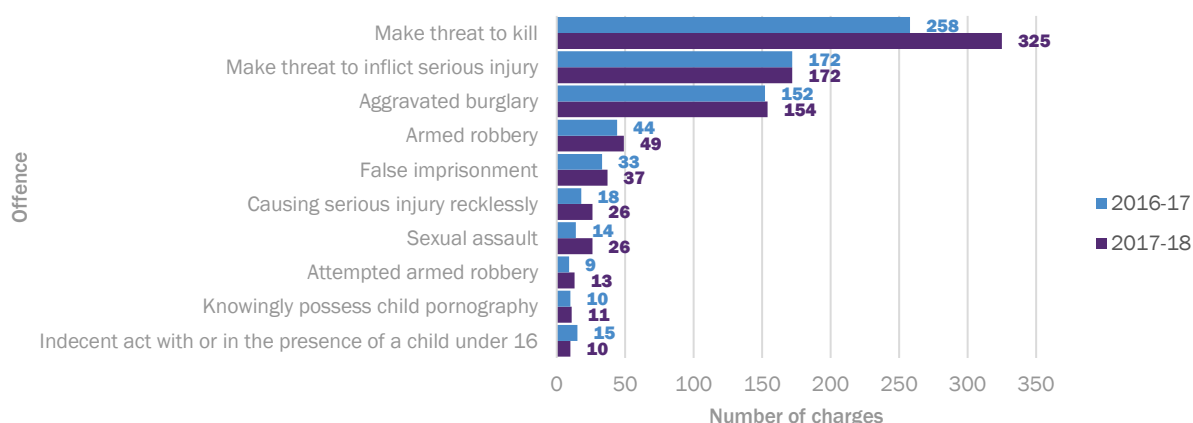
<sup>653</sup> *Sentencing Act 1991* (Vic) sch 1 cl 2.

<sup>654</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) sch 1. This Act has since been repealed and replaced with the *Serious Offenders Act 2018* (Vic).

<sup>655</sup> Sentencing Advisory Council (Victoria) (n 599) 8.

<sup>656</sup> Ibid.

**Figure 8-13: Number of sentenced charges of a serious offence committed while serving a CCO for the 10 most common serious offences sentenced in 2017–18 by type of serious offence and financial year**



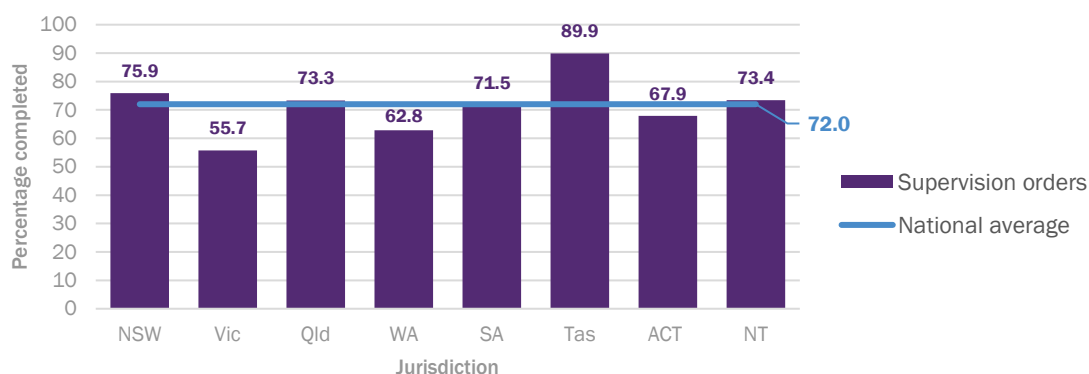
Source: Sentencing Advisory Council (Victoria).<sup>657</sup>

## 8.7 National completion rates for supervision orders — *Report on Government Services 2019*

The Productivity Commission's *Report on Government Services 2019* provides a comparison of completion rates for supervision orders across each jurisdiction. These data include all community correction orders that do not restrict a person's liberty (e.g. home detention) and do not include community service bond/order or fine option orders, which require offenders to undertake unpaid work. On this basis, the following data are broader than CCOs and ICOs.<sup>658</sup>

Figure 8-14 shows that nationally in 2017–18, 72.0 per cent of supervision orders were completed. Tasmania had the highest percentage of completed supervision orders at 89.9 per cent. In Queensland, 73.3 per cent of supervision orders were completed successfully, which was similar to the outcome obtained by NSW, SA and NT. Victoria and WA had the lowest percentages of successful completions at 55.7 per cent and 62.8 per cent, respectively.

**Figure 8-14: Completion of community corrections orders (supervision orders), 2017–18**



Source: Australian Government, Productivity Commission, *Report on Government Services 2019*.<sup>659</sup>

Figure 8-15 shows the national average for completion of supervision orders has increased by two percentage points, from 70.0 per cent in 2016–17 to 72.0 per cent in 2017–18. Queensland's completion rate increased to 73.3 per cent, up from 71.2 per cent. Victoria, Tasmania and the ACT all saw a decrease

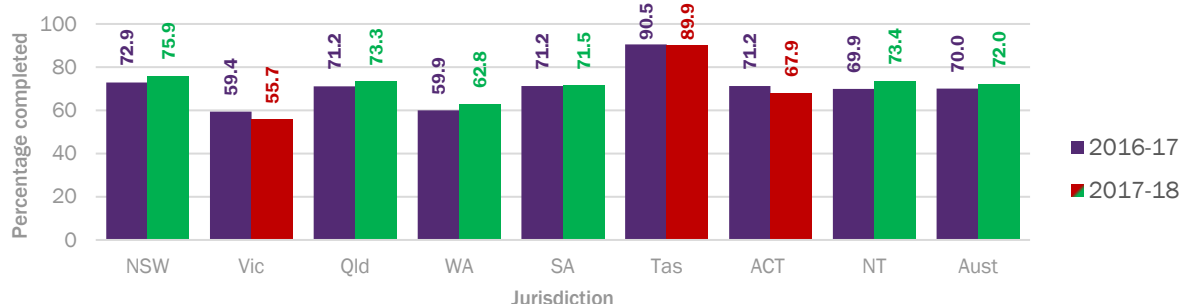
<sup>657</sup> Ibid 9.

<sup>658</sup> Note that this will reflect the old systems in NSW (CCO and new scheme active since September 2018) and Tasmania (CCO and new scheme active since December 2018).

<sup>659</sup> Australian Government, Productivity Commission (n 33) Table 8A.19.

in completion rates. In the following chart, bars shaded red indicate a decline in completion rates from the previous year, and bars shaded green indicate an increase from the previous year.

**Figure 8-15: Completion of community corrections orders (supervision orders), 2016–17 to 2017–18**



Source: Australian Government, Productivity Commission, *Report on Government Services*, 2018, 2019.<sup>660</sup>

Comparing data across jurisdictions has a number of limitations. First, it may reflect different counting rules that apply to whether community orders are recorded as ‘completed’. Secondly, it does not take into consideration the different offending and risk profiles of those being placed on community orders. For example, if the majority of those placed on such orders are low to moderate risk offenders, then completion rates can be expected to be (on average) high, whereas if those placed on community orders also include a number of offenders with complex needs who are at higher risk of reoffending (including those who would otherwise have been sentenced to a period of imprisonment), the completion rates could be expected to be lower. For example, Victorian stakeholders have identified the potentially more complex profile of clients now on CCOs, which has occurred in the context of other sentencing and parole reforms, as potentially contributing to lower completion rates.

Completion rates alone, therefore, are an imperfect measure of how effectively these orders are operating.

## 8.8 Community orders in England and Wales

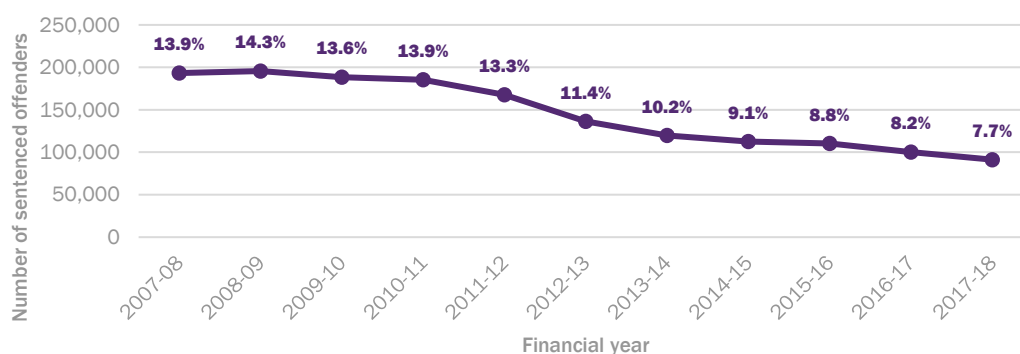
While in Victoria CCOs constitute around 10 per cent of sentences in the Magistrates’ Court and 14 per cent of sentences in the higher courts, the use of community sentences in England and Wales has been declining.

Figure 8-16 shows a marked decrease in community sentences over the past decade as a proportion of all sentences, from 193,298 sentences in 2007–08 (13.9% of cases) to 91,293 sentences in 2017–18 (7.7% of cases).<sup>661</sup>

<sup>660</sup> Ibid, Table 8A.19 and Australian Government, Productivity Commission, *Report on Government Services* 2018 (2018).

<sup>661</sup> ‘Community sentence’ means community orders for adults and youth rehabilitation orders for youths (ss 147(1) and 305 of the *Criminal Justice Act 2003* (UK)).

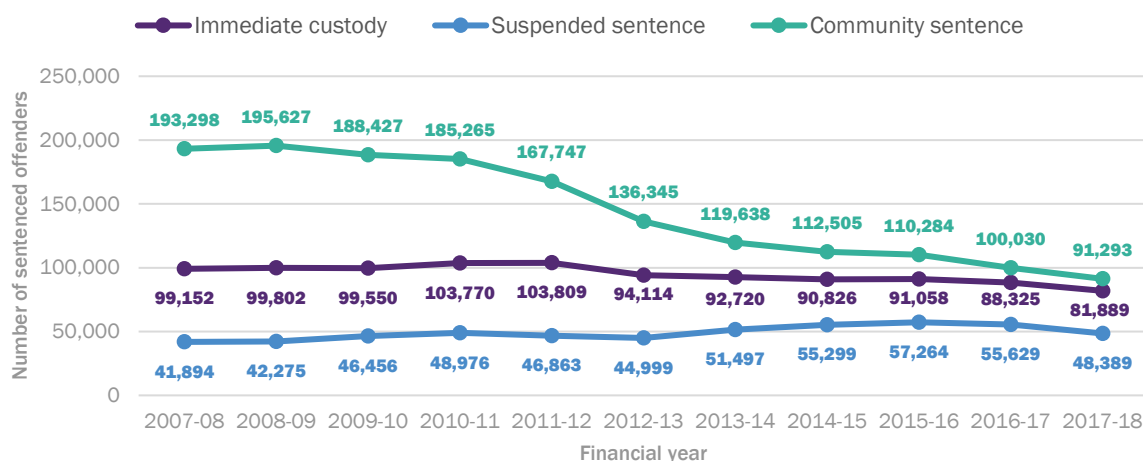
**Figure 8-16: Community sentences as a proportion of all sentences in England and Wales, 2007–08 to 2016–17**



Source: United Kingdom Ministry of Justice Court Proceedings Database.<sup>662</sup>

Figure 8-17 shows the number of sentencing orders used in England and Wales from 2007–08 to 2017–18. Community sentences have seen a marked decline over the decade, while sentences of imprisonment have showed a small decline and suspended sentences have showed a small increase over the same period.

**Figure 8-17: Sentencing outcomes in England and Wales, 2007–08 to 2017–18**



Source: UK Ministry of Justice Court Proceedings Database.<sup>663</sup>

Notes:

- 1) Data are given on a principal disposal basis — i.e. reporting the most severe sentence for the principal offence. Life sentences and other indeterminate sentences are excluded from the data.
- 2) Offenders who are not persons (e.g. companies, public bodies, etc.) are excluded from the data.
- 3) The following sentencing outcomes were not included in this figure: fine, absolute discharge, conditional discharge, compensation, otherwise dealt with.

The fall in the use of community orders has been attributed to factors including the increased use of suspended sentences (an order that is no longer available in Victoria), as well as a drop in the offence types that most commonly attracted these orders (theft and drug offences).<sup>664</sup> Magistrates' lack of confidence in

<sup>662</sup> UK Ministry of Justice Court Proceedings Database; *Criminal Justice Statistics — Quarterly update: the year ending June 2018* (2019) Table Q5.1b, accessed online 23 January 2019.

<sup>663</sup> Ibid.

<sup>664</sup> Danny Shaw, 'Why Are the Numbers of Community Sentences Falling?', *BBC News* (online, 16 January 2018) <<https://www.bbc.com/news/uk-42664042>>.

using the order as an effective alternative to imprisonment, or as reducing crime, has also been cited as a possible contributing factor.<sup>665</sup>

In 2015, a study undertaken by the UK Ministry of Justice that analysed the reoffending of offenders on community orders, found that 35 per cent of offenders reoffended within 12 months of the start of their community order. Of those individuals who were convicted of subsequent offences within 12 months of the start of their order, 36 per cent were convicted of an acquisitive offence (theft, burglary or fraud) and 20 per cent were convicted of a violent offence.<sup>666</sup>

An earlier 2013 study, which matched offenders on offender and offence-based characteristics (such as age, gender, ethnicity, number of prior criminal convictions and offence type) known as ‘propensity score matching’, found that offenders sentenced to less than 12 months in custody had a higher one-year reoffending rate of 6.4 percentage points than similar, matched offenders receiving a community sentence.<sup>667</sup> Offenders sentenced to a community sentence who reoffended had a lower number of proven offences (an average of 2.4 per offender for community orders, versus 3.4 for offenders sentenced to immediate custody of 12 months or less). Those who reoffended on a community order were less likely to be given a custodial sentence than those reoffending subject to other orders (44.4% custody rate for those previously sentenced to immediate custody of 12 months or less, versus 55.5% for those subject to a suspended sentence; and 33.3% for those on a community order).<sup>668</sup> Important differences from Queensland at that time include:

- offenders in England and Wales sentenced to custodial sentences of less than 12 months when the study was undertaken were not subject to post-release supervision by the probation service upon their release;
- suspended sentence orders in England and Wales provide for a range of conditions (including supervision) to be attached to the order.

The reduced reoffending of people serving community orders has been attributed to factors such as stable employment and suitable accommodation, which can be better supported and sustained by a community sentence than a sentence of imprisonment.<sup>669</sup> Building social bonds and positive personal relationships are also more able to be achieved as part of a community order than a sentence of immediate custody.<sup>670</sup>

## 8.9 Issues

The Council has specifically been requested under its Terms of Reference to consider reforming community-based orders to introduce a Victorian-style CCO.

There are a range of arguments both for and against introduction of a CCO in Queensland.

### 8.9.1 Arguments in favour of a CCO model

The primary argument in favour of the adoption of CCOs and bringing a number of current orders within the umbrella of a single form of community order is this order’s flexibility.

While the current forms of probation and community service orders are theoretically flexible, the conditions that can be attached have not been well defined, so courts have created their own packages of conditions. A CCO could better define packages of conditions that could potentially respond better to the circumstances

<sup>665</sup> Ibid. The following study, which included interviews of magistrates, was cited: Sophie du Mont and Harvey Redgrave, *Where Did It All Go Wrong? A Study into the Use of Community Sentences in England and Wales* (Crest Advisory, 2017). Over one-third of magistrates (37%) surveyed were not confident that community sentences are an effective alternative to custody, and two-thirds (65%) were not confident that community sentences reduced crime.

<sup>666</sup> UK Ministry of Justice, *Re-offending by Offenders on Community Orders* (2015) 15 [3.1].

<sup>667</sup> UK Ministry of Justice, *2013 Compendium of Re-Offending Statistics and Analysis* (2013) 14 (Table 1.1).

<sup>668</sup> The higher reoffending custody rate for suspended sentences can be understood in light of the operation of the relevant breach provisions, which require a court to activate a suspended sentence on breach ‘unless of the opinion that it would be unjust to do so *Criminal Justice Act 2003* (UK) sch 12 paras 8(3)–(4).

<sup>669</sup> Du Mont and Redgrave (n 665) 18.

<sup>670</sup> Ibid.

of individual offenders. If the CCO is introduced alongside an ability to combine orders for a single offence (e.g. imprisonment or a suspended sentence with a CCO), this would achieve maximum sentencing flexibility.

Depending on what orders are brought within the new CCO (probation and community service only, or these two orders plus ICOs) and the additional conditions provided for, the order could potentially allow for a high level of flexibility in relation to the conditions ordered and how the order is managed. It could allow punitive elements (such as community service) to be combined with rehabilitative components (such as participation in treatment and other interventions).

The Victorian Court of Appeal in *Boulton v The Queen* identified a number of ‘unique advantages’ that the CCO offers.<sup>671</sup> First, ‘[t]he availability of the CCO dramatically changes the sentencing landscape’.<sup>672</sup> With the introduction of this new order, the Court found that the sentencing court could ‘now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence’.<sup>673</sup>

Secondly, ‘the CCO option offers the court something which no term of imprisonment can offer’.<sup>674</sup> That is, ‘the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) ... pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places’.<sup>675</sup> Thirdly, by allowing the offender to remain in the community, it ‘enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide’.<sup>676</sup>

The Court concluded: ‘In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her’.<sup>677</sup>

The introduction of a new order also provides the opportunity to recalibrate the way existing community-based sentencing orders are viewed in terms of providing a serious alternative to a sentence of imprisonment.<sup>678</sup> The reasons for the rise in the use of imprisonment in Queensland are complex. But in part, this increase in the use of custodial sentences may be due to concerns that only imprisonment will meet the community’s need for denunciation and just punishment, and sufficiently deter future offending.

With the introduction of the CCO in Victoria, the Court of Appeal found that the fact an offence had previously been considered so serious that only a sentence of imprisonment was appropriate ‘should mark the beginning, not the end, of the court’s consideration’.<sup>679</sup> In making this finding, the Court agreed with statements made by the Attorney-General that the CCO has ‘the robustness and flexibility to be imposed in a wide variety of circumstances’.<sup>680</sup>

A new CCO could potentially reduce reliance on imprisonment where the purposes can be achieved by a higher-level CCO.

Adopting a CCO model would also be an important step to moving towards national consistency in the range of community-based sentencing orders available. While there are variations in the types of orders that exist at a state level, CCOs are now available in Victoria, NSW and Tasmania. With the introduction of a CCO in Queensland, it is possible other jurisdictions would follow — particularly given the ALRC recommended that consideration be given to introducing the CCO model.

<sup>671</sup> *Boulton v The Queen* [(2014) 46 VR 308, 311 [5] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>672</sup> *Ibid* 335 [113].

<sup>673</sup> *Ibid*.

<sup>674</sup> *Ibid* 335 [114].

<sup>675</sup> *Ibid*.

<sup>676</sup> *Ibid*.

<sup>677</sup> *Ibid* 335 [115].

<sup>678</sup> On this issue, see for example, *Boulton v The Queen* (2014) 46 VR 308, 311 [5] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>679</sup> *Ibid* 335 [115].

<sup>680</sup> *Ibid* 336 [116].

### 8.9.2 Arguments against adoption of a CCO model

In its Options Paper, the Council noted that the major barrier to the introduction of a new order, assuming it allows for a broader range of conditions than existing orders, is likely to be the issue of resourcing. As the Court of Appeal in Victoria cautioned in considering the likely use of this order in Victoria:

the readiness of sentencing courts to impose CCOs for serious offences will depend on these orders being shown to be effective. And they will not be effective unless they are properly supported and resourced ... Proper resourcing is essential to enable courts to attach conditions — both punitive and rehabilitative — in the knowledge that compliance with the conditions is likely to produce meaningful results. Otherwise, this new sentencing option will simply not realise its potential.<sup>681</sup>

TSAC voiced a similar concern in supporting the introduction of a CCO in Tasmania:

The challenge will be for the judiciary to feel confident in using the conditions attached to the order on the basis that offenders are effectively supervised, that drug and alcohol testing is available, that curfews and exclusions are monitored and that appropriate programs for treatment are available. This is a matter of resourcing and training for Community Corrections staff and the judiciary, and the failure to provide adequate resources to support compliance monitoring and treatment has been a factor identified elsewhere as leading to a lack of confidence in particular sanctions.<sup>682</sup>

In 2009–10, the real net operating expenditure per offender per day was \$10.59 in Queensland, and \$18.50 in Victoria.<sup>683</sup> By 2017–18, this had increased to \$13.79 in Queensland and \$32.40 in Victoria.<sup>684</sup> While Victoria has had a 75 per cent increase in funding over this period, there has been only a 30 per cent increase in funding per offender per day in Queensland, starting from a much lower funding base.

The Victorian Auditor-General report in February 2017 highlighted a number of areas for improvement in the management of these orders in Victoria. Since the delivery of this report, there has been a significant investment in community correctional services in that State. In the financial year, 2018–19, \$279.8 million was committed by the Victorian Government to support community-based supervision services, with a further increase to \$290.2 million in 2019–20, up from \$199.2 million in 2016–17.<sup>685</sup> As at June 2018, the Department of Justice and Regulation reported there were 999 (FTE) Community Corrections Practitioners employed.<sup>686</sup> In 2017, a commitment to bring the total number to 950 was said to represent an increase of more than 300 staff over the previous two years.<sup>687</sup> Victorian offender-to-staff ratios are now the lowest in the country (12.2 offenders per community services officer compared to 29.1 offenders per officer in Queensland).<sup>688</sup>

At the same time, it might be possible to adopt a model that allows the progressive rollout of conditions as more funding becomes available. If such an order is successful in diverting some offenders from prison, and in reducing risks of reoffending, the initial investment might yield significant benefits.

Apart from ensuring the availability of appropriate resourcing, concerns in other jurisdictions about the introduction of similar reforms have primarily been framed in terms of reducing the number of community-based sentencing options available to courts, the risks of penalty escalation and ‘offenders moving more quickly up the hierarchy to a prison sentence’.<sup>689</sup> Similar concerns have been raised with the Council.

<sup>681</sup> Ibid 339 [134].

<sup>682</sup> Sentencing Advisory Council (Tasmania) (n 80) 98.

<sup>683</sup> Australian Government, Productivity Commission, *Report on Government Services 2011* (2011) Corrective Services — Attachment, Table 8A.11.

<sup>684</sup> Australian Government, Productivity Commission (n 33) Corrective Services — Attachment, Table 8A.17.

<sup>685</sup> Victorian Government, *Victorian Budget 18/19, Budget Paper 3 — Service Delivery* (2018) 277; Victorian Government, *Victorian Budget 19/20, Budget Paper 3 — Service Delivery* (2019) 263. This includes funding for the supervision of offenders on parole.

<sup>686</sup> Department of Justice and Regulation (Victoria), *Annual Report 2017–18* (2018) 174.

<sup>687</sup> Minister for Corrections (Victoria), Gayle Tierney, ‘Stronger Community Corrections System to Keep Victorians Safe’ (Media Release, 16 January 2017).

<sup>688</sup> Australian Government, Productivity Commission (n 33) Table 8A.7.

<sup>689</sup> NSW Law Reform Commission (n 76) 290 [13.8].

Introducing an ability to combine existing orders (probation and community service) with a suspended sentence when sentencing for a single offence might address some of the concerns about the flexibility of existing orders without the need to introduce a new form of order.

Keeping probation, community service and ICOs as distinct forms of orders also has the advantage of these orders retaining a distinct identity based on the types of conditions attached, which also clearly indicates the level of sentence imposed on an offender's criminal history. Stakeholders have suggested that if CCOs are introduced, there should be some way of quickly and clearly identifying, on an offender's criminal history, where on the scale of offence seriousness the offence for which the CCO was imposed lies.

The introduction of CCOs may require pre-sentence reports or court advice on the appropriate conditions to be imposed, which would inevitably result in court delays and holds potentially significant resource implications for QCS. This is discussed further in section 14.1 of this report.

## 8.10 Introduction of a CCO model for Queensland

### 8.10.1 Preliminary views

During early consultations on the review, there was support from some stakeholders for exploring the potential benefits of introducing CCOs in Queensland.

Points of support included:

- A CCO of potentially longer duration, and with more flexible and varied conditions, than current community-based orders could be a more effective alternative for offenders who are on the cusp of imprisonment.
- CCOs may divert some short-sentence prisoners from custody where it is appropriate for them to be managed in the community.
- A CCO duration reflecting the Victorian model (5 years, or 3 years in the Magistrates Courts) would maximise the range of offences a CCO could be used for (although other views expressed concern about net widening and longer order lengths exposing offenders to greater risk of breach on monitoring or surveillance grounds).
- The benefits of flexibility was seen in the range of conditions possible that can be included on a CCO. These can address the overarching purposes of sentencing and the needs of the individual offender and victims of crime.
- CCOs may also increase flexibility in how corrective services is able to manage an offender's rehabilitation needs and risk to the community.

The Council's Aboriginal and Torres Strait Islander Advisory Panel was among those stakeholders who supported greater flexibility in conditions of community-based orders, as might be achieved through the introduction of a CCO, recommended by the ALRC in its 2018 *Pathways to Justice* report (see discussion in section 4.5 of this report). Complying with orders with a number of inflexible conditions, including reporting conditions, was highlighted as particularly difficult for offenders with mental health problems, cognitive impairment including Foetal Alcohol Spectrum Disorders, and other forms of disability. These issues were also highlighted by the ALRC in its report.<sup>690</sup>

Caution, or in some cases, opposition, was expressed in the following contexts:

- Resourcing was widely recognised as a major consideration.
- There would be restrictions on such orders in remote Queensland where offenders are difficult to treat and monitor.
- Net-widening concerns were raised, regarding more people being subject to higher levels of intervention, surveillance and, therefore potential further punishment.

<sup>690</sup> Australian Law Reform Commission (n 21) 42 [1.24] citing a number of reports and inquiries that had highlighted these issues.

- If CCOs subsumed all other community-based orders, they may limit the sentencing options available to courts.
- The interplay with court ordered parole would need to be further considered. There was some questioning of how CCOs would operate differently from court ordered parole.
- Administrative breach powers were opposed by some because of the loss of court oversight and the ability for offenders to be represented through such proceedings.
- The use of imprisonment as a sanction in the event of breach necessarily increases prison numbers, which in turn increases the State's prison costs. However, the capacity to intervene in minor rule breaking prior to behaviour escalating is an important factor in community management, with delays and lengthy court processes potentially undermining the effectiveness of the sanction.
- The best model to adopt for breach outcomes and non-compliance would need to be considered.
- Compliance-based sentences pose significant difficulties for people with complex health needs, including unrecognised cognitive/intellectual impairments and severe mental health problems.
- It would be useful for sentencing courts to receive reports about the person's criminogenic needs. There could be a legislative recognition of these reports. While psychiatrists and psychologists rely on clients self-reporting (which would also be the case in this instance), in the case of current specialist reports, this assessment process is aided by lawyers and background material.

### 8.10.2 Stakeholder views

The Council put forward three options for the purpose of further consultation in its Options Paper:

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

Stakeholders expressed mixed views about the proposed introduction of CCOs in Queensland.

During consultation, the majority of legal stakeholders continued to express support for the introduction of the new order, provided it was properly resourced and care was taken to ensure the availability of more (and more intrusive, or onerous) conditions did not translate to offenders receiving more severe sentences.

The Queensland Law Society (QLS) and Legal Aid Queensland (LAQ) were among those stakeholders that supported the introduction of CCOs.<sup>691</sup> LAQ, in supporting the CCO model, submitted: 'Greater flexibility in relation to what could amount to community service and better resourcing as to what is on offer under a probation order would improve the current options'.<sup>692</sup> At the same time it expressed concern that:

the introduction of CCOs similar to some other jurisdictions with long periods of supervision and increased hours of community service, together with conditions, without guidelines, could be interpreted by courts to mean an overall legislative intention to increase community based order sentences.<sup>693</sup>

LAQ noted that either clear Explanatory Notes introducing the legislation, or guidelines within the PSA were needed to ensure that the CCO conditions are proportionate to the offence, particularly for low-level offenders, and to ensure that offenders with complex criminogenic needs are not being set up to fail the conditions of the order.<sup>694</sup>

The Bar Association of Queensland, in an earlier submission, supported the introduction of this form of order, suggesting it could operate as a 'more robust order than a probation order or intensive correction order, thereby making it a reasonable alternative to imprisonment (in appropriate cases)'.<sup>695</sup> They submitted that:

<sup>691</sup> Submission 6 (Legal Aid Queensland) and 15 (Queensland Law Society) 29.

<sup>692</sup> Submission 6 (Legal Aid Queensland) 3.

<sup>693</sup> Ibid 4.

<sup>694</sup> Ibid 3–4.

<sup>695</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 1.

'Assuming appropriate levels of funding and offender support, CCOs, because of their longer duration and greater flexibility, are likely to achieve better outcomes in terms of rehabilitation than the measures that are currently in place', and may have the result of reducing the number of offenders spending time in custody.<sup>696</sup> The Bar Association supported the Victorian model as providing a template for how the Queensland order should be structured.

The Bar Association expressly rejected the suggestion that the more flexible components of a CCO could be included within a modified form of probation, with concerns including views of the community that 'a probation order is not a robust order.'<sup>697</sup> They suggested 'It would be difficult to re-educate members of the public that a "revised probation order" is now a reasonable alternative to imprisonment in cases where previously imprisonment would have been the only reasonable option open to a Magistrate or Judge'.<sup>698</sup>

The Queensland Council for Civil Liberties supported the introduction of CCOs as they provided a flexible and broad but principled discretion for a court to impose additional conditions as appropriate, which would meet the sentencing needs of the individual offender and the community.<sup>699</sup> They recommended that:

- CCO conditions should prioritise treatment and rehabilitation to reduce recidivism, preserve individual liberty and encourage community reintegration.<sup>700</sup>
- Courts 'should therefore be required to consider CCO availability before considering either imprisonment or a suspended sentence. A legislative requirement to consider CCOs for specified offences will ensure that imprisonment remains a last resort for courts when sentencing offenders'.<sup>701</sup>
- A 'rehabilitative purpose should be reflected and promoted in the legislative guidance addressing the additional conditions of a CCO'.<sup>702</sup>

Fighters Against Child Abuse Australia supported CCOs for specific offences such as driving offences, vandalism and petty theft but did not support CCOs for child abuse offenders.<sup>703</sup>

The Queensland Network of Alcohol and Other Drug Agencies, while not addressing CCOs specifically, commented:

[a] community based sentencing order should always be considered as a first option for people who commit more serious offences and who have issues related to problematic alcohol or other drug use. This may be most relevant where their offending can be directly related to problematic substance use and most effectively treated by providing a health response such as specialist alcohol and other drug treatment.<sup>704</sup>

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel who attended a special meeting of the panel on the Council's Options Paper supported the introduction of CCOs as the order could be adaptive to the diversity across Queensland Indigenous Communities.<sup>705</sup> At a later Council meeting, however, some panel members expressed some reservations about the potential replacement of community service orders and probation as discrete forms of sentencing orders with the proposed new CCO.<sup>706</sup>

<sup>696</sup> Ibid 2.

<sup>697</sup> Ibid 3.

<sup>698</sup> Ibid.

<sup>699</sup> Submission 8 (Queensland Council for Civil Liberties) 2.

<sup>700</sup> Ibid.

<sup>701</sup> Ibid.

<sup>702</sup> Ibid, 3.

<sup>703</sup> Submission 4 (Fighters Against Child Abuse Australia) 11–12.

<sup>704</sup> Submission 5 (Queensland Network of Alcohol and Other Drug Agencies) 4. They also stated their belief that 'any sentence applied to people whose most serious offence is 'possess illicit drugs', and other possession offences such as 'possession of drug utensils', is ineffective, inefficient and counterproductive to community safety'.

<sup>705</sup> 'Talking points for Advisory Panel Members: Council meeting 18 June', 2, summarising views of Panel members who attended an extraordinary meeting of the Panel on 17 May 2019.

<sup>706</sup> Queensland Sentencing Council Advisory Council meeting of 18 June 2019.

Queensland Corrective Services, while not expressing a preferred reform option, acknowledged the potential benefits of a CCO as being a simple form of order that courts can tailor to the individual offender.<sup>707</sup>

Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis of The University of Queensland School of Law and Sisters Inside, however, supported the retention of the current community-based sentencing options over the introduction of the CCO.

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis noted the reasons such an order might be introduced, including 'to simplify sentencing' and to allow for judicial discretion to be exercised regarding conditions to be imposed, rather than deciding between penalty options.<sup>708</sup> However, they were concerned such an order could have a net-widening effect.<sup>709</sup> Other concerns included the attaching of unnecessary or onerous conditions that could 'set people up to fail' and that there would be an enhanced opportunity for people subject to these orders to be 'risk managed', 'in ways that are unnecessarily intrusive and which can lead to further stigmatisation and criminalisation'.<sup>710</sup> They concluded that 'CCOs may be too broad a penalty option to effectively safeguard against these risks'.<sup>711</sup>

Sisters Inside opposed the introduction of CCOs on the basis that these orders are highly resource intensive, and that resources were better spent elsewhere, including to address homelessness, substance use counselling and rehabilitation (outside the context of a criminal sentence) and concerns that breach of CCOs would contribute to, and fail to address, higher remand rates in Queensland.<sup>712</sup> They also noted, based on the experience in Victoria, the introduction of CCOs carried a risk of politicising the sentencing process, which they suggested 'could undermine the effective operation of the criminal legal system'.<sup>713</sup>

Some other stakeholders did not express a view regarding the introduction of CCOs but did advocate for reform of community-based orders. For example, the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd supported community options that improved access to rehabilitative programs and services.<sup>714</sup>

The Queensland Police Service (QPS) also expressed its general support of 'reforms to sentencing measures proportionate to offending conduct with the primary aim of supporting community safety and treatment-based options which address causes of offending behaviour to reduce recidivism', further submitting:

A collaborative, holistic approach encompassing health, housing, justice and specialist support services is integral in the effective case management of offenders, particularly those dealing with multiple complex needs. Emphasis on early intervention and treatment of underlying causes of offending behaviour and pro-social pathways may subsequently reduce strain on resource capabilities for the QPS as well as the criminal justice system.<sup>715</sup>

An individual submission recommended that offenders with drug, alcohol and misdemeanour offences would be better treated with a boot-style camp order with counselling and rehabilitation facilities to reduce recidivism, the prison population, and costs.<sup>716</sup>

### 8.10.3 The Council's view

A majority of the Council supports the introduction of a fully resourced CCO model (Option 3) to be implemented over time, in conjunction with another key reform (allowing suspended sentences to be imposed with a community-based sentencing order, as distinct orders, on a single charge).

As discussed in Chapter 7, the model supported is slightly different from that canvassed by the Council in its Options Paper as the Council does not recommend that a Queensland CCO model immediately replace ICOs

<sup>707</sup> Submission 11 (Queensland Corrective Services) 4.

<sup>708</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 1.

<sup>709</sup> Ibid.

<sup>710</sup> Ibid.

<sup>711</sup> Ibid.

<sup>712</sup> Submission 7 (Sisters Inside) 4–5.

<sup>713</sup> Ibid 5.

<sup>714</sup> Preliminary submission (Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd) 6 July 2018, 4.

<sup>715</sup> Submission 3 (Queensland Police Service) 3.

<sup>716</sup> Submission 14 (Jannean Dean) 1, 3–4.

(as it would community service and probation orders). Rather, ICOs should be retained as an interim measure, with a view to their repeal, subject to monitoring and analysis of proposed sentencing and parole reforms, incorporating a transitional period of concurrent usage.

### The case for reform

- ***A Queensland CCO will be implemented in a different environment from other jurisdictions.***

The model proposed is not a carbon copy of similar orders introduced in three other Australian jurisdictions. Two key differences with those other jurisdictions must be emphasised:

- suspended sentences will be retained, and their use widened (as above), not phased out and replaced by CCOs; and
- Queensland will retain court ordered parole, a second option that is not present in the other jurisdictions that have adopted CCOs.

The most significant challenges in introducing a CCO model in Queensland relate not to the legislative structure that supports its use, but to implementation. Feedback from stakeholders in other jurisdictions regarding the development, enactment and implementation of their CCO models demonstrates the fundamental importance of:

- involving stakeholders in genuine consultation that allows sufficient time and consideration of proposed amendments, their cost and their consequences on the system as a whole;
  - informing and educating stakeholders and the general public about changes – and funding this properly;
  - acknowledging the cost involved for meaningful reform (in circumstances where Queensland is currently the lowest-cost community corrections service in the country, on the existing sentencing model, and the need for resourcing of universal criminal-justice-system-related gaps, especially housing) and the ongoing cost that will be required to keep a CCO model performing;
  - evaluating the expenditure of those funds and monitoring the effectiveness of the order and ongoing resource need.
- ***CCOs will be different from probation orders.***

At its foundation, the concept of probation is based on supervision. Linked to this are concepts of surveillance, monitoring, policing and reporting. This is demonstrated in the general requirements of probation and ICOs.<sup>717</sup> The CCO model proposed by the Council would change this paradigm by making such requirements largely optional at a court's discretion, as opposed to the bedrock starting point of each and every order. Specifically, the proposed CCO model does not carry a mandatory supervision condition, and those conditions that do have such an effect are more specific, with a clearer purpose and more clearly defined application.

Evidence shows that across a range of cohorts, 'high-risk offenders benefit most from intensive supervision', yet 'low-risk offenders benefit most from less intensive intervention'.<sup>718</sup> Servicing an offender above their level of risk can in fact increase recidivism.<sup>719</sup> Furthermore, '[a]pproaches which are predominantly surveillance-focused are less likely to result in behavioural change than those that adopt a therapeutic philosophy, emphasise support for offenders, and seek to address their underlying risks and needs'.<sup>720</sup>

By reducing the mandatory legislated conditions, increasing the scope and specificity of optional ones, and more clearly defining the relationship between judicial conditions and administrative directions, a CCO would have key differences from the community-based sentencing orders used in Queensland for almost three decades.

<sup>717</sup> *Penalties and Sentences Act 1992* (Qld) ss 93, 114.

<sup>718</sup> Submission 11 (Queensland Corrective Services) 3.

<sup>719</sup> Ibid 5.

<sup>720</sup> Lorana Bartels, *Literature Review on Intensive Supervision Orders – A Report Prepared for the ACT Justice and Community Safety Directorate* (University of Canberra, 2014) iv.

- **CCOs will exist as sentencing orders in their own right, not as a means of serving a prison sentence.**

The broad range of conditions available under the order and their duration — from a short period of supervision or limited number of hours of community work, up to extended periods of supervision, electronic monitoring, curfews, and intensive rehabilitation and treatment conditions — means that this new order can be applied to offences that previously would have attracted a community service order or probation, as well as offences that may have, prior to its introduction, resulted in a sentence of immediate imprisonment.

While there was some support for an approach that would allow a court to make a CCO instead of sentence a person to a term of imprisonment of a specified duration,<sup>721</sup> in the Council's view this approach may not be appropriate given that some offences for which this new order will be imposed are those that would not otherwise have attracted a sentence of imprisonment.

It is also important, in the Council's view, that this order be viewed in itself as sufficiently punitive to provide an alternative to imprisonment, without establishing it as a direct substitute for imprisonment. The fact the order can be combined, under the Council's proposals, with a short term of imprisonment or a suspended sentence, should also provide for its broader use for more serious forms of offending.

- **The breadth of CCO condition options, and their replacement of existing multiple orders, requires legislative guidance regarding imposition.**

The Council's intention in recommending a CCO model is that CCOs be used for an extremely wide range of offending behaviour, from conduct that would have attracted a community service order of the minimum 40 hours with no conviction recorded, or 6 months' probation (supervision), to that which would have warranted imprisonment for serious offending in the form of an ICO, suspended sentence, or a short sentence of immediate imprisonment.

It necessarily follows that a CCO will take different forms for different offenders — the duration and optional conditions selected will reflect the varying level of criminality and balancing of the many competing sentencing factors assessed in the process of instinctive synthesis.

A CCO can therefore be used to meet a wide range of sentencing purposes<sup>722</sup> without the need for the court to impose a sentence of imprisonment. As noted by TSAC in recommending the adoption of a CCO model in Tasmania:

[A CCO] punishes an offender through the requirement to perform unpaid community work, the restrictions imposed on movement, association and leisure time, the reporting requirements and the requirement to comply with the order. The length of the order may also meet the need for punishment. Similarly, a CCO can provide substantial general deterrence on the basis of the punitive effect of the order. The requirements for an offender to participate in treatment programs and submit to judicial monitoring addresses specific deterrence as well as rehabilitation concerns. Specific deterrence can also be fulfilled by supervision, the restriction on liberty and the need to give up leisure time and the use of an intensive compliance period. The fact that a CCO is a real punishment and the consequences for breach of the order also act as a specific deterrent. Rehabilitation can also be met through any of the conditions imposed to the extent that they address the factors that have contributed to offending. The onerous nature of the order (its length and conditions) fulfils the requirement for denunciation. Non-association, residence restrictions or exclusions, place or area exclusions, curfews and electronic monitoring incapacitate the offender as well as providing community protection. The community is also protected to the extent to which the assessment and treatment condition addresses the underlying causes of the offender's behaviour.<sup>723</sup>

While it is intended that the CCO will have the capacity to be a highly punitive sentence in appropriate cases, it is not intended that CCOs would have the same punitive force or effects as an order, for example, under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), or be sought to be used in place of such orders.

The Council proposes legislative guidance to aid the judiciary in imposing these orders, including ensuring that any remoteness issues, particularly challenging for Queensland, do not result in unjust outcomes because of unavailability of particular services or programs in the regions. As discussed in Chapter 13 of this report, the limited availability or absence of services in some locations can reduce both the use of particular

<sup>721</sup> For example, Preliminary submission (Bar Association of Queensland) 20 March 2019, 5–6.

<sup>722</sup> Freiberg (n 125) 699 [11.15]; *Boulton v The Queen* (2014) 46 VR 308, 330–2 [85]–[98] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>723</sup> Sentencing Advisory Council (Tasmania), *Phasing Out of Suspended Sentences* (Final Report No. 6, 2016) 89.

types of community-based orders, and the likelihood that those subject to them will be able to comply with their conditions.

By creating minimal mandatory conditions and a wide-ranging suite of optional ones (with the court being required to attach at least one), the Council's intention is to encourage the creation of tailor-made, individualised orders and sentencing practice that guards against the application of template orders due to custom, practice or precedent. The Council envisages proportionate and parsimonious application of conditions so that only those demonstrably required for the individual are imposed, and those that are not are actively avoided. This has the twin benefits of preserving resources while maximising community safety.

It is likely, based on the Victorian experience, that in the immediate years following this order's introduction, courts will be most likely to attach conditions that resemble the existing probation and community service orders. VSAC found in its 2014 monitoring report exploring the use of CCOs that in the Magistrates' Court, the most common conditions imposed were supervision, unpaid community work, and assessment and treatment (imposed together in close to one-third of CCOs).<sup>724</sup> Further:

Of the 7,571 CCOs that included unpaid community work, over three-quarters (77.0%) had at least one other condition type, most commonly supervision (63.5%). A higher proportion of the 7,832 CCOs that included assessment and treatment also included other conditions (87.9%), most commonly unpaid community work (72.6%). Virtually all of the supervision conditions were coupled with at least one other condition (99.5%), with the vast majority combined with assessment and treatment (97.3%) and nearly two-thirds (64.4%) combined with unpaid community work.<sup>725</sup>

This same trend regarding treatment, supervision and unpaid community work conditions was apparent in the use in the Victorian higher courts,<sup>726</sup> although 'use of the new condition types tended to be more common in the higher courts than in the Magistrates' Court'.<sup>727</sup>

A similar finding has been made with the use of community orders in England and Wales. In the first three years following the community sentence being introduced in 2005, five requirements constituted 90 per cent of community orders imposed: supervision and unpaid work (each being ordered in about a third of cases); an accredited program requirement (12–18% of cases), drug treatment (5–6% of cases); and a curfew requirement (in 3% of cases immediately following introduction, rising to 7% by 2008).<sup>728</sup>

The Council also notes potential concerns that the introduction of such an order could lead to courts imposing more conditions than are warranted, thereby setting offenders up to fail. This has not been the experience in Victoria or in England and Wales. Research from Victoria shows that two-thirds (66.5%) of CCOs imposed by Magistrates' Courts have either two or three conditions, with a further 26.6 per cent having only one condition imposed.<sup>729</sup> Less than 1 per cent (0.8%) had more than four conditions attached.<sup>730</sup> In England and Wales, a 2009 monitoring report found that about half of orders had only one requirement, a further 35 per cent had two requirements, and between 12 and 14 per cent, three requirements.<sup>731</sup> Fewer than 1 per cent of orders made had five or more requirements.<sup>732</sup>

- ***The breadth of CCO condition options, and their replacement of existing multiple orders, needs to emphasise the fact that sentencing is not a 'ladder' and that CCOs are not a one-use-only order.***

Subject to any statutory constraints on general sentencing discretion or on the presumption against imprisonment, a CCO should still be considered without prejudice when sentencing an offender who has been sentenced to a CCO, or CCOs, in the past.

<sup>724</sup> Sentencing Advisory Council (Victoria) (n 603) 16.

<sup>725</sup> Ibid.

<sup>726</sup> Ibid. See also 39, 55.

<sup>727</sup> Ibid 39.

<sup>728</sup> George Mair and Helen Mills, *The Community Order and the Suspended Sentence Order Three Years On: The Views and Experiences of Probation Officers and Offenders* (Centre for Crime and Justice Studies, 2009) 11.

<sup>729</sup> Sentencing Advisory Council (Victoria) (n 615) 16.

<sup>730</sup> Ibid.

<sup>731</sup> Mair and Mills (n 728) 10, Table 3.

<sup>732</sup> Ibid 9.

Similarly, on a breach of CCO, a court that has determined to re-sentence should again consider a CCO, perhaps with different conditions, in the range of sentencing options available.

The flexibility and range of optional conditions is so wide that it would be erroneous to assume that one CCO is the same as another, or that a failure to complete one form of CCO renders the person incapable of completing another.

A factor that can impact on the use of imprisonment for less serious forms of offending which would not otherwise have warranted a term of imprisonment is repeat offending. The failure of a person to comply with the conditions of a community-based order can also be taken as evidence that they will not comply with such an order in future.

The Council is aware that such a risk also exists in Queensland whereby a court may impose increasingly more severe penalties on the basis of these factors, rather than by reference to the appropriate penalty for the present offence (i.e. a fine for a first offence, probation for a second offence, a suspended sentence for a third offence, moving then to an immediate term of imprisonment).

The High Court has stated that an offender's antecedent criminal history may be taken into account on sentence, 'but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences'. It is relevant to show whether the offence 'is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law'.<sup>733</sup>

The Queensland Court of Appeal has stated that sentencing requires the imposition of an appropriate sentence in relation to the particular offence.<sup>734</sup> There is no 'arithmetic or logical progression that requires the imposition of progressively heavier sentences'.<sup>735</sup> Further:

Evidence of convictions and the sentences imposed for offences committed both before and after the offence for which sentence is to be imposed is both relevant and admissible when the sentencing discretion is to be exercised. Evidence of later convictions may be used to determine whether leniency ought to be exercised ... Such evidence may also be used to determine the risk of recidivism, the prospect of rehabilitation, and, the connection, if any, between the offence for which the offender is being sentenced and the later offences for which the offender has been earlier sentenced.<sup>736</sup>

Similarly, the NSW Court of Criminal Appeal has rejected as a principle of law the proposition that 'it is a principle of sentencing for criminal convictions that there should be a graduation in sentences imposed, so that no gross disparity appears between previous and present sentences'.<sup>737</sup> Instead:

- In determining the appropriate sentence in any given case, it will always be relevant to have regard to both the accused's record of convictions and prior sentences (particularly if they are for the same or similar offences).
- There is 'no graph-like pattern to be followed' when determining the proper sentence in any given case.
- 'There is no principle requiring a later sentence on a similar offence to bear any particular relationship or proportion to an earlier sentence. The earlier sentence is no more than one of a

<sup>733</sup> *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 477 (Mason CJ, Brennan, Dawson and Toohey JJ). See also *Baumer v The Queen* (1988) 166 CLR 51, 57 (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ); *Weininger v The Queen* (2003) 212 CLR 629, 640 (Gleeson CJ, McHugh, Gummow and Hayne JJ) as cited in *R v Kirby* (2009) 193 A Crim R 357, 364 [26] (Fraser JA, Holmes and Muir JJA agreeing).

<sup>734</sup> *R v Aston (No. 2)* [1991] 1 Qd R 375, 380, 382 (Cooper J, Kneipp and Shepherdson JJ agreeing). Applied in *R v CBG* [2013] QCA 44, 8 [30]–[32] (Atkinson J, White and Gotterson JJA agreeing) and *R v McCusker* [2015] QCA 179, 11–13 [51] (McMeekin J, Morrison and Philippides JJA agreeing).

<sup>735</sup> *R v Aston (No. 2)* [1991] 1 Qd R 375, 382 (Cooper J, Kneipp and Shepherdson JJ agreeing).

<sup>736</sup> *Ibid* 382 (citations omitted).

<sup>737</sup> *R v Breasley* [1974] NSWLR 736, 738 (Street CJ, Nagle and Taylor JJ), citing *R v Sloane* [1973] 1 NSWLR 202, 203.

congeries<sup>738</sup> of relevant matters to be taken into account when determining the sentence on the later occasion'.<sup>739</sup>

The Queensland Court of Appeal has also commented on a short period of one month's actual custody imposed (which it replaced with a 12-month ICO) as 'a short sharp lesson' for a youthful offender:<sup>740</sup>

Clearly that could have been the only purpose of such a short term of imprisonment. It would be most unlikely to have any rehabilitative effect. On the other hand it is potentially harmful; it may introduce him to hardened criminals whom he might not otherwise meet and to hard drugs and it may subject him to the risk of injury or degrading conduct.

In our view the imprisonment imposed in this case was not a satisfactory means merely of imposing a short sharp lesson upon a youthful first offender, primarily because of the potential harm it may cause. That is not to say that offences of this seriousness can never justify the imposition of a term of imprisonment. But in our opinion the facts in this case did not justify the imposition of such a short term on this applicant for that purpose only and it seems to us a sentence of so short a term can have no other purpose.<sup>741</sup>

- ***The breadth of CCO condition options, and their replacement of existing multiple orders requires system changes to record the specificity of tailored orders.***

Criminal histories and QCS completion summaries will need to reflect conditions so that the true nature of an order is recorded (while not padding out a criminal history to give a false impression of recidivism or seriousness on cursory inspection — a risk that has come to light in discussion with legal stakeholders in Victoria).

The Council also recognises the fundamental importance and cost-effectiveness of a dedicated, fully resourced court advisory service, which is almost completely absent from the current court system — although the Council's position is (with some possible exceptions for conditions such as electronic monitoring) that the ordering of pre-sentence or assessment reports should not be mandatory (see Chapter 14 for a fuller discussion of this issue).

- ***CCOs should apply to as many offence categories as possible.***

The Council recommends that no restrictions should be placed on the type of offences, or categories of offending, to which CCOs can be applied. Rather, the appropriateness of the making of such an order in a given case should be left to the court to determine, taking into account its seriousness and the ability of the court, in setting the conditions of the order, to meet the relevant purposes of sentencing.

Any amendment, post CCO introduction, to prevent CCOs from applying to certain offence or offender types is also, in the Council's view, to be avoided given its potential to seriously undermine not just the CCO scheme, but the broader sentencing scheme in Queensland. The reforms in Victoria that have resulted in restricting the availability of this order do not, in the Council's opinion, provide a useful blueprint for Queensland.

The fact there will be a broad range of conditions available under the order — some of which are highly restrictive, including electronic monitoring and curfews — that can be combined with intensive rehabilitation and treatment means the new order should be able to be applied to more serious examples of offending than is currently the case with the existing forms of non-custodial community-based orders. The current 'churn' of offenders on court ordered parole supports the need for a more flexible form of order with a broad range of conditions that can be tailored to the circumstances of the individual offender and applied to meet both punitive and rehabilitative purposes.

In practice, existing mandatory sentencing provisions will limit the availability of this order, as they already do for probation and community service orders. The application of existing principles under section 9 of the

<sup>738</sup> A 'congeries' refers to a disorderly collection; a jumble (*Oxford English Dictionary*, online at 14 April 2019).

<sup>739</sup> *R v Breasley* [1974] NSWLR 736, 738 (Street CJ, Nagle and Taylor JJ).

<sup>740</sup> *R v Hamilton* [2000] QCA 286, 5–6 [19]–[20] (Davies and Thomas JJA). The sentence was 9 months' imprisonment suspended after 1 month for an offender who was 17 years old at the time of the offence and who pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm. McPherson JA agreed but was more circumspect regarding the utility of a 'short, sharp' sentence: 'It is not easy in circumstances like those here to make a confident choice between these two views of the matter': 7 [25].

<sup>741</sup> *Ibid*, 6 [19]–[21] (citations omitted).

*Penalties and Sentences Act 1992* (Qld) (PSA) — in particular, those that create a statutory presumption of imprisonment and/or that displace a sentence that allows the offender to remain in the community — are also likely to have this effect. The Council’s recommended review of section 9 will provide an opportunity to consider if current presumptions that imprisonment be imposed should still apply following the introduction of the CCO, in view of the types of conditions that can be imposed.

- **The risks must be monitored.**

The Council members supporting the CCO model view these differences that are unique to Queensland, and the lessons learned from Victoria and NSW regarding implementation and resourcing, as overcoming the legitimate concerns raised by stakeholders and shared by a minority of the Council. Those concerns will, however, require consideration in the ongoing evaluation and gradual introduction of reforms during the transition to the new sentencing regime discussed above. Key concerns raised were:

- Net widening — people being sentenced to a CCO who would have received a bond or fine if CCOs did not exist, and people being sentenced to a CCO with too many conditions that are not required or conditions that the person cannot comply with because of their personal circumstances;
- Escalating progression to imprisonment — repeat offenders or people who breach their CCO progressing more quickly through the sentencing order options to imprisonment than they otherwise would, because the CCO is one form of order replacing two (or three if ICOs are phased out). Some stakeholders have expressed concerns that sentencing courts may use CCOs to progress up a perceived sentencing ladder or hierarchy, which may but should not exist in practice (despite case law from higher courts determining that this is not to occur and is not permissible).

## **RECOMMENDATIONS: COMMUNITY CORRECTION ORDER**

### **Introduction of CCO**

9. A new intermediate sanction — a ‘community correction order’ (CCO) — should be introduced in Queensland with a maximum term of 3 years.
10. A CCO should be able to be imposed with, or without, a conviction being recorded and should exist as a sentencing order in its own right, rather than as a means of serving a prison sentence.

### **Probation and community service**

11. Probation (in the form of ‘supervision’) and community service should be subsumed within the CCO as conditions of a CCO, rather than existing as separate forms of sentencing orders.
12. In terms of transitional provisions, the *Penalties and Sentences Act 1992* (Qld) should be amended to remove the power of a court to make a new probation order or community service order once the CCO has been fully implemented. The provisions under Part 5 of the *Penalties and Sentences Act 1992* (Qld) should be repealed after an appropriate period has passed and transitional arrangements are in place for the management of any probation orders or community service orders that are still active.

### **CCO — Implementation**

13. The CCO should not be introduced in Queensland until such time as:
  - (a) work has been undertaken to identify the packages of conditions to be supported under the new scheme, appropriate service delivery models for services linked to these conditions, and required resourcing and staffing levels;
  - (b) infrastructure needs, including changes to IT systems, have been considered and scoped;
  - (c) any new funding required has been secured and staff recruited and trained.
14. To allow for the gradual transition to the CCO regime, the Government should consider options for a progressive rollout of the new CCO. For example, to introduce the power of courts under the *Penalties and Sentences Act 1992* (Qld) to order specific packages of conditions as funding and services are enhanced to support their delivery (for example, electronic monitoring conditions, tailored mental health assessment and treatment conditions, and drug and alcohol treatment conditions).

#### **Notes:**

1. For the Council’s recommendations on implementation of its reform package, see recommendations 65–74 and Chapter 15 of this report.
2. Recommendation 6 proposes a transitional period of at least two years during which time intensive correction orders and any new community correction order (including used in combination with a suspended sentence) should operate concurrently.

## 8.11 Key elements of a Queensland CCO model

### 8.11.1 Legislative principles guiding use — the Victorian experience

In Victoria, section 5(4C) of the *Sentencing Act 1991* (Vic) directs a court, subject to some specified exceptions, that it: ‘must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order to which one or more of the conditions [permitted to be attached to the order] are attached’.

This is distinct from the general principle of imprisonment as a last resort. It focuses on the preference for a court to impose a CCO over actual imprisonment in appropriate cases.

The Victorian Court of Appeal considered the effect of section 5(4C) in *Boulton v The Queen* discussed above. The Court remarked:

What is most powerful about s 5(4C) is that it prohibits the imposition of a sentence of imprisonment unless the sentencing court has paid specific and careful attention to:

- (a) the purposes for which sentence is to be imposed on the offender; and a
- (b) whether those purposes can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached.

The process of deliberation which this provision requires should assist in the reconceptualisation of sentencing options to which we have referred. In particular, that process will throw into much sharper focus the distinction we have sought to draw, between the narrow punitive purpose (and effect) of imprisonment, on the one hand, and the multi-purpose character of the CCO. The sentencing court should ask itself a question along the following lines:

Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?<sup>742</sup>

In the later decision of *Sherritt v The Queen*, Maxwell P stated that:

The Court in *Boulton* emphasised that, if the CCO is to serve the purpose which Parliament quite clearly envisaged for it, sentencing courts (including this Court [the Victorian Court of Appeal]) need to rethink the conventional wisdom about whether prison is really the only option.<sup>743</sup>

Section 36(1) of the *Sentencing Act 1991* (Vic) goes on to provide that the purpose of a CCO ‘is to provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender’ and that:

Without limiting when a community correction order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment.<sup>744</sup>

There is a similar provision in NSW that guides the making of CCOs, which provides: ‘Instead of imposing a sentence of imprisonment on an offender, a court that has convicted a person of an offence may make a community correction order in relation to the offender’.<sup>745</sup>

The Victorian legislation also includes a general statement that directs courts that they must attach conditions to a CCO in accordance with the principle of proportionality, the purposes of sentencing, and the specific purposes of a CCO.<sup>746</sup>

As discussed in Chapter 5, legislative principles alone are unlikely to significantly shift current sentencing practices away from the use of custodial sentences to community-based sentencing orders. Nonetheless,

<sup>742</sup> *Boulton v The Queen* (2014) 46 VR 308, 336–337 [120]–[121] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

<sup>743</sup> *Sherritt v The Queen* [2015] VSCA 1, 12 [46] (Maxwell P).

<sup>744</sup> *Sentencing Act 1991* (Vic) s 36(2).

<sup>745</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(1).

<sup>746</sup> *Sentencing Act 1991* (Vic) s 48A.

such principles may usefully signal to courts the legislature's intention that courts seriously contemplate the use of community-based sentences where offenders are on the cusp of imprisonment and a term of imprisonment might otherwise be imposed.

Consultation with legal stakeholders in Victoria has highlighted how important the Victorian Court of Appeal's guideline judgment in *Boulton v The Queen*<sup>747</sup> was in setting the parameters for use of the CCO as a new sentencing order in Victoria. It is important to set any new order on as firm a legislative foundation as possible from the outset so the same kinds of uncertainties and lack of clarity about its use as experienced in Victoria can, as far as possible, be avoided.

The types of guidance recommended by the Council in support of the new order are aimed at promoting its use, while at the same time avoiding potential for more conditions to be ordered than are necessary to meet the purposes of sentencing, or inappropriate conditions being made that cannot be complied with. Legislation should also restrict the use of conditions that result in significant restrictions on liberty — such as curfew conditions with electronic monitoring — to circumstances where this is proportionate to the seriousness of the offence for which the order is imposed, as is appropriate.

The Council recommends:

1. A new principle be inserted into the PSA that provides that a court must not impose a sentence of imprisonment (including suspended imprisonment), unless the sentencing court concludes that the purposes of the sentence cannot be achieved by a CCO to which one or more conditions are attached. A reference to the term 'imprisonment' is preferred over the Victorian form of words of a sentence 'that involves the confinement of the offender' taking into account that, in contrast to Victoria, under the Council's proposals, Queensland will retain three orders that can be used in place of immediate imprisonment (ICOs, wholly suspended sentences, and imprisonment with immediate release on court ordered parole). In the Council's view, these custodial orders should be clearly positioned above a CCO (all involving the imposition of a prison sentence, and the mandatory recording of a conviction).
2. Legislative guidance should be provided in the making of the order that no more conditions are to be ordered than are necessary to meet the purposes of the order, reflecting the principle of proportionality.<sup>748</sup> Direction should also be given that in imposing two or more conditions, the court must consider whether the conditions are compatible with each other.<sup>749</sup>
3. On imposing a CCO and considering appropriate additional conditions, a court should be required under the Act to have regard to the vulnerabilities of the person being sentenced (with respect to, for example, their physical health, age, maturity, the existence of any mental illness or cognitive or intellectual disability, whether they are homeless, or are experiencing domestic and family violence), as well as the particular circumstances of Aboriginal and Torres Strait Islander offenders, and the ability of the person to comply with the order, including any geographical constraints in complying and/or limitations on service delivery in that region.
4. Restrictions on liberty imposed under any conditions of the order should be proportionate to the seriousness of the offence, or offences and, in determining restrictions on liberty to be imposed, the court may have regard to any period of pre-sentence custody served in connection with the offence, or other offences with which the person has been charged.<sup>750</sup>

To seek to avoid the risk that courts may fail to consider a CCO where a CCO has been imposed previously, it is also recommended that legislative guidance be included that makes clear that the fact a CCO has been imposed previously, including upon a breach, should not inhibit the further imposition of a CCO, taking into account the broad range of conditions that can be attached.

<sup>747</sup> (2014) 46 VR 308.

<sup>748</sup> See *Sentencing Act 1991* (Vic) s 48A, which expressly provides that the court must attach conditions to a CCO in accordance with the principle of proportionality, the purposes of sentencing and the purpose of a CCO.

<sup>749</sup> See *Criminal Justice Act 2003* (UK) s 177(6) for a potential model.

<sup>750</sup> See *ibid* ss 148(2)(b), 149 on which these principles have been based.

The Council notes that these principles will not necessarily apply to federal offenders sentenced to a CCO.<sup>751</sup> However, they will provide important guidance to courts in sentencing for state offences on the proper application of this new order.

### Specific issues relevant to consent

In Queensland, a court may only make or amend a probation or community service order if the offender agrees to the making of the order and to complying with it.<sup>752</sup> The consent required encompasses both the probation or community service being imposed, and the terms of the order (such as its duration and the number of hours of community service to be performed).<sup>753</sup> Consent to a community service order is not required if the offender is convicted of a 'prescribed offence' with a 'circumstance of aggravation,'<sup>754</sup> or for the making of a graffiti removal order<sup>755</sup> taking into account that the making of these orders in the circumstances prescribed under the Act is mandatory.

Arguments in favour of consent being required prior to the making of community-based orders include that an offender's attitude to a community-based order may reflect his or her motivation to comply and the benefit to be gained from this type of sentence being imposed.<sup>756</sup> At the same time, however, there is some risk that offenders may give their consent simply to avoid immediate imprisonment.<sup>757</sup> In Queensland, the existence of other alternatives to immediate imprisonment, such as the power of courts when imposing a sentence of 5 years or less to order that it be suspended immediately or, in the case of offenders eligible for court ordered parole, to set the parole release date as the date of sentence, may protect against this risk — although, in contrast to probation and community service orders, a conviction must be recorded, and there are also potentially more serious (and in the case of parole, potentially more immediate) consequences should the conditions of these orders be breached.

Regimes that require an offender's consent to conditions of community orders which are not treatment based (such as unpaid work) have also been criticised on the basis that they result in the sentencing powers of a court being fully dependent on an offender's consent in circumstances where the offender has been found guilty of a criminal offence.<sup>758</sup> Where community-based orders are used as a direct alternative to imprisonment, the need for consent is in direct contrast to orders of immediate or suspended imprisonment that do not require such consent to be given. It has been argued, in particular, that requiring an offender to consent to the making of a community service order is unnecessary, with a view being expressed that offender consent has 'no proper place' in the decision to impose such orders or conditions, with the exception of circumstances where 'invasive procedures such as drug testing' are required.<sup>759</sup>

Of those jurisdictions with CCOs (Victoria, Tasmania, NSW and England and Wales), only Victoria requires the offender's consent prior to the making of the order in all cases irrespective of what conditions are to be imposed.<sup>760</sup> In introducing the new CCO provisions, the then Attorney-General identified the requirement for

<sup>751</sup> This is due to Commonwealth sentencing principles under s 16A of the *Crimes Act 1914* (Cth) applying instead of state sentencing principles. For example, the Victorian guideline judgment in *Boulton v The Queen* (2014) 46 VR 308, which provided an approach emphasising the advantages of a CCOs to be considered before sentencing, does not apply to the sentencing of Commonwealth offenders: *Atanackovic v The Queen* (2015) 45 VR 179, 208 [95] (Weinberg, Kyrou and Kaye JJA).

<sup>752</sup> *Penalties and Sentences Act 1992* (Qld) ss 96, 106.

<sup>753</sup> See also *R v Marsden* [2003] QCA 473, 5 (Mackenzie J, McPherson JA and Wilson J agreeing).

<sup>754</sup> *Penalties and Sentences Act 1992* (Qld) s 108B. A community service order must be made if an offender has been convicted of a 'prescribed offence' (includes affray, grievous bodily harm, wounding, common assault, certain types of serious assault and assaulting or obstructing police) with a circumstance of aggravation (committed in a public place while adversely affected by an intoxicating substance). See section 5.7.4.

<sup>755</sup> *Penalties and Sentences Act 1992* (Qld) s 110A.

<sup>756</sup> Terese Henning, 'Hidden Factors in the Assessment of Offenders for Community Service Orders in Tasmania' 8(3) *Current Issues in Criminal Justice* 287, 293–4.

<sup>757</sup> Ken Pease, 'Community Service Orders' (1985) 6 *Crime and Justice: An Annual Review of Research* 51, 70 noting: 'It is significant that wherever offenders on community service are asked what sentence they would have received if community service had not been available, they estimate custody more often than is realistic'.

<sup>758</sup> Darragh K Connell, 'Serving the Community: Lessons from the UK Experience of Community Orders' (2013) 12 *Hibernian Law Journal* 27, 34–5. The author suggests: 'There is no Constitutional right, entitlement or privilege to refrain from complying with a lawful court order to carry out unpaid work having been found guilty of a criminal offence': Ibid 35.

<sup>759</sup> Ibid 41.

<sup>760</sup> *Sentencing Act 1991* (Vic) s 37(c).

consent as a safeguard against the unreasonable limitation of offenders' rights to privacy, freedom of association and freedom of movement as contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) through the conditions imposed (other safeguards include that conditions are imposed by the sentencing judge at the discretion of the court and the ability of the court to order judicial monitoring of conditions).<sup>761</sup>

In contrast to Victoria, in NSW there is no requirement for the offender to consent to a CCO prior to the making of such an order.<sup>762</sup> Similarly, in Tasmania, an offender's consent is not required by a court when making the order, although one ground for cancelling or varying a CCO is that 'the offender is no longer willing ... to comply with the order'.<sup>763</sup>

In England and Wales, an offender's consent is not required prior to the making of a community order, although a court may only include or amend a mental health treatment requirement,<sup>764</sup> drug rehabilitation requirement<sup>765</sup> and/or alcohol treatment requirement<sup>766</sup> if the offender has expressed a 'willingness to comply' with such a requirement. In cases where an offender fails to express a 'willingness to comply' with such a requirement proposed to be included in the order, the general restriction that a custodial penalty is a sentence of last resort does not apply.<sup>767</sup>

In the Council's view, a court should be required to consider whether the person consents to the order being made, but this should not be a necessary precondition for the making of the order. However, conditions requiring the offender to undergo treatment, and other invasive procedures, should require the offender's consent prior to such conditions being made. This should be further considered in the development of packages of conditions to be made available under the order (see Recommendation 13).

<sup>761</sup> Victoria, Parliamentary Debates, Legislative Assembly, 'Statement of Compatibility: Sentencing Amendment (Community Correction Reform) Bill 2011', 15 September 2011, 3289–90 (Robert Clark, Attorney-General). In Queensland, it is unclear how the recent *Human Rights Act 2019* (Qld) may affect the requirement to consent (the Act received assent on 7 March 2019, some provisions proclaimed to commenced on 1 July 2019 but others are not yet been proclaimed into force).

<sup>762</sup> Although where supervision is ordered as an additional condition, the offender is required to 'submit' to supervision from a corrective services officer. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(2)(g).

<sup>763</sup> *Sentencing Act 1997* (Tas) s 42AU(6)(b). This is consistent with the previous community service and probation provisions (probation orders could have a condition that an offender 'must submit' to testing, assessment or treatment — s 37(2). See also Sentencing Advisory Council (Tasmania), *Mandatory Treatment for Sex Offenders: Research Paper No. 1* (2016) 27, 'There is no requirement that an offender consent to the making of the order but consent is implicit because the order may be cancelled if the offender is no longer willing to comply with the conditions of the order. However, the general nature of the condition in the sentencing order may mean that an offender can refuse to take part in psychological counselling but offer to take part in other programs and so may technically not be in breach of the order'.

<sup>764</sup> *Criminal Justice Act 2003* (UK) s 207(3)(c).

<sup>765</sup> *Ibid* s 209(2)(d).

<sup>766</sup> *Ibid* s 212(3).

<sup>767</sup> *Ibid* s 152(3).

## RECOMMENDATIONS: PRINCIPLES IN MAKING A CCO AND SETTING CONDITIONS

15. In introducing the new CCO, principles should be included under the *Penalties and Sentences Act 1992* (Qld) that provide:
  - (a) a court must not impose a sentence of imprisonment (including suspended imprisonment), unless the sentencing court concludes that the purposes of the sentence cannot be achieved by a CCO to which one or more conditions are attached; and
  - (b) the fact a CCO has been imposed previously, including on a breach, does not prevent the further making of a CCO, taking into account the broad range of conditions that can be attached.
16. Legislative guidance should be provided to courts that:
  - (a) no more conditions must be ordered than are necessary to meet the purposes of the order, reflecting the principle of proportionality;
  - (b) the restrictions on liberty imposed under any conditions should be proportionate to the seriousness of the offence, or offences. In determining restrictions on liberty to be imposed, the court should be permitted to take into account any pre-sentence custody served in relation to that offence or other offences of which that person has been charged;
  - (c) in deciding on appropriate additional conditions, the court must consider:
    - (i) the circumstances and any vulnerabilities of the person being sentenced (with respect, for example, to their physical health, age, maturity, the existence of any mental illness or cognitive or intellectual disability, whether they are homeless, or are experiencing domestic and family violence), as well as the particular circumstances of Aboriginal and Torres Strait Islander offenders;
    - (ii) the ability of the person to comply with the proposed conditions of the order, including any geographical constraints in complying, and/or availability of services in that region; and
    - (iii) whether the person consents to the making of the conditions; and
  - (d) where two or more conditions are imposed, the conditions must be compatible with each other.

### 8.11.2 Term of the order

Stakeholders generally supported a CCO being of a realistic length to support compliance with conditions and avoid 'setting offenders up for failure'.

The Bar Association of Queensland supported a CCO being 3 years in length where this applied to a person sentenced by a Magistrates Court (reflecting the jurisdictional limit of this court), but up to 5 years for the District and Supreme Courts.<sup>768</sup>

The Council's view is that the maximum term of the new CCO should correspond with the existing term of a probation order in Queensland and be set at 3 years. This aligns with the CCO model adopted in NSW and most recently in Tasmania.

Setting the maximum term at this level will enable a CCO to be ordered where a short sentence of imprisonment might otherwise be imposed while avoiding overly long orders being made, such as initially occurred in Victoria. Unlike Victoria, CCOs are not intended to replace suspended sentences and the need for longer orders to 'fill the gap' left by the removal of suspended sentences is not required.

Three years also aligns with the jurisdiction of the Magistrates Courts, which impose the majority of short sentences in Queensland.

### 8.11.3 Combination orders

As discussed in section 5.4.7 of this report, the Council supports the broader availability of combined sentencing orders to courts in sentencing for a single offence. Consistent with its proposed reforms, the Council recommends a court should be permitted to sentence an offender for a single offence to:

- a term of immediate imprisonment (including under a partially suspended sentence) of up to 12 months in addition to a CCO (in which case the requirements of the CCO should commence on the person's release from custody);

<sup>768</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 4.

- a wholly suspended sentence of any length with a CCO; and
- a fine with a CCO.

As discussed in Chapter 10, the Council recommends that breach of the conditions of a CCO (other than by reoffending) should not trigger action for breach of a suspended sentence.

The use of these combination orders will allow a court to increase the punitive weight of a sentence, while avoiding the need to impose an immediate term of imprisonment.

A power to impose a fine, in addition to any other sentence imposed, is an existing power under section 45(2) of the PSA.

#### **RECOMMENDATIONS: CCO – COMBINATION ORDERS**

17. A court should be permitted to sentence an offender in respect of one, or more than one, offence to:
  - (a) a term of imprisonment – including a sentence that is partially suspended but excluding an intensive correction order (ICO) – with a CCO, provided any period of imprisonment to be served (excluding any time declared as time served) is no more than 12 months from the date of sentence, in which case the requirements of the CCO should commence on the person's release from custody;
  - (b) a wholly suspended sentence of any length with a CCO; and
  - (c) a fine with a CCO.
18. When combined with an actual term of imprisonment (including a sentence that is partially suspended), both the CCO and the requirements of the CCO should commence on the release of the offender from prison.
19. An ICO should not be able to be ordered at the same time as a CCO. However, the fact the person is subject to an existing ICO should not affect the court's ability to impose a CCO for a new offence.

#### **8.11.4 General (core) conditions**

##### **Submissions and consultation**

At consultation sessions held with legal and other criminal justice stakeholders, there was general support for limiting the core (mandatory) conditions to which offenders are subject to allow for the appropriate tailoring of orders to specifically address criminogenic needs, and thereby target areas of risk, and that offenders are not 'set up to fail' by complex, lengthy sets of conditions that are difficult for offenders to understand.

In its submission, QCS supported similar general (core) conditions being adopted similar to those that currently exist under a probation order and community service order. These types of conditions were viewed as important to allow for the effective supervision of those subject to these orders, and as an important means of distinguishing the order from unsupervised forms of orders (such as suspended sentences and bonds):

For QCS to effectively supervise any model of CCOs, the proposed core conditions require an element of supervision such as the need for the offender to engage in supervision, engage in programs and counselling and restrict interstate travel without approval. Without a core condition of supervision, the order would more closely resemble a suspended sentence or a good behaviour bond and it would be unclear as to what role QCS has in monitoring such an order.<sup>769</sup>

To avoid the 'over-servicing' of those offenders on such orders, however, QCS suggested supervision should be required 'for the period of the order or for a lesser period' until all rehabilitation conditions have been met satisfactorily. It was considered this approach would allow QCS the flexibility to end supervision early if it reasonably believed it was in the interests of the offender and the community.<sup>770</sup>

<sup>769</sup> Submission 11 (Queensland Corrective Services) 5.

<sup>770</sup> Ibid.

The Council's Aboriginal and Torres Strait Islander Advisory Panel recommended that CCOs should have as few mandatory conditions as possible.<sup>771</sup>

### The Council's view

The Council recognises that the inclusion of core conditions (referred to as 'general requirements' under the Act) is necessary for the proper administration of these orders. These core conditions are also required to give appropriate definition to the obligations of those who are subject to these orders.

At the same time, the Council has received feedback that the number of conditions attached to an order can increase the likelihood of orders being breached as a result of the person failing to comply with the conditions of the order, as distinct from reoffending.

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel supported greater flexibility in the conditions set, noting that under the current arrangements offenders may prefer serving their sentence in prison to being subject to multiple conditions under a community-based order that they may find very difficult to comply with.<sup>772</sup>

An obligation to report in person to a Probation and Parole office is an example of a condition that may present challenges for offenders located in rural and remote areas of the State. Transport options may be limited, and where reporting requirements are imposed for a compliance, rather than a rehabilitative purpose — particularly where the person is assessed as being at low risk, or low to medium risk of reoffending — the costs of such a requirement in terms of higher likelihood of breach may outweigh any benefit of the person being required to report.

The Council supports an approach that would limit the number of general requirements to those considered necessary to monitor compliance with the order and for its proper administration.

After considering possible approaches, including potential retention of the full range of core conditions that apply to a probation and community service order, the Council prefers the approach in NSW and England and Wales, which limits the mandatory conditions of their CCOs (or equivalents). In NSW, the standard conditions of a CCO are:

- not to commit another offence; and
- appear before the court if called on to do so at any time during the term of the order.<sup>773</sup>

Conditions such as notifying of changes of address, contact details or employment only apply if a supervision condition is attached.<sup>774</sup> Others, such as not leaving the State without permission, apply only to more restrictive forms of supervised orders, such as ICOs and parole orders.<sup>775</sup>

Under the England and Wales sentencing regime, the only conditions are:

- not to commit another offence;
- to keep in touch with the responsible corrections officer in accordance with such directions as he or she may from time to time be given;<sup>776</sup>
- not change of residence without permission given by a responsible officer or a court.<sup>777</sup>

Some other requirements considered core conditions under existing Queensland orders would only be activated in the event that specific types of additional conditions are attached to the order (under the English form of community sentence, the court must attach at least one). For example, not to leave the country or territory if a foreign travel prohibition requirement has been made.

<sup>771</sup> 'Talking points for Advisory Panel Members: Council meeting 18 June', 2 summarising views of panel members who attended an extraordinary meeting of the panel on 17 May 2019.

<sup>772</sup> Ibid.

<sup>773</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 88(2).

<sup>774</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 188(1)(f).

<sup>775</sup> Ibid ss 187(1)(g)–(h) (ICOs), ss 214A(1)(g)–(h) (parole). This also applies to re-integrative home detention: ss 232C(2)(f)–(g).

<sup>776</sup> *Criminal Justice Act 2003* (UK) s 220.

<sup>777</sup> Ibid s 220A.

The Council supports minimal conditions similarly being attached to a Queensland form of CCO, replicating those that exist in NSW. The Council notes that some forms of these NSW orders are unsupervised (see discussion at section 8.12.4).

The type of reporting conditions required to administer individual condition types should be provided for under specific additional conditions.

### 8.11.5 Additional conditions

#### Specificity versus flexibility in conditions

The ability of courts to order participation in specific treatment, programs or rehabilitative activities is premised on the court having sufficient information before it to inform its views. A requirement for pre-sentence reports is one means of ensuring this occurs in all cases; however, for the reasons discussed below, this approach is unlikely to be realistic in a jurisdiction such as Queensland with courts that must service a number of regional, rural and remote regions of the State.

QCS, as the body charged with administering community-based orders, supported retention of flexibility in the conditions ordered, cautioning:

Allowing the courts to be specific with programs and interventions within conditions could restrict QCS in appropriately addressing assessed needs, in turn potentially impacting on the effectiveness of the order. A condition scheme which is too prescriptive also increases the risk of an offender being required to attend a specific program or intervention service that is not available within their community (i.e. due to the location or demand of the service).<sup>778</sup>

The use of ‘generalised conditions’, such as submitting to assessment and treatment ‘as required by the chief executive of QCS’ was, therefore, viewed as preferable to more specific conditions being ordered, ‘allowing decisions about the specific criminogenic needs of the offender to be informed by a risk assessment, and could also take into account the availability of specific treatment programs’.<sup>779</sup>

As a general position, QCS noted that any increase in conditions relating to program participation would result in an increase in referrals made to external (community-based) providers. ‘If the availability of community-based programs is not also expanded this would result in greater levels of unmet demand’.<sup>780</sup>

#### Judicial monitoring

Judicial monitoring (also referred to as ‘judicial supervision’) is available as a condition of a CCO (and equivalent orders) in Victoria and Tasmania, and in England and Wales, for offenders subject to a drug rehabilitation requirement.<sup>781</sup>

Judicial supervision has its origins in the concept of therapeutic jurisprudence and is a common feature of specialist or problem-solving courts such as a drug court, which ‘provides the opportunity to motivate behavioural change and ensures offender accountability’.<sup>782</sup> Magistrate Pauline Spencer, a magistrate in Victoria who has written about the adoption of therapeutic jurisprudence practices by mainstream courts, suggests that to make effective use of this approach judicial officers are required ‘to understand the nature of the underlying causes of offending, how behavioural change occurs and the stages of such change’ and ‘to be adept at behaviour change techniques such as motivational interviewing and collaborative problem-solving’.<sup>783</sup>

There is limited research into the use of judicial monitoring in mainstream courts, with the majority of studies focusing on either pre-plea or post-plea problem-solving courts, such as drug courts. More research on the

<sup>778</sup> Submission 11 (Queensland Corrective Services) 6.

<sup>779</sup> Ibid.

<sup>780</sup> Ibid.

<sup>781</sup> This condition is mandatory if the treatment and testing period is more than 12 months: *Criminal Justice Act 2003* (UK) s 210(1).

<sup>782</sup> Pauline Spencer, ‘From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream’ (2014) 39(4) *Alternative Law Journal* 222, 224.

<sup>783</sup> Ibid.

potential benefits of judicial monitoring is required. However, drawing on the drug court research, judicial monitoring may be beneficial in the case of high-risk, high-need offenders who require this level of intensive supervision where provided by the sentencing judge or magistrate.<sup>784</sup>

Judicial monitoring is used widely in Victoria, with estimates of use at about one in four cases.<sup>785</sup> Judicial monitoring was almost unanimously favoured by legal stakeholders in Victoria with whom the Council met as a mechanism to keep clients accountable and to provide an opportunity to review conditions and progress. It was noted that breach proceedings are sometimes deferred due to the existence of judicial monitoring, and it can result in a formal reprimand being issued. There was some call for enhanced judicial powers in this context (to alter the order, its conditions, or to cancel the order in appropriate circumstances). The main barrier to its adoption in Victoria was identified as being resourcing. Courts and legal representatives are not funded to support this additional monitoring function. Such a function also requires significant support by corrective services in providing progress reports and attendance either in person or via video link at progress hearings.

QCS has cautioned that providing an element of 'case management' to the judiciary presents 'a significant risk of over servicing offenders', which 'could have a detrimental effect on their rehabilitative journey and overall outcomes'.<sup>786</sup>

While such a condition 'would allow for an additional layer of accountability on the offender', QCS supported judicial monitoring 'being an optional condition, reserved for offenders with a poor history of complying with community-based supervision, or who have previously failed to comply with a community-based order and been resentenced'.<sup>787</sup>

Such a condition would also have resource implications for courts, QCS (if required to attend court and/or provide regular status updates) and legal representatives.<sup>788</sup>

The Bar Association of Queensland was among those stakeholders that commented: 'Unless properly funded, judicial monitoring of CCOs is likely to be burdensome on sentencing courts, which will in turn render the imposition of monitoring conditions unlikely'.<sup>789</sup>

### **Residential requirement, curfews and electronic monitoring (EM)**

The potential inclusion of conditions under a CCO that would restrict an offender's liberty was met with mixed views.

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis, while expressing broader concerns about the effects of introducing a CCO model in Queensland, suggested a home address requirement, a curfew, and electronic monitoring (EM) could be conditions of a CCO 'if necessary and practicable, taking into account the circumstances of the individual'.<sup>790</sup>

The Bar Association of Queensland similarly nominated among conditions that might be made under such an order: a residential address condition; home detention with EM; and a curfew condition.<sup>791</sup>

<sup>784</sup> For a summary of key features of successful judicial supervision of Drug Court participants, see National Association of Drug Courts Professionals, *Adult Drug Court Best Practice Standards: Volume 1* (2018 rev), III. 'Roles and Responsibilities of the Judge—Commentary', 22–5.

<sup>785</sup> Department of Justice and Community Safety, 'Use and Operation of Community Correction Orders and Intensive Correction Orders' (Information provided to the Queensland Sentencing Advisory Council at the Council's request).

<sup>786</sup> Submission 11 (Queensland Corrective Services) 7.

<sup>787</sup> Ibid.

<sup>788</sup> This was identified as a potential consideration by a number of stakeholders including Queensland Corrective Services (Submission 11).

<sup>789</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 7.

<sup>790</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 3.

<sup>791</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 6.

The QLS supported home detention as being an available condition of a CCO, consistent with its support for the introduction of ‘varied sentencing options’, suggesting in this form (rather than as a separate form of order): ‘it may be easier to integrate the management of suitability and compliance with such an order’.<sup>792</sup>

Sisters Inside was opposed to the use of EM as a condition, arguing: ‘It is costly, it net widens, it does not prevent “crime” and it is highly stigmatising’.<sup>793</sup> Sisters Inside further suggested the use of this form of monitoring raises ethical concerns about the privatisation of public safety ‘as governments generally outsource the provision of monitoring technology to the private sector and these costs may be passed on to the individual’.<sup>794</sup> Given limited resources, they preferred the ‘resourcing non-punitive support options such as drug rehabilitation or community mental health services’.<sup>795</sup>

Members of the Council’s Aboriginal and Torres Strait Islander Advisory Panel who attended a special meeting of the panel on the Council’s Options Paper strongly opposed EM as a condition and suggested that if it was a choice, most Indigenous people would choose imprisonment rather than consent to the condition.<sup>796</sup>

Challenges with the use of EM and curfew conditions, as identified by QCS, include:

- potential difficulties in using the existing community-based breach process should a GPS device be removed — QCS noted the current breach process is resource intensive and time consuming, and there would be barriers to returning an offender in breach to court in a timely way;
- the need for QCS to retain discretion to respond to breaches of EM conditions or curfews, which it was suggested ‘not only provides for better outcomes and rehabilitation of offenders but reduces the likelihood of courts being unnecessarily burdened with technical breach matters’.<sup>797</sup>

QCS further submitted any extension of surveillance-type orders and conditions would need to consider the impact on Corrective Services, noting:

As part of a considered evidence-based case management plan, QCS undertakes a number of surveillance tasks as required throughout the supervision of an offender’s order including home visits, curfew checks, urinalysis and breath tests, and collateral checks on employment and accommodation ... only some district offices have dedicated surveillance resources to undertake these tasks, with the majority of these checks being conducted by case management officers. Any potential increase in the sentencing of orders which contain specific supervision or compliance conditions would require an expansion of this function.<sup>798</sup>

### The Council’s view

One of the distinct benefits of a CCO over other forms of community-based orders is its flexibility — both in the types of conditions that can be ordered and the ability, through the conditions imposed, to meet multiple sentencing purposes, including just punishment, deterrence and rehabilitation.

Consequently, the Council recommends that courts should have available to them a broad range of conditions under any new form of CCO, consistent with the types of conditions available under similar orders that exist elsewhere. This will ensure orders can be appropriately tailored and conditions attached that address specific factors associated with an individual’s risk of reoffending.

The types of conditions recommended for adoption in Queensland are those available in other jurisdictions including:

- to perform unpaid community service in the community (minimum of 40 hours up to 300 hours — see further below) (community service condition);

<sup>792</sup> Submission 15 (Queensland Law Society) 5.

<sup>793</sup> Submission 7 (Sisters Inside) 6 (citations omitted).

<sup>794</sup> Ibid.

<sup>795</sup> Ibid.

<sup>796</sup> ‘Talking points for Advisory Panel Members: Council meeting 18 June’, 2, summarising views of panel members who attended an extraordinary meeting of the panel on 17 May 2019.

<sup>797</sup> Submission 11 (Queensland Corrective Services) 8.

<sup>798</sup> Ibid 5.

- to submit to supervision by an authorised corrective services officer and to report to that officer as directed (supervision condition);
- to comply with any directions given by an authorised corrective services officer to attend appointments and/or to participate in activities with a view to promoting the offender's rehabilitation (rehabilitation condition);<sup>799</sup>
- to submit to assessment and treatment (including testing) for alcohol or drug abuse or dependency, medical assessment or treatment, mental health assessment and treatment, or other treatment, as directed by an authorised corrective services officer (treatment condition);<sup>800</sup>
- to abstain from consuming alcohol, or not to consume alcohol so as to exceed a specified level of alcohol and submit to monitoring (where consuming alcohol was an element of the offence, or has contributed to the commission of the offence and the person is not alcohol dependent) (alcohol abstinence and monitoring condition);<sup>801</sup>
- to abstain from drugs, except those prescribed for the person by a medical practitioner (drug abstinence condition);<sup>802</sup>
- not to contact or associate with a person specified in the order, or a particular class of persons specified (for the period of the order or lesser period) (non-association condition);<sup>803</sup>
- to live at a place specified in the order, or not at a place specified (for the period of the order or lesser period) (residence restriction and exclusion condition);<sup>804</sup>
- not to enter or remain in a specified place or area (for the period of the order or lesser period) (place or area exclusion condition);<sup>805</sup>
- to remain at a specified place between specified hours of each day (with ability to specify different places or periods for different days) (for limited number of hours and period) (curfew condition);<sup>806</sup>
- to pay an amount of money as a bond, whole or part of which is subject to be forfeited for non-compliance (bond condition);<sup>807</sup>
- to reappear at a times or times directed before the court for a review of compliance with the order (for period of the order, or lesser period) (judicial monitoring condition);<sup>808</sup>
- to be subject to electronic monitoring for the purpose of monitoring compliance with curfew and/or a place or area exclusion condition (for the period of that condition or lesser period) (electronic monitoring condition);<sup>809</sup> and
- any other condition the court considers is necessary.

There is also scope within this framework to recognise the need to develop, over time, culture-specific programs, which could either be a separate program condition or fall within the broader rehabilitation condition. As one example, the *Sentencing Act 1991* (NZ) recognises as a 'program' anything that an offender might be required to participate in for the purposes of a supervision order (equivalent to probation in Queensland) including: 'placement in the care of any appropriate person, persons, or agency, approved by the chief executive of the Department of

<sup>799</sup> See 'rehabilitation activity requirement' under *Criminal Justice Act 2003* (UK) ss 200A(3)–(7) as a potential model. See also *Sentencing Act 1991* (Vic) s 48D(4); *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 189D.

<sup>800</sup> See *Sentencing Act 1991* (Vic) s 48D as a potential model.

<sup>801</sup> See *Criminal Justice Act 2003* (UK) s 212A as a potential model.

<sup>802</sup> See *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 189E as a potential model.

<sup>803</sup> See *Sentencing Act 1991* (Vic) s 48F as a potential model. See also *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 189F.

<sup>804</sup> See *Sentencing Act 1991* (Vic) s 48G as a potential model.

<sup>805</sup> See *ibid* s 48H as a potential model. See also *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 189G.

<sup>806</sup> See *Criminal Justice Act 2003* (UK) s 204 and *Sentencing Act 1991* (Vic) s 48I as potential models. See also *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 189B.

<sup>807</sup> See *Sentencing Act 1991* (Vic) s 48JA as a potential model.

<sup>808</sup> See *ibid* s 48K as a potential model.

<sup>809</sup> See *ibid* s 48LA and *Criminal Justice Act 2003* (UK) s 215 as potential models. This condition is expressly excluded in NSW for CCOs.

Corrections', with examples listed including Maori cultural groups (an iwi, hapu, or whanau): a marae or other ethnic or cultural group. Similar recognition could be given, for example, to the continued engagement of Aboriginal and Torres Strait Islander offenders with a Community Justice Group to which they have been referred.

### COMMUNITY-BASED ALTERNATIVES FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

One of the key issues identified in the literature review undertaken by Gelb, Stobbs and Hogg is the lack of robust research on 'what works' in sentencing for Aboriginal and Torres Strait Islander people. That report noted:

Community orders are seen as more appropriate than terms of imprisonment for Aboriginal and Torres Strait Islander offenders, for whom prison can be particularly harmful. But community sentences need to be more accessible and more flexible to provide greater support and to mitigate against high breach rates. Conditions of community sentences, as well as support and services, need to be culturally appropriate.<sup>810</sup>

A recent report by Dr Clarke R Jones examined the obstacles faced by Aboriginal and Torres Strait Islander offenders. Having consulted with correctional agencies around Australia and undertaken a review of literature relevant to the topic, the author concluded:

... that a lack of Indigenous-specific programs and services, and the lack of viable access to them, has created barriers for offenders to participate in these programs. Aside from the many societal complications, this is translating to Aboriginal and Torres Strait Islander offenders unsuccessful reintegrating back into communities and, therefore, returning to prison as a result.<sup>811</sup>

Both the Gelb Stobbs, and Hogg and Jones reports highlight a significant research gap on sentencing for Aboriginal and Torres Strait Islander people, and both call for more research and evaluation to understand what needs to be in place to effectively address reoffending in this cohort. In addition, Jones recommends 'more carefully targeted effort (and funding) is required to develop and implement a range of new, innovative and culturally sensitive alternatives to reduce imprisonment rates.'<sup>812</sup>

A preliminary submission received by the Council from the Aboriginal and Torres Strait Islander Legal Service commented on the specific need for more trauma-informed, culturally safe programs for their clients.<sup>813</sup> They particularly spoke about the need for appropriate programs for offenders sentenced to imprisonment for breach of domestic violence orders, repeat driving offences and public nuisance offences to rehabilitate individuals and protect the community.<sup>814</sup>

These themes were also discussed by the Council's Aboriginal and Torres Strait Islander Advisory Panel and are consistent with their advice. Following the Council's visit to Victoria to discuss the effectiveness of CCOs in that jurisdiction, the panel welcomed information about a specific residential program targeting male Aboriginal and Torres Strait Islander offenders sentenced with a CCO. Several members on the panel felt that this kind of program, specifically designed by and for Aboriginal and Torres Strait Islander offenders, had great potential to support these offenders to successfully complete their orders and reintegrate into their community.

#### Wulgunggo Ngalu Learning Place

Located in Gippsland Victoria, the Wulgunggo Ngalu Learning Place is a 65-hectare property where participants can live on site for between three and six months (weekend leave is available after the first 21 days) while completing conditions of their CCO. The centre offers Aboriginal and Torres Strait Islander men both an educational and cultural component as well as community service work while they reside at the centre. An important emphasis is on transition planning for each participant when they return to their community. Family members are permitted to stay at the centre to assist with this process, and an exit plan is developed in consultation with the participant. Specific cultural activities and practices are an ongoing feature of the program, with Elders and Respected Persons attending regularly to provide cultural support and teaching. The program is supported by up to nine staff, including a manager, program and clinical support staff, Koori support workers, administrative officer and an Elder/Respected Person.

The program has been operating since 2008 and won the community corrections category of the 2010 International Corrections and Prisons Association awards.

As discussed above, as a safeguard against courts imposing more conditions than are necessary, the Council considers it important that the legislative framework established for the new CCO scheme sets out a principle that makes it clear that no more conditions should be attached than are necessary to meet the purposes of

<sup>810</sup> Gelb, Stobbs and Hogg (n 28) 113.

<sup>811</sup> Dr Clarke R Jones, *Obstacles to Parole and Community-Based Sentencing Alternatives for Aboriginal and Torres Strait Islander Offenders* (Report for the Australasian Institute of Judicial Administration, 2019) 67.

<sup>812</sup> Ibid 70.

<sup>813</sup> Preliminary submission (Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd) 8 February 2019, 5.

<sup>814</sup> Ibid 6.

sentencing, taking into account the principle of proportionality.<sup>815</sup> This is an important limiting principle that should guide courts in determining what conditions should be imposed, and their duration.

The effective operation of many of the conditions identified above will depend on the availability of appropriate services and support. It is likely, at least in the short term following implementation, that the sorts of additional conditions ordered will resemble those that can already be made under a probation or community services order. This appears to have been the experience elsewhere, as confirmed in recent discussions with stakeholders in NSW and Tasmania following the introduction of CCOs last year.

However, over time, as more funding for services is made available, and courts build greater confidence in the use of these new orders and conditions, the Council would expect to see an expansion in the sorts of conditions ordered.

Some conditions, such as EM, will not realistically be available to be imposed until the supporting infrastructure is in place to enable their use. Similarly, the imposition of curfew conditions depends on the ability to effectively monitor compliance (whether in combination with EM conditions, or other monitoring arrangements).

In the initial stages of introduction and transition to the new order, broad conditions reflecting those that can already be imposed under a community service order and probation order might be made available to courts, with more tailored conditions added to the suite of conditions that can be ordered over time. In the Council's view, there is little benefit to be gained in setting out legislatively a broad range of conditions that are not adequately resourced or that cannot practically be supported. Such an approach is liable to compromise confidence in use of the new order.<sup>816</sup>

### 8.11.6 Community service as a condition

#### Submissions and consultation

There were mixed views about the appropriate maximum number of hours that should be permitted to be ordered under any new CCO scheme.

LAQ submitted that there may be merit in increasing the maximum number of hours a court can order above that which currently applies to community service orders if this allows the order to apply to a wider range of offending, in the interests of avoiding imprisonment.<sup>817</sup> However, they considered it important that offending that currently attracts a small number of hours of community service should continue to attract the same level of penalty following the CCO's introduction.<sup>818</sup>

QCS raised concerns about the impacts either of increasing the maximum number of hours that can be ordered under a community-based order, or limiting the hours that can be performed per week or month on the basis of its inflexibility and increased likelihood of breach:

An increase in the maximum number of community service hours a court can order may have a range of impacts. Increasing community service hours, potentially up to 600 hours, could be inflexible for offenders, particularly those offenders who may also have work for dole, employment, education or parenting/caregiver obligations. It could also impact on an offender's ability to address other aspects of their criminogenic behaviour.

Conversely, limiting the hours that can be performed per week or month does not recognise that some offenders may be unemployed or prefer to complete their community service work as quickly as possible. Limiting the ability to assist willing and capable individuals to attend community service and successfully complete their orders can impact on the chance of offenders breaching their orders.<sup>819</sup>

<sup>815</sup> See *Sentencing Act 1991* (Vic) s 48A as a potential model.

<sup>816</sup> See Sentencing Advisory Council (Tasmania) (n 80), which similarly notes that 'a failure to provide adequate resources to support compliance monitoring and treatment has been a factor identified elsewhere as leading to a lack of confidence in particular sanctions': 98.

<sup>817</sup> Submission 6 (Legal Aid Queensland) 3.

<sup>818</sup> Ibid 4.

<sup>819</sup> Submission 11 (Queensland Corrective Services) 9.

QCS further identified a number of practical barriers to increasing use of community service, suggesting ‘a significant increase in service sites and sponsors would be needed to support lengthy community service orders’, which ‘may not be feasible’ given current issues in identifying suitable sites and provision of in-house projects ‘for offenders who may not be suitable to attend certain community service sites’.<sup>820</sup>

To support greater flexibility, QCS further suggested it may be ‘appropriate to consider the removal of other specific orders, including safe night out, graffiti removal, alcohol fuelled violence, and fine option orders’.<sup>821</sup>

The Council’s views on mandatory penalties are set out at section 5.7.6 of this report. Consideration of fine option orders is outside the scope of this review.

### **The Council’s view**

The Council had initially contemplated the new CCO replacing probation, community service orders and ICOs. Given more serious offences that would otherwise have attracted an ICO would be captured, the Council suggested the same maximum number of community service hours that can be ordered under the Victorian form of order (600 hours) could be adopted in Queensland. Such an approach would allow for a CCO to be ordered for more serious forms of offending that otherwise may have warranted an immediate term of imprisonment.

Practical concerns have been raised by stakeholders about the availability of community service in the community and the ability of QCS to meet any increased demand. It was also suggested this could be quite onerous if other conditions are attached to the order.

The Council, therefore, recommends that the number of hours should initially be capped at 300. This level is consistent with the cap adopted in England and Wales for a 2-year community order, and in SA for its community service order, as well as the cap for Victorian CCO orders that expire on the satisfactory completion of community service where it was attached as the sole condition. It will be slightly higher than is currently permitted under the existing form of community service order (240 hours) taking into account the longer maximum duration of the order, but below the maximum that exists in NZ (400 hours), the NT (480 hours), NSW (500 hours) and Victoria (600 hours).

As is the current operational practice, it should be made clear that if the order has both unpaid community service and treatment and/or rehabilitation conditions, the court should be permitted to determine that some or all hours are to be counted towards the community service hours (otherwise, there should be a legislative presumption that all hours are to be counted towards community service hours).<sup>822</sup>

Where community service is the only additional condition imposed, the CCO should expire on the successful completion of the number of community service hours stated in the order, consistent with the current position under section 108 of the PSA.

---

<sup>820</sup> Ibid.

<sup>821</sup> Ibid.

<sup>822</sup> See *Sentencing Act 1991* (Vic) s 48CA for a potential model.

## RECOMMENDATIONS: CCO — CONDITIONS

### CCO — General requirements (core conditions)

20. The core conditions of a CCO should be limited to those directly associated with the purposes for which the order is made and required for its proper administration. The Council suggests core conditions should be that the offender:
- (a) not commit another offence during the period of the order; and
  - (b) appear before the court if called on to do so at any time during the term of the order.
21. Any additional requirements (e.g. to report as directed, or to notify of any changes of contact details or address) that are considered necessary by Queensland Corrective Services or other relevant agency to support the effective management of offenders subject to additional conditions (such as supervision, rehabilitation, treatment or curfew conditions) should be stated as requirements for complying with those specific conditions, rather than included as mandatory conditions that apply to all orders.

### CCO — Additional requirements

22. When making a CCO, a court should be required to attach at least one additional condition. Additional conditions should include (subject to further development of the appropriate form of these conditions and supporting service delivery model — Recommendation 13):
- to perform unpaid community service in the community (minimum of 40 hours up to 300 hours) (*community service condition*);
  - to submit to supervision by an authorised corrective services officer (*supervision condition*);
  - to comply with any reasonable directions given by an authorised corrective services officer to attend appointments and/or to participate in activities with a view to promoting the offender's rehabilitation (*rehabilitation condition*);
  - to submit to assessment and treatment (including testing) for alcohol or drug abuse or dependency, medical assessment or treatment, mental health assessment and treatment, or other treatment, as directed by an authorised corrective services officer (*treatment condition*);
  - to abstain from consuming alcohol, or not to consume alcohol so as to exceed a specified level of alcohol and submit to monitoring (where alcohol consumption is an element of the offence, or has contributed to the commission of the offence and the person is not alcohol dependent) (*alcohol abstinence and monitoring condition*);
  - to abstain from drugs, except those prescribed for the person by a medical practitioner (*drug abstinence condition*);
  - not to contact or associate with a person specified in the order, or a particular class of persons specified (for the period of the order or lesser period) (*non-association condition*);
  - to live at a place specified in the order, or not at a place specified (for the period of the order or lesser period) (*residence restriction and exclusion condition*);
  - not to enter or remain in a specified place or area (for the period of the order or lesser period) (*place or area exclusion condition*);
  - to remain at a specified place between specified hours of each day (with ability to specify different places or periods for different days) (for limited number of hours and period) (*curfew condition*);
  - to pay an amount of money as a bond, whole or part of which is subject to be forfeited for non-compliance (*bond condition*);
  - to reappear at a time or times directed before the court for a review of compliance with the order (for the period of the order or lesser period) (*judicial monitoring condition*);
  - to be subject to electronic monitoring for the purpose of monitoring compliance with curfew and/or a place or area exclusion condition (for the period of that condition or lesser period) (*electronic monitoring condition*); and
  - any other condition the court considers is necessary.

### CCO — Community service condition

23. If community service is the sole condition, the CCO should expire when the hours have been satisfactorily completed.
24. If the order has both unpaid community service and treatment and/or rehabilitation conditions, the court should be permitted to determine that some or all hours are to be counted towards the community service hours (otherwise, there should be a legislative presumption that all hours are to be counted towards community service hours).

### CCO — Compliance period

25. A court should be permitted to limit the period during which an additional condition attached to a CCO is in force. After this time, the person should be required to comply with the core requirements of the order only.

### 8.11.7 Role of pre-sentence reports (PSRs)

Pre-sentence reports (PSRs) are an essential part of the Victorian CCO model. A dedicated court advisory service staffed by court assessment and prosecutions officers undertakes assessments to determine offenders' suitability for a CCO and makes recommendations about conditions to reduce reoffending and support rehabilitation.

Consultations by the Council with Victorian legal stakeholders suggest there is a good level of confidence in PSRs, although in their current form comments were made that they are very brief.<sup>823</sup> There can also be delays in assessment for some conditions – such as 'Justice Plan' conditions managed by the Department of Health.

In contrast, in NSW, PSRs (referred to as sentence 'assessment reports'<sup>824</sup>) are not mandatory for the making of a CCO, and are required only when a court is imposing a community service work condition.<sup>825</sup> While assessment reports are widely used, a challenge with the current approach noted by some NSW legal practitioners is that in their current form, they identify an offender's level of risk.<sup>826</sup> While this is useful for correctional services staff in suggesting appropriate conditions and supervision arrangements, for those offenders assessed at medium to high risk, it may also mean that judicial officers are less likely to impose a CCO or other form of community order, and more inclined to impose an immediate term of imprisonment.

QCS advised in its submission that 'between July 2016 and June 2018, QCS conducted 1,446 PSRs (verbal and written reports) across the State. Over the same period, 50,036 admissions for new community-based orders were received by QCS'.<sup>827</sup> On this basis, only a very small percentage of offenders in Queensland subject to community-based orders (2.9%) have had a PSR prepared.

#### Submissions and consultation

Over the course of the review, a number of legal stakeholders have indicated their support for the broader availability of PSRs. QCS in its submission identifies a number of potential benefits of the broader availability of pre-sentence advice, including:

- a reduction in the administrative burden on QCS officers seeking amendments to an offender's conditions;
- better supporting courts in making informed sentencing decisions that are commensurate with offending behaviour, the risks posed by an offender to the community, and the ability to address criminogenic behaviour to reduce reoffending;
- potential to encourage the greater use of community-based orders, rather than imprisonment, where appropriate;
- allowing QCS to administer initial screening and assessments to more offenders prior to sentencing.<sup>828</sup>

In the absence of PSRs, QCS noted 'there is a risk that sentencing may not be compatible with the needs of the offender, community, or current resource or service restrictions', which 'may lead to increases in breach action and ultimately impact on prisoner numbers'.<sup>829</sup>

There were particular circumstances identified by QCS in which the use of PSRs can be particularly relevant – for example, to assess suitability for an EM condition, for community service, or the provision of a certain program (such as an intensive sexual offender program or drug program).<sup>830</sup> The preparation of these reports allows QCS 'to conduct initial screening and assessments relevant to imposing certain conditions', and also

<sup>823</sup> For a schedule of those agencies consulted, see Appendix 2.

<sup>824</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 4B.

<sup>825</sup> *Ibid* ss 17D(4), 89(4).

<sup>826</sup> Teleconference, Legal Aid NSW, 6 June 2019.

<sup>827</sup> Submission 11 (Queensland Corrective Services) 10.

<sup>828</sup> *Ibid*.

<sup>829</sup> *Ibid*.

<sup>830</sup> *Ibid*.

to 'assess an offender's readiness to change and engage in intervention services'.<sup>831</sup> It also allows QCS to offer courts some guidance about 'the suitability of a proposed condition and its availability in the local community'.<sup>832</sup>

However, '[w]here an offender is to be sentenced to an order with core conditions and some broad special conditions such as counselling (which may include drug counselling/relationship counselling)' QCS submitted, a PSR should not be required.<sup>833</sup>

Stakeholders generally supported the Council's view that requiring PSRs in all cases where the making of a CCO is contemplated would not be realistic or recommended in a jurisdiction such as Queensland with a dispersed population, even with the establishment of a new court advisory service. The QLS in their submission, for example, noted:

To mandate the production of reports prior to imposing a particular order or condition may have unintended, and undesirable, consequences including:

- Restricting the availability and/or appeal of community based sentencing orders in regional or remote jurisdictions where reports are unavailable or difficult to obtain;
- Placing further pressure on already heavily burdened Queensland Corrective Services staff, resulting in reports of varying levels of detail, usefulness and quality;
- Leading a court into error in exercising its judgment in relation to the appropriate sentencing order for a particular offender. For example, where reports contain limited or inaccurate information such that a court is not informed of all of the relevant circumstances of the offender; and
- Causing delays in the finalisation of court matters for both offenders and victims.<sup>834</sup>

The QLS supported retention of the current position on this basis, noting:

Retaining the current position allows a court the discretion to order a pre-sentence report where, notwithstanding the assistance provided by the offender's representative, the court considers a report is appropriate to assist the court in imposing an appropriate sentence.<sup>835</sup>

Members of the Council's Aboriginal and Torres Strait Islander Panel supported no change to the current requirement for PSRs. They recommended that PSRs should include cultural reports, culturally safe screening, and assessment tools for people with cognitive disability and should consider the impact to the family of the offender if imprisonment were to be imposed.<sup>836</sup>

The Bar Association of Queensland supported PSRs for some special conditions but noted that a formal PSR was not always required. For example, where a court is considering imposing community service, particularly in a remote community, an informal advice that a community service project is available would be sufficient.<sup>837</sup>

Sisters Inside did not support mandatory PSRs and was concerned that they may prejudice particular defendants if the report is based on a QCS 'risk' framework, as this may fail to adequately recognise the impact of trauma and social factors and the person cannot afford an independent report to present this information to the court.<sup>838</sup>

### The Council's view

In its Options Paper, the Council considered the broader issue of whether there should be a presumption in favour of the ordering of a pre-sentence report, or if the current approach should be retained.

<sup>831</sup> Ibid.

<sup>832</sup> Ibid.

<sup>833</sup> Ibid.

<sup>834</sup> Submission 15 (Queensland Law Society) 22–3.

<sup>835</sup> Ibid 23.

<sup>836</sup> 'Talking points for Advisory Panel Members: Council meeting 18 June', 3, summarising views of panel members who attended an extraordinary meeting of the panel on 17 May 2019.

<sup>837</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 9.

<sup>838</sup> Submission 7 (Sisters Inside) 10.

The Council continues to support its preferred option, as indicated in that paper, of retaining the current approach under section 344 of the *Corrective Services Act 2006* (Qld), which provides courts with a discretion to order such reports, and for that information to be received and taken into account where this is considered appropriate.<sup>839</sup> This applies equally to the making of a CCO, should such order be introduced.

The Council remains concerned that even a presumption in favour of ordering of a PSR may act as a barrier to courts making such an order for offenders who might otherwise benefit from the order being made.

The Council acknowledges there is some risk with the introduction of the CCO, that in the absence of good pre-sentence advice, courts will not be able to sufficiently tailor and target conditions to address the underlying causes of offending. However, the Council considers it should be possible to cast many of the conditions a court may be able to impose in broad enough terms to enable the individualisation of interventions, treatment and program requirements to occur post-sentence once the offender has been assessed by QCS.

Retention of the current legislative approach would still provide scope for expansion of the availability of PSRs and a court advisory service, as supported by many legal stakeholders. This is discussed further in Chapter 14 of this report.

As highlighted by QCS in its submission, pre-sentence suitability assessments may be particularly beneficial for some types of conditions, such as EM conditions, community service conditions, and specific program conditions. Where specific suitability assessment reports are required or recommended, this should be identified in the supporting legislation.

The availability of cultural reports is also an important factor in ensuring orders and conditions made under them are appropriately tailored. The use of these reports is discussed in Chapter 14.

#### **RECOMMENDATIONS: CCO – PRE-SENTENCE REPORTS AND ASSESSMENTS**

26. While desirable to facilitate the appropriate targeting of conditions attached to the order to address factors associated with offending, a pre-sentence report should not be mandatory if a court is considering imposing a CCO. Instead, courts should retain the discretion to request a pre-sentence report in circumstances where this is considered appropriate in accordance with section 15 of the *Penalties and Sentences Act 1992* (Qld) and section 344 of the *Corrective Services Act 2006* (Qld).
27. A suitability assessment report should be required prior to the making of specific conditions that may require particular suitability and other checks of the person's residence to be undertaken – for example, for an electronic monitoring condition to monitor a curfew or place or area exclusion condition.

### **8.11.8 Power to amend or vary and suspension powers**

#### **Submissions and consultation**

During consultation undertaken as part of the review, there was some recognition by stakeholders of the benefits of QCS being able to target its resources effectively at those offenders with medium to high risk and need who are most likely to benefit from more intensive supervision and support.<sup>840</sup>

NSW has introduced a formal power to suspend some conditions of a CCO (a supervision condition, a curfew condition, and a non-association condition).<sup>841</sup> The regulations provide guidance regarding what matters a community corrections officer must take into account in deciding whether to suspend a supervision condition, being:

- a) the risk of the offender re-offending;
- b) the seriousness of the offender's criminal history;

<sup>839</sup> See *Penalties and Sentences Act 1992* (Qld) s 15(1).

<sup>840</sup> For example, at the Stakeholder Roundtable hosted by the Council on 14 May 2019.

<sup>841</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 107E.

- c) the likely benefits of the supervision condition continuing to apply and the effect of any other measures that are being, or may be, taken to address the risk of the offender re-offending;
- d) the resources available to supervise the offender and other offenders who may be at a higher risk of re-offending.<sup>842</sup>

A suspension order must be approved by a more senior community corrections officer, and notice must be given to an offender of the making or revocation of the suspension order.<sup>843</sup> An offender who is subject to a suspension order must still provide notice of any change to their place of residence or contact details.<sup>844</sup>

QCS suggested the addition of a similar power to that which exists in NSW could be beneficial to managing offender behaviour, consistent with methodologies embedded in QCS practices of tailoring supervision to ensure over-servicing does not occur in managing low-risk offenders. They cautioned, however:

should a similar provision be adopted in Queensland, clarity would be required regarding the courts' expectation should QCS suspend supervision of an offender and the offender re-offend prior to the expiration of the order. Further consultation on the operationalisation of such a condition would be required, with a review of the NSW operational model supported.<sup>845</sup>

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel were supportive of incentives to be included in CCOs such as allowing for conditions to be reduced or the order to end earlier as a result of satisfactory compliance.<sup>846</sup>

### The Council's view

The Council considers it important that QCS has the ability to respond flexibly in the management of offenders. As an example, this includes an ability to either increase or reduce the frequency of reporting, as well as the form of supervision (e.g. a phone call rather than a requirement to attend a Probation and Parole office in person). This may not only allow QCS to better target limited resources to those offenders requiring additional supervision and support, but also provide an incentive to offenders to actively engage with services to which they are referred, to reduce their requirements under the order.

While the Council considers that providing QCS with limited administrative power to suspend conditions in appropriate cases may have some merit, it agrees with the conclusion reached by QCS that further consultation would be required prior to the adoption of such an approach in Queensland. There are likely to be significant concerns about the adoption of this approach, given it would effectively mean a court imposed condition can be overridden by an administrative body without court oversight. In contrast to NSW, where the Council understands advice is provided to courts about the likelihood of supervision conditions being suspended and the period after which this is likely to occur as part of the pre-sentence assessment report process, in Queensland, pre-sentence reports are not commonly available. There is therefore a real risk that courts will lose confidence in the use of the order, or particular conditions, on becoming aware of how they are being managed in practice.

As an alternative, the Council prefers an approach that makes clear in the wording of any supervision condition that the frequency and nature of reporting is to be determined by QCS as it considers appropriate, but without providing a power to suspend conditions absolutely.

In the event a condition, or the order, is no longer required, under the Council's proposal an application could be made to have the condition (or order) revoked. This application could be made by the offender, corrective services, or by the court acting on its own initiative.

The early revocation of an order to reward an offender's progress was supported by a number of stakeholders. For example, the Bar Association of Queensland noted: 'it could provide powerful incentives

<sup>842</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 189I(1).

<sup>843</sup> *Ibid* ss 189I(2)–(3).

<sup>844</sup> *Ibid* s 189I(4).

<sup>845</sup> Submission 11 (Queensland Corrective Services) 5.

<sup>846</sup> 'Talking points for Advisory Panel Members: Council meeting 18 June', 2, summarising views of panel members who attended an extraordinary meeting of the panel on 17 May 2019.

to offenders to meaningfully engage in rehabilitation’ and that this could also result in resources being better targeted.<sup>847</sup>

The Council agrees that the power to revoke a condition or the order should be available as an incentive to reward progress made under the order, and also supports an ability to seek amendment or revocation of the order where the court is satisfied ‘it is otherwise appropriate to do so’.<sup>848</sup> This will provide a broader basis for QCS to apply for variation of an order where this is required than is currently the case to enable effective management of offenders subject to these orders — including to respond to issues of escalating risk. Broader grounds to seek variations of orders is particularly important in the absence of pre-sentence assessments that might identify these issues in advance of the order being made.

#### **RECOMMENDATIONS: CCO — AMENDMENT AND REVOCATION**

28. A court should be provided with the power, on application by the offender, an authorised corrective services officer, the director of public prosecutions, or by the court on its own initiative (for example, where a judicial monitoring condition is in place), to:
  - (a) amend the order;
  - (b) revoke the order and deal with the offender in any way in which the court could deal with the offender had he or she just been convicted of the offence or offences;
  - (c) revoke the order and make no further order in respect of the offence or offences for which the order was originally made, including on the basis that the offender is making good progress or responding satisfactorily to supervision or treatment;
  - (d) in relation to a condition of the order, cancel, suspend, vary or reduce the condition (e.g. number of hours under a community service condition);
  - (e) attach a new condition on the order.
29. The grounds for seeking an amendment or revocation should reflect those in section 120(1) of the *Penalties and Sentences Act 1992* (Qld) but with new criteria that allows the court to vary or revoke the order if the court is satisfied:
  - (a) the rehabilitation and reintegration of the offender would be advanced by making the decision to deal with the order; or
  - (b) the continuation of the sentence is no longer necessary in the interests of the community or the offender; or
  - (c) it is otherwise appropriate to do so.
30. Consistent with the current provisions relating to the amendment or revocation of a community-based order under Part 7, Division 1 of the *Penalties and Sentences Act 1992* (Qld), the court should be required to consider the extent to which the offender has complied with the order in deciding the appropriate action to take.

#### **8.11.9 Administrative breach processes**

As discussed in Chapter 4, one of the fundamental principles adopted by the Council for the purposes of the review was that limited executive power to deal with minor breaches may enhance the flexibility of community-based sentencing orders.

In its submission, QCS noted:

the capacity to intervene in minor rule breaking behaviour prior to the behaviour escalating is an important factor in community management, with delays and lengthy court processes potentially undermining the effectiveness of the sanction.<sup>849</sup>

Some jurisdictions have established formal legislative arrangements for Corrective Services to apply administrative penalties (or in the case of the England and Wales community sentence, to issue a formal warning<sup>850</sup>) in circumstances where a person has failed to comply with the conditions of the order, other

<sup>847</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 8.

<sup>848</sup> See *Sentencing Act 1997* (Tas) s 42AU(6)(c), which adopts similar wording.

<sup>849</sup> Submission 11 (Queensland Corrective Services) 5.

<sup>850</sup> *Criminal Justice Act 2003* (UK) sch 8 para 5.

than by reoffending. These schemes go beyond the types of sanctions that QCS can already apply administratively in the management of community-based orders, such as increasing the frequency of an offender's reporting arrangements to respond to issues of escalating risk.

In Victoria, an administrative penalty regime applies to CCOs that contain either (or both) an unpaid work condition or a curfew condition. In circumstances where the Secretary (or delegate — for example, the Commissioner, Corrections Victoria, and other officers to which these powers are delegated, such as senior operational staff) is satisfied that the offender has failed to comply with the order without reasonable excuse, the Secretary may respond by increasing the community work condition by up to 16 hours in a 12-month period,<sup>851</sup> or by extending the curfew by up to two hours a day or the duration of the curfew condition by up to 14 days.<sup>852</sup>

There are safeguards built into the Victorian scheme to ensure it operates fairly. These safeguards include:

- allowing for this power to be exercised only where the failure to comply with the order is considered by the Secretary to be sufficiently serious to give the direction, but not so serious as to warrant a charge being filed for the offence,<sup>853</sup> and where these conditions are still active;<sup>854</sup>
- requiring the Secretary to provide written notice to the offender of the direction relating to the community work or curfew condition, including the reasons for the decision, and the decision only coming into effect when the notice is served;<sup>855</sup> and
- a right by the offender to seek a merits review of the decision by the original sentencing court (in which case the court may confirm, vary or revoke the decision).<sup>856</sup>

Senior staff of Corrections Victoria also have the power to issue an infringement notice of 1 penalty unit (\$165.22 from 1 July 2019 to 30 June 2020<sup>857</sup>) for non-compliance with a CCO in circumstances where a person has failed to comply with directions given by the Secretary under the order.<sup>858</sup>

### Submissions and consultation

The Victorian Department of Justice and Community Safety has identified that the establishment of arrangements in support of the introduction of this administrative penalties regime required significant time to implement.

As part of the implementation process, a separate administrative review hearing process was established, now referred to as 'compliance review hearings', which was intended to provide 'a structured, swift and tangible response to low level "conditions only" non-compliance and to reduce the administrative burden on the courts by providing an alternative to dealing with lower-level non-compliance cases'.<sup>859</sup> At the same time, a significant investment was made in the training of senior staff to make them aware of these powers and their proper application. An internal infringements process was also established.

<sup>851</sup> *Sentencing Act 1991* (Vic) s 83AU(1). However, the maximum number to be performed when added to those the offender was originally ordered to be served must not exceed the maximum number of hours permitted under the order: s 83AU(2)(d).

<sup>852</sup> *Ibid* s 83AV(1). The number of hours of each day that the offender must remain at the place as directed by the Secretary together with the number of hours that the offender has been ordered to remain at the place by the court attaching the condition, however, must not exceed the maximum number of hours permitted under the Act: ss 83AV(2)(d)–(e).

<sup>853</sup> *Ibid* ss 83AU(2)(a)–(b), 83AV(2)(a)–(b).

<sup>854</sup> *Ibid* ss 83AU(2)(c), 83AC(2)(c).

<sup>855</sup> *Ibid* s 83AX.

<sup>856</sup> *Ibid* s 83AY.

<sup>857</sup> *Monetary Units Act 2004* (Vic) s 5; *Victorian Government Gazette* No. G14, 4 April 2019, 572.

<sup>858</sup> *Sentencing Act 1991* (Vic) s 115C.

<sup>859</sup> Department of Justice and Community Safety (Victoria), 'Use and operation of community correction orders and intensive correction orders', document responding to questions raised by the Queensland Sentencing Advisory Council provided by email on 17 June 2019.

The Victorian Department of Justice and Community Safety has advised that the administrative review hearings now ‘are generally used for conferencing/problem solving and to identify case management strategies with the offender to encourage compliance on their order’.<sup>860</sup>

The QPS acknowledged that:

the exercise of discretion in dealing with technical and minor contraventions of a community-based sentence order could be in the public interest and might reduce the frequency of minor matters brought before the courts. A balanced approach would be required to ensure community safety whilst providing an offender with an opportunity to rehabilitate.<sup>861</sup>

During the Council’s consultation, legal stakeholders expressed significant reservations about how such administrative breach powers would be exercised in practice, and the difficulties of ensuring that these sorts of powers are exercised only in appropriate cases. The Bar Association of Queensland, which was among those stakeholders that raised such concerns, was of the view that QCS should not be able to exercise administrative breach powers in administering such orders, and that consistent breaches of conditions should instead be referred to a court.<sup>862</sup> Introducing administrative breach powers for community-based orders, the Bar Association suggested, would be likely to ‘dramatically increase the number of offenders who may potentially be affected by adverse decisions’, with a related concern being that legal aid is currently not available in respect of administrative law matters, which would leave many offenders unable to access legal assistance to contest such a breach.<sup>863</sup>

### **The Council’s view**

Based on the Victorian experience, and given concerns raised by stakeholders, the Council has chosen not to recommend that the same types of administrative breach powers that exist in Victoria should be imported into a Queensland CCO scheme. As with the introduction of a power to suspend compliance with conditions, the Council considers further consultation would need to occur with key stakeholders prior to a commitment being made to such an approach to consider whether such reforms would be likely to enhance compliance with orders and, if introduced, what protections there would need to be to ensure these powers operate equitably, fairly, and consistently with principles of procedural justice.

#### **8.11.10 Powers on breach**

Responding effectively to breach of orders is an important means of building the credibility of community-based alternatives to imprisonment.

In considering the introduction of EM as a potential condition of a CCO, QCS noted the time- and resource-intensive nature of the formal breach process, and the need to provide QCS with appropriate discretion to respond to technical breaches without initiating breach action:

The current community based order breach process is resource intensive and time consuming due to requirements to compile court reports, up to date police documents (criminal history and QP9’s), complete a Complaint and Summons, Oath of Service, and lodge at a local court.

Throughout the case management and supervision of an offender, technical violations can occur that do not always result in an increase of the offender’s risk. To retain effective evidence based case management practices, it is important that QCS has discretion in responding to breaches of EM conditions or curfews. This not only provides for better outcomes and rehabilitation of offenders but reduces the likelihood of courts being unnecessarily burdened with technical breach matters.<sup>864</sup>

The Council recommends that the court should have the following powers on breach:

- revoke the order and re-sentence the offender (taking into account prior compliance with the order);
- vary or revoke non-standard conditions;

---

<sup>860</sup> Ibid.

<sup>861</sup> Submission 3 (Queensland Police Service) 2.

<sup>862</sup> Preliminary submission (Bar Association of Queensland) 20 March 2019, 8–9.

<sup>863</sup> Ibid 8.

<sup>864</sup> Submission 11 (Queensland Corrective Services) 8.

- impose additional conditions, including new program conditions;
- vary the order (including extending the term of the order);
- take no action (admonish and discharge the offender).

While a court's powers on breach proposed will largely replicate those that currently exist under Part 7, Division 2 of the PSA, other reforms discussed at Chapter 14 of this report may assist in streamlining current court processes by enabling courts to deal with breaches of orders made by other courts where this is appropriate.

Another mechanism that could be used to promote compliance with orders is the use of judicial monitoring. The use of this condition in Victoria is discussed above.

#### **RECOMMENDATION: CCO – BREACH POWERS**

31. On finding an offender has breached a CCO without reasonable excuse, a court should have equivalent powers to those which currently exist under Part 7, Division 2 of the *Penalties and Sentences Act 1992* (Qld) including:
- (a) revoking the order and resentencing the offender (taking into account prior compliance with order);
  - (b) varying or revoking additional conditions;
  - (c) imposing additional conditions, including attendance at programs under a new rehabilitation condition;
  - (d) varying the order (including extending the term of the order);
  - (e) taking no action (admonish and discharge the offender).

#### **8.11.11 Recording the sentence imposed**

In considering use of the then new community sentence shortly after its introduction, the Sentencing Guidelines Council for England and Wales highlighted the importance, given there would be only one (generic) community sentence, of any future sentencing court having 'full information about the requirements that were inserted by the court into the previous community sentence imposed on the offender ... and also about the offender's response.'<sup>865</sup> It suggested that this would be important to a court when considering the merits of imposing the same, or similar requirements, as part of another community sentence. It therefore recommended: 'The requirements should be recorded in such a way as to ensure they can be made available to another court if another offence is committed'.<sup>866</sup>

It is likely that the most effective way of ensuring that information about conditions of previous CCOs imposed is readily available not only to the court, but also to prosecutors and the person's legal representatives is to ensure this information is recorded on the person's criminal history. While the recording of this information can be managed through administrative arrangements, to ensure this occurs the Council recommends that the new CCO provisions should provide that in the making of the order (whether or not a conviction is recorded) its duration, and any conditions imposed must be entered in the offender's criminal history.

#### **RECOMMENDATION: CCO – RECORDING OF SENTENCE**

32. The provisions governing the making of a CCO should provide that on the making of the order (whether or not a conviction is recorded), its duration and any conditions imposed must be entered in the offender's criminal history.

<sup>865</sup> Sentencing Guidelines Council for England and Wales, *New Sentences: Criminal Justice Act 2003 – Guideline* (2004) 11 [1.1.36].

<sup>866</sup> Ibid.

## 8.12 'Reasonable direction' requirement for community-based orders

The overall purpose of corrective services is 'community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders'.<sup>867</sup> This purpose is not unfettered, as corrective service officers are subject to the directions of the court that made the community-based order.<sup>868</sup>

The effect of a probation order is that a person 'is released under the supervision of an authorised corrective services officer for the period stated in the order'.<sup>869</sup> The provisions detailing the effects of community service, graffiti removal, and ICOs do not mention supervision.<sup>870</sup> While there is no explicit mention of supervision, every community-based order has a condition that a person 'must comply with every reasonable direction of an authorised corrective services officer'.<sup>871</sup> It is an offence for a person subject to a community-based order to contravene a requirement.<sup>872</sup>

For offenders on parole, every parole order also carries a mandatory condition that the parolee 'carry out the chief executive's lawful instructions'.<sup>873</sup> A 'reasonable direction' for parolees must be 'necessary for the proper administration of a direction ... to remain at a stated place for stated periods; or to wear a stated device; or to permit the installation of any device or equipment at the place where the prisoner resides'.<sup>874</sup> If a corrective services officer gives a parolee this type of direction, it must also not be inconsistent with another condition of the person's parole order.<sup>875</sup> For further discussion of these powers, see section 11.13.5.

The PSA and CSA do not define or provide guidance about what a 'reasonable direction' is in respect of community-based orders. An absence of legislative guidance could risk inappropriate (or inadequate) supervision, which would frustrate the intended purpose of the order. For a person subject to the order, it could result in a lack of understanding and result in non-compliance.

Section 135 of the PSA does provide that any direction must, as far as practicable, avoid:

- (a) conflicting with the offender's religious beliefs; and
- (b) interfering with any times during which the offender usually works or attends school or another educational or training establishment; and
- (c) interfering with the offender's family responsibilities.<sup>876</sup>

Relevant to the administration of community service conditions, this section of the Act also provides that an offender must not be given a direction under a community-based order to perform more than eight hours

<sup>867</sup> *Corrective Services Act 2006* (Qld) s 3. Other provisions in that Act further define the scope of powers. Subject to any direction of the Minister, the chief executive is responsible for, inter alia, the supervision of offenders in the community ('offender' includes a person subject to a community-based order: schedule 4), and has the power to do all things necessary or convenient to be done for, or in connection with, the performance of the chief executive's functions under an Act (s 263). The chief executive may give written administrative directions to facilitate the effective and efficient management of corrective services (s 264) and must make administrative procedures to facilitate the effective and efficient management of corrective services, which must take into account the special needs of offenders (s 265). Chief executive functions (including powers) can be delegated and subdelegated (s 271). A corrective services officer has the powers given to the officer under an Act and is subject to the directions of the chief executive in exercising the powers. The powers may be limited under a regulation, condition of appointment, or by written notice given by the chief executive (s 276).

<sup>868</sup> *Penalties and Sentences Act 1992* (Qld) s 133. This is in contrast to section 276(b) of the *Corrective Services Act 2006* (Qld) in respect of supervision of parolees where corrective services are 'subject to the directions of the chief executive in exercising the powers.'

<sup>869</sup> *Penalties and Sentences Act 1992* (Qld) s 92(1)(a).

<sup>870</sup> Community service: 'the offender is required to perform unpaid community service for the number of hours stated in the order' (*Penalties and Sentences Act 1992* (Qld) s 102); graffiti removal order: 'the offender is required to perform unpaid graffiti removal service for the number of hours stated in the order' (s 110B), intensive correction order: 'the offender is to serve the sentence of imprisonment by way of intensive correction in the community and not in a prison' (s 113).

<sup>871</sup> See *Penalties and Sentences Act 1992* (Qld) ss 93(1)(g), 103(g), 110C(1)(g) and 114(1)(i). 'Community based order' is defined to mean 'any community service order, graffiti removal order, intensive correction order or probation order' (s 4).

<sup>872</sup> *Ibid* s 123(1).

<sup>873</sup> *Corrective Services Act 2006* (Qld) s 200(1)(b). This term is also not defined in the Act.

<sup>874</sup> *Ibid* ss 200A(2)–(3).

<sup>875</sup> *Ibid* s 200A(4).

<sup>876</sup> *Penalties and Sentences Act 1992* (Qld) s 135(1).

unpaid service on any day, unless the offender consents to this and this is approved by an authorised corrective services officer; and the offender must be allowed reasonable rest and meal breaks.<sup>877</sup>

Aside from these provisions, there is no legislative guidance in respect of the purpose of the direction or the types of matters for which a 'reasonable direction' can be given. Generally, where legislation delegates administrative power, this should be sufficiently defined, and the administrative decision be subject to appropriate review.<sup>878</sup>

Some stakeholders have suggested that a lack of guidance for what is a 'reasonable direction' can be problematic.<sup>879</sup> In Queensland, a person is required to consent to the making of a community-based order.<sup>880</sup> Despite a provision that the order be explained in 'language or a way likely to be understood by the offender',<sup>881</sup> factors such as poor literacy, use of legal terminology, a lack of plain language, the stress of being in court, and high levels of emotion may result in a person not fully understanding the requirements.<sup>882</sup> This was a matter particularly raised by the Aboriginal and Torres Strait Islander Advisory Panel, which also spoke about the traditional mistrust and fear that Aboriginal and Torres Strait Islander people can feel in a court setting.

### 8.12.1 Whether a direction is 'reasonable' or a judicial function

Aside from the general purposes of sentencing,<sup>883</sup> there is no specific legislative purpose of a community-based order for a court to consider before it is imposed. This is relevant as a community-based order may be imposed to meet a number of sentencing purposes, including punishment, rehabilitation, and community protection, or a combination of these purposes.

The parts of the PSA relating to probation and ICOs contain identical provisions<sup>884</sup> which give courts discretion to order additional requirements to the mandatory statutory requirements. They relate to submitting to medical, psychiatric or psychological treatment and complying with conditions 'the court considers necessary' to encourage behaviour acceptable to the community and to stop reoffending. In this respect, conditions affecting behaviour and risk of reoffending are primarily a judicial function.

If a corrective services officer identified a risk factor that may result in a person on a community-based order committing an offence, a court application would need to be made and a court would need to be satisfied:

- a) that the offender is not able to comply with the order because the offender's circumstances have materially altered since the order was made; or
- b) that the circumstances of the offender were wrongly stated or were not accurately presented to the court; or
- c) that the offender is no longer willing to comply with the order.<sup>885</sup>

This process takes time and may curtail a corrective services officer's ability to supervise a person subject to the order by being unable to quickly respond to changes in dynamic risk.

### 8.12.2 A condition or a direction: ability to challenge on appeal

The NSW Court of Criminal Appeal has noted the following principles apply to a court when imposing conditions on an order:

<sup>877</sup> Ibid ss 135(3)–(5).

<sup>878</sup> *Legislative Standards Act 1992* (Qld) s 4(3)(a).

<sup>879</sup> See, for example, Submission 11 (Queensland Corrective Services) 13.

<sup>880</sup> *Penalties and Sentences Act 1992* (Qld) ss 96, 106.

<sup>881</sup> Ibid s 95(2).

<sup>882</sup> Australian Law Reform Commission (n 21) 255 [7.101] citing NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders* (2011) 59 [5.13] and Australian Government, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016) 5.24.

<sup>883</sup> *Penalties and Sentences Act 1992* (Qld) s 9(1).

<sup>884</sup> Ibid s 94 regarding probation and s 115 regarding intensive correction orders.

<sup>885</sup> Ibid s 120(1)(b). For a community service order made under section 108B or a graffiti removal order, see s 120A.

First, the discretion as to conditions that may be attached to a bond is broad but not unlimited. The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for that crime, including deterrence and rehabilitation.

Secondly, the conditions must each be certain, defining with reasonable precision conduct which is proscribed.

Thirdly, the conditions should not in their operation be unduly harsh or unreasonable or needlessly onerous.<sup>886</sup>

There are currently no principles guiding a 'reasonable direction' in Queensland and it is not a simple process to challenge whether a direction is 'reasonable', as discussed in *Attorney-General for the State of Queensland v Brown*:<sup>887</sup>

It might be said that such an unreasonable direction could be challenged in court proceedings because it was unauthorised by law. However, no simple procedure exists for such a decision to be reviewed on the merits. The course of instituting and pursuing judicial review proceedings is costly and complicated. Incidentally, counsel for the Chief Executive of Queensland Corrective Services challenged whether the decision made requiring the respondent to reside at the Wacol Precinct in November 2011 was a decision of an administrative character made under an enactment and thereby a decision to which the *Judicial Review Act 1991* (Qld) applied. If, however, such a decision is of such character or is otherwise amenable to judicial review, the practical and forensic task of challenging such an unreasonable direction by means of judicial review is substantial.<sup>888</sup>

### 8.12.3 Legislative guidance for a 'reasonable direction'

If legislative guidance was provided, it could be either general or specific, with an explanation or example of the type of 'reasonable direction' that can be given depending on the type and purpose of the order imposed. However, even where legislation provides specific guidance,<sup>889</sup> whether a direction is 'reasonable' may depend entirely on the circumstances. For example, Justice Applegarth has commented:

Section 16B [of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)] permits a corrective services officer to give a released prisoner a reasonable direction about, amongst other things, accommodation. Depending upon the circumstances, a direction that a released prisoner be accommodated at the Wacol Precinct may be entirely reasonable. Such a direction may be reasonable in the context of a supervision order made against someone in the respondent's unusual circumstances where suitable accommodation in the community is not available, where suitable accommodation is available and the person does not take reasonable steps to obtain it or if there has been a change in a person's circumstances relating to the level of risk of committing a serious sexual offence. However, in many other circumstances, a direction under a supervision order for the respondent to live at the Wacol Precinct would be unreasonable. It would be unreasonable if such a course jeopardised his rehabilitation and with it, the protection of the community. It would be unreasonable if the direction arose because of inadequate steps taken by the Department to locate suitable accommodation in the community or because the Department unreasonably found accommodation proposed by the respondent to be not suitable.<sup>890</sup>

### 8.12.4 Examples from other jurisdictions

Requiring a person subject to a community-based order to comply with a direction of a supervising authority is not unique to Queensland. Other jurisdictions such as Victoria, NSW, and England and Wales have differing provisions on this issue and this must be considered in the context of the wider sentencing regime in each jurisdiction.

In Victoria and England and Wales, the legislative provisions are mostly general in nature with a few specific provisions. In NSW there are a variety of specific provisions and some general provisions. These jurisdictions

<sup>886</sup> *R v Bugmy* [2004] NSWCCA 258 [61] (Kirby P, Bryson JA and James J agreeing).

<sup>887</sup> [2012] QSC 68.

<sup>888</sup> *Ibid* 30 [160] (Applegarth J). This related to a reasonable direction under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 16B.

<sup>889</sup> For example see *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) s 16B.

<sup>890</sup> *A-G (Qld) v Brown* [2012] QSC 68, 30 [159] (Applegarth J).

provide examples for how legislation can provide both general and specific guidance for a supervising authority depending on the type of condition imposed.

## Victoria

The mandatory statutory conditions of Victorian CCOs in the *Sentencing Act 1991* (Vic) include a requirement for the person to ‘comply with any direction given by the Secretary that is necessary ... to ensure that the offender complies with the order’,<sup>891</sup> whether the direction is oral or in writing.<sup>892</sup>

The next section (Power of the Secretary to give written directions) specifically states that ‘there is attached to each community correction order the term that the offender must comply with any written direction given by the Secretary for or with respect to’ a list of items. These include:

- Reporting;
- Receiving visits;
- Notifying of a change of address and employment;
- Obtaining permission to leave the state;
- If subject to a community work condition — a written direction about performing unpaid work such as the place, date or time;
- If subject to a treatment and rehabilitation condition — a written direction about participation in a treatment or rehabilitation program; undergoing any drug or alcohol assessment; undergoing any drug or alcohol testing or undergoing any medical assessment or mental health assessment, such as to the place, date or time.<sup>893</sup>

Unlike Queensland, each type of CCO condition includes an overarching purpose of the condition for the court to consider. For example, a court may attach a ‘supervision condition’ if the court considers the person is to ‘be supervised, monitored and managed as directed by the Secretary ... for the purpose of addressing the need to ensure the compliance of the offender with the order.’<sup>894</sup>

## England and Wales

In England and Wales, a person subject to a community order is under the supervision of a ‘responsible officer’.<sup>895</sup> Legislation provides that a responsible officer has a general, overarching duty:

- (a) To make any arrangements that are necessary in connection with the requirements imposed by the order, and
- (b) To promote the offender’s compliance with those requirements.<sup>896</sup>

For each requirement of a community-based order, there are specific provisions for what instructions a responsible officer may give a person subject to the order. For example, under a ‘rehabilitation activity requirement’ a responsible officer may give instructions to attend appointments or participate in activities. Section 200A of the *Criminal Justice Act 2003* (UK) stipulates that:

- (3) Any instructions given by the responsible officer must be given with a view to promoting the offender’s rehabilitation; but this does not prevent the responsible officer giving instructions with a view to other purposes in addition to rehabilitation.<sup>897</sup>
- (4) The responsible officer may instruct the offender to attend appointments with the responsible officer or with someone else.

<sup>891</sup> *Sentencing Act 1991* (Vic) s 45(1)(f).

<sup>892</sup> *Ibid* s 45(2).

<sup>893</sup> *Ibid* s 46.

<sup>894</sup> *Ibid* ss 48E(1)–(2).

<sup>895</sup> *Criminal Justice Act 2003* (UK) s 197.

<sup>896</sup> *Ibid* s 198(1).

<sup>897</sup> It is unclear what ‘other purposes in addition to rehabilitation’ in section 200A(3) of the *Criminal Justice Act 2003* (UK) may mean, other than compliance with the order. See *Criminal Justice Act 2003* (UK) s 198(1)(b).

- (5) The responsible officer, when instructing the offender to participate in activities, may require the offender to –
- (a) participate in specified activities and, while doing so, comply with instructions given by the person in charge of the activities or
  - (b) go to a specified place and, while there, comply with any instructions given by the person in charge of the place.<sup>898</sup>

### New South Wales

In NSW, there are minimum standard conditions<sup>899</sup> and a court may order additional conditions on a CCO.<sup>900</sup> Depending on the type of additional condition imposed, there are separate obligations, which are outlined in the *Crimes (Administration of Sentences) Regulation 2014* (NSW).<sup>901</sup>

The legislative guidance provided in the Regulations clearly illustrate the types of matters for which a ‘reasonable direction’ can be given in respect of a ‘supervision condition’, ‘community service work condition’ and ‘rehabilitation or treatment condition’.<sup>902</sup> However, all other conditions (including a ‘curfew condition’, ‘abstention condition’ and ‘non-association condition’) have no obligations involving a community corrections officer.<sup>903</sup> As a stand-alone condition, this would mean the order is not monitored by a community corrections officer.

A person subject to a CCO with a ‘supervision condition’<sup>904</sup> has an obligation ‘to comply with all reasonable directions of a community corrections officer’ relating to any of the following:

- the person’s place of residence;
- participation in programs;
- not associating with a specified person;
- not frequenting or visiting a specified place or area;
- ceasing drug use;
- ceasing or reducing alcohol use;
- submitting to drug and alcohol testing;
- requirements for the purposes of monitoring compliance with the order; and
- permitting ‘a community corrections officer to visit the place of residence at any time and, for that purpose, to enter the premises’.<sup>905</sup>

There is no provision in the legislation for a court to vary or amend the obligations under the *Crimes (Administration of Sentences) Regulation 2014* (NSW). It is unclear why a community corrections officer can give directions in respect to matters for which a court could impose a stand-alone condition. For example, a person sentenced to a CCO with a ‘supervision condition’ can be given a direction not to associate with a specified person and not to frequent a place or area, despite a court deciding not to impose a ‘non-association condition’ or ‘place restriction condition’. A person may also be directed to undergo drug and alcohol testing or to cease or reduce alcohol use under a ‘supervision condition’, despite a court not imposing an ‘abstention condition’ or ‘rehabilitation or treatment condition’.

<sup>898</sup> *Criminal Justice Act 2003* (UK) s 200A.

<sup>899</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 88: must not commit any offence and must appear before the court if called on to do so.

<sup>900</sup> *Ibid* s 89.

<sup>901</sup> Pt 10 div 2.

<sup>902</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) ss 188, 189C, 189D.

<sup>903</sup> *Ibid* ss 189B, 189E–G.

<sup>904</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(2)(g).

<sup>905</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 188.

The ability of a community corrections officer to give directions in respect of abstaining from alcohol without any criteria is in contrast to the England and Wales regime. For example, in England and Wales, before an ‘alcohol abstinence and monitoring requirement’ can be made, a court must be satisfied that alcohol was either an element of the offence or a factor that contributed to the offence<sup>906</sup> and the person ‘is not dependent on alcohol’.<sup>907</sup> This is because a person subject to ‘alcohol abstinence’ is only monitored whereas an ‘alcohol treatment requirement’ provides for a person to receive treatment from a qualified or experienced person with a view to reducing or eliminating dependency on alcohol.<sup>908</sup> The purpose of alcohol abstinence in England and Wales is to provide a sentencing option to treat offenders who misuse alcohol and a court team will assess a person for suitability.<sup>909</sup> Comparatively, there are no assessment criteria for a community corrections officer in NSW to consider before giving any of the directions under a ‘supervision condition’.

In addition, under a ‘supervision condition’, a community corrections officer may ‘visit the place of residence at any time and, for that purpose, to enter the premises’.<sup>910</sup> In Queensland, legislation that confers the power to enter a residential premises without a warrant issued by a judicial officer or with the occupier’s consent should not, without the highest justification, be legislated without safeguards.<sup>911</sup>

The NSW regime provides an example for how legislation can specify the types of ‘reasonable directions’ that can be given to a person under an order. However, the regulations highlight that there can be potential risks when delegating administrative power.

### 8.12.5 The Council’s view

The Council considers there should be greater legislative guidance in respect of ‘reasonable directions’ for community-based orders. This would not only ensure that a person consenting to the order understands their obligations, but also provide for the scope of supervision for corrective services and may prevent a need for an application to be made to a court to amend the order.

If a CCO scheme is adopted in Queensland, the Council supports legislative guidance for reasonable directions to be necessary for the administration of each specific condition in the order (similar to the England and Wales model). The Council does not consider that CCO conditions such as abstaining from drugs or alcohol, non-association or curfews be unsupervised (as is the case in NSW).

The Council acknowledges that this issue was not raised in the Options Paper or discussed with stakeholders and recommends there be further consultation prior to this recommendation being implemented.

#### RECOMMENDATION: REASONABLE DIRECTIONS

33. The reasonable directions powers to be exercised by Queensland Corrective Services should be defined with reference to the specific types of directions necessary to properly administer individual conditions of the order, rather than be defined broadly (e.g. a requirement to comply with ‘any reasonable directions’ given by an authorised corrective services officer). Further consultation on the scope of reasonable directions powers should occur with courts and criminal justice stakeholders, including those agencies that have contributed to the Council’s review, prior to their introduction.

<sup>906</sup> *Criminal Justice Act 2003* (UK) s 212A(9).

<sup>907</sup> *Ibid* s 212A(10).

<sup>908</sup> *Ibid* s 212(1).

<sup>909</sup> Mayor’s Office for Policing and Crime, *Alcohol Abstinence Monitoring Requirement Toolkit (Version 2, 2014)* 6, 19–20. Offenders with the following medical conditions are excluded from alcohol abstinence requirement: type 1 diabetes, those with circulation problems, nerve damage, history of swelling, nickel allergies and deep vein thrombosis.

<sup>910</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 188(1)(e).

<sup>911</sup> *Legislative Standards Act 1992* (Qld) s 4(3)(e). See also, Queensland Government, Department of the Premier and Cabinet, *Queensland Legislation Handbook*, ‘Chapter 7 — Fundamental Legislative Principles’, 7.2 *Rights and Liberties of Individuals* (Web Page, 18 May 2016) <[https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/rights-and-freedoms.aspx#\\_edn31](https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/rights-and-freedoms.aspx#_edn31)>.

## Chapter 9 Home detention

### 9.1 What is home detention?

Home detention involves the confinement of offenders in their homes, rather than in prison.<sup>912</sup>

As highlighted in the QUT literature review undertaken for the purposes of this reference, there is no single model of home detention — but rather a number of models that apply at different stages of the criminal justice process:

Home detention takes different forms and can be utilised at various stages of the criminal justice process: as a component of bail designed to ensure the defendant's appearance at trial and non-interference with witnesses, in sentencing following conviction as a 'front-end' alternative to incarceration (when offenders have their sentences of imprisonment fully suspended and are instead sentenced to serve their time at home), and, more commonly, for eligible offenders on the 'back end' of sentences after a specific period of incarceration, as part of parole or as a distinct stage in the sentence.<sup>913</sup>

In the context of the Council's review, the models of home detention of most relevance are those that exist as sentencing options as a 'front-end' alternative to imprisonment.

### 9.2 Availability and use of home detention

Until 2006, home detention was available as a 'back-end' option in Queensland as part of a post-prison community release scheme. Under the former scheme, a prisoner could apply to a Community Corrections Board for a post-prison community release order if sentenced to a period of imprisonment of any length (for offences committed before 1 July 2001) or more than 2 years (for an offence committed on or after 1 July 2001).<sup>914</sup> A parole board was permitted to grant the order by making a release to work order, a home detention order or a parole order.<sup>915</sup>

As described by a 2005 legislative review of the *Corrective Services Act 2000* (Qld) (since repealed):

A home detention order is a highly supervised order with strict supervision. A prisoner on a home detention order is subject to a number of standard conditions as well as any condition made by a Community Corrections Board. A prisoner who is subject to a home detention order must live in the prisoner's own home or in other accommodation approved by a Community Corrections Board, such as a rehabilitation centre. The prisoner is not allowed to leave an approved residence without the permission of a corrective services officer, who may issue a pass for travel to a specific location for purposes such as employment or training or attending a rehabilitation program. A prisoner's whereabouts is randomly checked at home and other locations. A prisoner subject to a home detention order is not allowed to drink alcohol and is required to submit to drug tests.<sup>916</sup>

Home detention was abolished with the introduction of the new *Corrective Services Act 2006* (Qld) (CSA), with the intention of reducing the complexity of the community-based release framework in Queensland by establishing parole as the single form of supervised release into the community.

While the ability to attach the same conditions as for home detention exists under the CSA, these are conditions of parole, not a form of order that is made prior to a prisoner being eligible for release, or to apply for release, on parole.

<sup>912</sup> Gelb, Stobbs and Hogg (n 28) 45.

<sup>913</sup> Ibid 46.

<sup>914</sup> *Corrective Services Act 2000* (Qld) (repealed) ss 134(1) and 136.

<sup>915</sup> Ibid s 141.

<sup>916</sup> Queensland Government, Department of Corrective Services, *Legislation Review Corrective Services Act 2000, Community Based Release: Consultation Paper* (2005) 10 [18] (references omitted).

### 9.3 Issues

The Queensland Productivity Commission made a draft recommendation that the Queensland Government should reform sentencing legislation to make a sentence involving home detention available to courts.<sup>917</sup> In making this recommendation, the Commission pointed to NSW research which found that home detention with electronic monitoring (EM) and rehabilitation for offenders convicted of non-violent and non-serious offences reduces the probability of reoffending within 2 years by 16 percentage points compared to serving a prison sentence (a result which persisted for 5 years).<sup>918</sup> The cost savings were estimated at close to \$30,000 for each eligible prisoner on the basis of reduced supervision and future court and prison costs.<sup>919</sup>

The Commission suggested:

Although electronic monitoring should not be regarded as a panacea for the problems of prison overcrowding, opportunities exist for the greater use of technology to support a shift from prison to community management of the offender population.<sup>920</sup>

As discussed in Chapter 3 of this report, there is conflicting evidence about the impact on recidivism for offenders sentenced to home detention, and some concerns about its potential negative impacts, although it appears to help offenders to reintegrate into the community and deter future offending.

The Council is aware of a number of criticisms of home detention, including that an offender's family can be significantly affected by living in a home where an offender is under surveillance. This can make family members feel responsible for assisting the offender to meet the requirements of their order.<sup>921</sup> There are also negative impacts for family members of being included within the same environment as those who are subject to high levels of government oversight.<sup>922</sup>

During consultation, concerns were raised about female offenders who may be subject to domestic and family violence within the home; for these women, home detention may increase their exposure to the threat of violence and potentially reduce their ability to escape a violent partner.

Finally, concerns were expressed that the ability to access home detention as a penalty will disproportionately discriminate against Aboriginal and Torres Strait Islander offenders, mentally ill offenders, and offenders without a permanent home who may not have suitable accommodation for a court to consider home detention a viable option.

### 9.4 Options Paper proposals

In its Options Paper, the Council did not identify a preferred position on the introduction of home detention. Instead, it put forward questions about whether, if introduced, the better model was for it to be introduced as a condition of the proposed new CCO, or as a stand-alone sentencing order, and if introduced as a stand-alone order, what eligibility and suitability criteria should be applied, the preferred maximum duration of the order, and conditions.

In calling for feedback on home detention, the Council noted that:

- home detention may increase the sentencing options available to a court, but equally carries with it a number of risks (as outlined above) and is likely to be an option suitable only for a very small group of offenders;
- encompassing the ability to impose curfews with EM within a broader community order may be preferable to creating a complex legislative architecture to support a home detention order or more restrictive 'home detention' conditions likely to be used only for a small number of offenders,

<sup>917</sup> Queensland Productivity Commission (n 12) 161, Draft Recommendation 4.

<sup>918</sup> Ibid 152 citing Jenny Williams and Don Weatherburn, *Can Electronic Monitoring Reduce Reoffending?*, IZA Discussion Paper No. 12122 (IZA Institute of Labor Economics, 2019).

<sup>919</sup> Ibid.

<sup>920</sup> Ibid 153.

<sup>921</sup> Gelb, Stobbs and Hogg (n 28) 124 citing Marietta Martinovic, 'Home Detention: Issues, Dilemmas and Impacts for Detainees' Co-residing Family Members' (2007) 19(10) *Current Issues in Criminal Justice* 90.

<sup>922</sup> Ibid.

particularly given that parole, as it currently operates, already allows for the same types of EM and curfew conditions to be ordered, effectively creating a form of home detention.

## 9.5 Submissions and consultation

### 9.5.1 Merits of introducing a home detention order in Queensland

The Council has heard mixed views expressed regarding the potential introduction of home detention as a sentencing option.

Legal and criminal justice stakeholders, on the whole, have provided cautious support for this proposal, to the extent that they accept that home detention might provide courts with a broader suite of sentencing options. The views of Legal Aid Queensland (LAQ) are broadly representative of these views, with the observation made: ‘As another sentencing option home detention, may represent a good half way step back into the community for those on lengthy remand periods, or be [an] appropriate option for young offenders’.<sup>923</sup>

The strongest support was from the Bar Association of Queensland, the Queensland Law Society (QLS) and the Queensland Police Union of Employees (QPU). In a preliminary submission, the Bar Association expressed support for home detention as a sentencing option and as a potential pre-release option.<sup>924</sup> In support, it was noted that a home detention order could allow for ‘greater rehabilitation of offenders in the community, and access to additional services, while also removing the high cost of incarceration to the public.’<sup>925</sup> The QLS also supported home detention as a condition of a new CCO, noting that being a condition of a CCO would be easier to integrate into the sentencing regime, or alternatively, as a stand-alone sentencing option.<sup>926</sup>

The QPU supported the introduction of home detention, suggesting it was: ‘a worthwhile sentencing option’ which, if implemented properly, could provide ‘a realistic solution to prison and watchhouse overcrowding and the default option for persons ordered to serve actual imprisonment’ but excluding ‘certain offences, such as murder, offences of violence and sexual offences’ on community protection grounds.<sup>927</sup>

At the same time, many stakeholders have acknowledged this option is likely to be used only for a relatively small number of offenders — one of the most significant barriers to the potential take-up of this option being the availability of suitable accommodation. LAQ noted that housing would be a significant barrier to its use, given that for many of its clients ‘stable housing is a major issue and may not be available for long periods of time’.<sup>928</sup> It also recognised home detention ‘is likely to be costly to impose and monitor’.<sup>929</sup> In a similar vein to the Queensland Productivity Commission, the QPU, has pointed to the ‘substantial savings to Government’ such a proposal could deliver ‘by reducing the actual number of prison beds required’.<sup>930</sup>

Support for the introduction of home detention among legal stakeholders, however, has not been universal, with Sisters Inside strongly opposed to this proposal, and to the use of EM more generally. Their concerns included that home detention ‘extends the violence of the prison system into people’s homes’ and ‘normalises surveillance and compliance, rather than support, autonomy and accountability’.<sup>931</sup> Particular objections include that home detention:

<sup>923</sup> Submission 6 (Legal Aid Queensland) 7.

<sup>924</sup> Preliminary submission (Bar Association Queensland) 13 July 2018, 5–6. See also the Bar Association’s support for home detention to be a condition of a CCO in their preliminary submission (Bar Association Queensland) (20 March 2019), 7–8.

<sup>925</sup> Preliminary submission (Bar Association Queensland) 13 July 2018, 5.

<sup>926</sup> Submission 15 (Queensland Law Society) 4–5.

<sup>927</sup> Submission (Queensland Police Union of Employees) 1.

<sup>928</sup> Submission 6 (Legal Aid Queensland) 7.

<sup>929</sup> Ibid.

<sup>930</sup> Submission 10 (Queensland Police Union of Employees) 7.

<sup>931</sup> Submission 7 (Sisters Inside) 5.

- ‘will have a negative gendered impact for women, both as people sentenced for offences and as family members’,<sup>932</sup> including exposing women to further punishment and exposing them to violence ‘as they may feel unable to leave a violent relationship or call the police for assistance’;<sup>933</sup>
- will have a negative impact on children living in the household and the ability of parents to support children – such as in circumstances where there is a medical emergency;<sup>934</sup> and
- will operate in a discriminatory way as it would only be available to women who have a suitable home.<sup>935</sup>

Citing statistics from the 2018 National Prisoner Health Data Collection, Sisters Inside noted that people who enter prison are 66 times more likely to be homeless than people in the general population, and 54 per cent of people leaving prison (based on those who participated in the survey) expect to be homeless on release.<sup>936</sup> Sisters Inside supported the Government placing a priority on housing for women exiting prison and suggested ‘it [would be] unconscionable to introduce a sentencing option that relies on people having a home’.<sup>937</sup>

The QPU responded to what it anticipated as being objections by some that home detention would disadvantage those who are homeless by suggesting any savings achieved by reducing prisoner numbers could be reinvested in other services, such as providing housing for the homeless and other similar social support services aimed at preventing offending.<sup>938</sup> QPU further suggested the use of government-owned housing might provide an option for homeless people while serving a period of home detention, or ‘the Department of Corrective Services might acquire housing in major centres, which could be used for home detention purposes’.<sup>939</sup>

### 9.5.2 Use of home detention in other jurisdictions for federal offenders

The Office of the Commonwealth Director of Public Prosecutions (CDPP) referred to the availability of home detention orders for federal offenders in NSW, SA, and the NT.<sup>940</sup> It observed that these orders have been imposed ‘infrequently’ over the past three financial years, having been ordered in just 47 cases.<sup>941</sup>

The CDPP identified a potential reason might be that, ‘due to combined state and federal legislative requirements, this sentencing option is only available in a limited number of cases and circumstances’.<sup>942</sup>

The CDPP noted that if home detention were to be introduced in Queensland and intended for use in the sentencing of federal offenders, it would need to be prescribed as an available order under the *Crimes Regulations 1990* (Cth).<sup>943</sup>

The CDPP considered that the form of Tasmania’s new home detention order was not sufficiently similar to those preserved in section 20AB(1AA)(a) of the *Crimes Act 1914* (Cth) and advised that a request had been made of the Commonwealth Attorney-General’s Department to consider prescribing these orders under Regulation 6 of the *Crimes Regulations 1990* (Cth).<sup>944</sup>

Arrangements for recognition and use of state-based sentencing orders in the sentencing of federal offenders is discussed at section 5.5.4 of this report.

---

<sup>932</sup> Ibid.

<sup>933</sup> Ibid 6.

<sup>934</sup> Ibid

<sup>935</sup> Ibid.

<sup>936</sup> Ibid.

<sup>937</sup> Ibid 6.

<sup>938</sup> Submission 10 (Queensland Police Union of Employees) 7.

<sup>939</sup> Ibid 8.

<sup>940</sup> Submission 13 (Commonwealth Director of Public Prosecutions) 1 [4]–[5].

<sup>941</sup> Ibid.

<sup>942</sup> Ibid 1 [4].

<sup>943</sup> Ibid 1 [5].

<sup>944</sup> Ibid 5 [28].

### 9.5.3 Suitability and eligibility criteria

In its Options Paper, the Council asked what protections would need to be established if home detention was to be introduced as a sentencing order, to ensure it is used only in appropriate circumstances. For example, whether the availability of home detention should be restricted to circumstances where:

- the person is convicted of an offence punishable by imprisonment;
- a conviction is recorded;
- the person consents to the order being made;
- the court would otherwise have imposed a sentence of immediate imprisonment and would not have ordered the sentence to be suspended or the person to be released at the date of sentence or shortly after this on court ordered parole;
- a suitability assessment has been undertaken that takes into account any impact the order is likely to have on any victim of the offence, any spouse or family member of the offender, and anyone living at the residence at which the person would live;
- any co-resident has consented to the person living at the nominated address.

Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis of The University of Queensland School of Law supported home detention as an alternative to an ICO and all the listed criteria as relevant factors to be taken into account by a court where a home detention order is being considered.<sup>945</sup>

LAQ supported the need for the person to have been convicted of an offence punishable by imprisonment, the person to consent to the making of the order, and assessment of suitability, but did not think a conviction would 'necessarily' need to be recorded.<sup>946</sup>

The QLS supported the above criteria except for the requirement that the court must otherwise have imposed immediate imprisonment and not a suspension, or release on parole, at or shortly after sentence.<sup>947</sup> The QLS considered that as suitability for the order is likely to be limited to a small group of offenders, the availability of the order should not be further constrained.<sup>948</sup>

The QLS noted that a requirement for a co-resident to consent was sensible; however, it was concerned that the offender may be at the co-resident's mercy and there could be difficulties if consent was withdrawn at a later date and there were not practical variation or cancellation provisions.<sup>949</sup>

Fighters Against Child Abuse Australia (FACAA) supported consideration of any impact the order is likely to have on any victim of the offence, any spouse or family member of the offender, and anyone living at the residence at which the person would live, as part of a suitability assessment, as well as the suitability of the location of the proposed residence, suggesting:

This should be an absolute must for any order of home detention. If the home is near the victim at all then it is inappropriate. This is why we at FACAA believe home detention is inappropriate for child abuse sentences. Simply put homes are always near pre-schools, schools, parks and this is not a risk we are willing to take so a convicted child abuser can serve their sentence in comfortable surroundings.<sup>950</sup>

It also supported any suitability checks extending to other members of the person's household:

Background checks also need to be done on all residents of the home the detention is to be served and their criminal history needs to be checked. Should it be found the residents of the house are of

<sup>945</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 3.

<sup>946</sup> Submission 6 (Legal Aid Queensland) 7–8.

<sup>947</sup> Submission 15 (Queensland Law Society) 5–6.

<sup>948</sup> Ibid 6.

<sup>949</sup> Ibid 7.

<sup>950</sup> Submission 4 (Fighters Against Child Abuse Australia) 14–15.

questionable character, then that residence would be deemed to be inappropriate for a home detention order to be served.<sup>951</sup>

The need for the consent of co-residents was identified by the QPU and FACA, in particular, as essential.<sup>952</sup> The QPU also suggested prior breaches of home detention orders may need to be considered by a court before making such an order.<sup>953</sup>

FACA was strongly of the view if an offence is punishable by imprisonment, then imprisonment should be ordered<sup>954</sup> — suggesting its support for the use of home detention only where a non-custodial order would otherwise have been considered, rather than use of this option in place of imprisonment.

#### 9.5.4 Offences

The Council asked in its Options Paper whether there should be any restrictions on the types of offences, or circumstances, in which home detention is used (e.g. if there are safety concerns for victims or co-residents, or in the case of offences involving the use of violence, whether there is an unacceptable risk of the person committing a further violent offence).

LAQ indicated they would not support any limitation on the availability of home detention by offence type, suggesting the identified ‘protections/guidelines in conjunction with a suitability assessment would be sufficient’.<sup>955</sup>

The QLS did not support types of offences being excluded but did consider there should be circumstances where the court should not make a home detention order, such as:

- Where there are safety concerns for victims or co-residents;
- Where there are safety concerns for other vulnerable people;
- Where there are safety concerns for the offender;
- In circumstances regarding a violent or sexual offence, where the court considers there is an unacceptable risk the offender would commit a further violent or sexual offence; and/or
- Where there are concerns regarding domestic violence in the proposed residence.<sup>956</sup>

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis also supported there being a discretion as to the types of offences to which home detention might apply, provided the person is otherwise assessed as suitable for the order and it is considered appropriate to make the order taking into account the individual circumstances of the case.<sup>957</sup> In doing so, they remarked:

We appreciate that in some cases a person who is convicted of offences involving violence may be deemed unsuitable for home detention, but it is our view that they should not be automatically excluded — it should depend on the circumstances. Part of the assessment for suitability should include assessment for risk of violence.<sup>958</sup>

The QPU considered there are certain offences for which home detention would not be appropriate, being offences ‘of a sexual nature (unless there were exceptional circumstances), and those involving violence to a domestic partner or another person who ordinarily resides with the offender’.<sup>959</sup>

---

<sup>951</sup> Ibid.

<sup>952</sup> Ibid; Submission 10 (Queensland Police Union of Employees) 6.

<sup>953</sup> Submission 10 (Queensland Police Union of Employees) 7.

<sup>954</sup> Submission 4 (Fighters Against Child Abuse Australia) 15.

<sup>955</sup> Submission 6 (Legal Aid Queensland) 8.

<sup>956</sup> Submission 15 (Queensland Law Society) 7.

<sup>957</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 4.

<sup>958</sup> Ibid.

<sup>959</sup> Submission 10 (Queensland Police Union of Employees) 7.

FACAA emphasised the importance of public safety and community protection (particularly of children), as the overriding consideration, submitting:

Home detention is appropriate when the crime committed does not place the public in harm[’s] way should the criminal re-offend. These crimes include petty theft, not paying fines, driving offences (other conditions can be used for driving offences such as interlock devices or impounding of the convicted person’s car).<sup>960</sup>

...

Giving home detention should only be used for cases where the crimes have not put the public at risk at all.<sup>961</sup>

...

If the nature of the crime involves a direct threat to the general public (child offences, sex offences, violent offences) then no a home detention order is inappropriate as an ankle bracelet electronic monitoring device will not stop someone from abusing a child or committing a sexual offence against a member of the public.<sup>962</sup>

### 9.5.5 Form of order

The QPU supported home detention as providing an alternative to immediate imprisonment, which would require a person to live at a specified address and not leave that address, ‘unless in circumstances of real emergency or for purposes authorised by the sentencing court or a supervising parole officer’ instead of a curfew.<sup>963</sup> Examples provided by QPU of circumstances that would properly support the person leaving their residence while subject to the order included to:

- attend actual work;
- perform community service;
- attend medical appointments;
- discharge specific parental responsibilities (such as taking children to school);
- attend training or other courses of study; or
- undertake grocery shopping or attend to other household needs.<sup>964</sup>

LAQ similarly recognised the need for ‘some flexibility if there are reporting requirements or to allow a person to attend courses, training, schooling or family commitments’.<sup>965</sup>

As discussed above, the impact of home detention on parents’ ability to support their children was a particular concern of Sisters Inside, which opposed the introduction of home detention.<sup>966</sup>

The QPU submitted individuals on home detention should be subject to regular monitoring, including being required to wear a GPS tracker, and to abstain from the consumption of alcohol and dangerous drugs (other than those prescribed and disclosed to QCS).<sup>967</sup> The ability of police officers and parole officers to perform checks was also considered important, including requiring the person to provide breath, urine or blood samples for testing.<sup>968</sup> To act as a ‘viable option’ and alternative to actual imprisonment, the QPU recommended:

[f]urther restrictions would need to be imposed on an offender, and with their consent, other occupants. Those would need to extend to a general ban on the possession of alcohol and dangerous drugs at the

<sup>960</sup> Submission 4 (Fighters Against Child Abuse Australia) 13.

<sup>961</sup> Ibid 14.

<sup>962</sup> Ibid 16.

<sup>963</sup> Submission 10 (Queensland Police Union of Employees) 5.

<sup>964</sup> Ibid.

<sup>965</sup> Submission 6 (Legal Aid Queensland) 7.

<sup>966</sup> Submission 7 (Sisters Inside) 5–6.

<sup>967</sup> Submission 10 (Queensland Police Union of Employees) 6.

<sup>968</sup> Ibid.

premises, and a legislative power for parole officers and police officers to enter and search such premises at any time for the purposes of ensuring compliance, without the need for a search warrant.

There would also need to be a restriction on the number of persons who would be permitted to visit the premises or remain in the premises overnight.<sup>969</sup>

The QPU also supported the use of community service as a condition of home detention, and also suggested courts would need the ability to impose other conditions as they considered appropriate, 'such as limited access to the internet or computer systems for certain types of offenders'.<sup>970</sup>

While not a specific question in the Options Paper, the Council received some limited feedback on appropriate breach powers. For example, the QPU supported breaches being punishable administratively by 'requiring the person to serve actual imprisonment for a period not exceeding 2 weeks for each breach' and suggested '[r]epeated breaches should be a criminal offence and/or grounds for applying to the court to revoke the home detention order'.<sup>971</sup>

### 9.5.6 Duration

LAQ supported a maximum term of 12 months on the basis that: 'many of our clients would struggle to maintain consistent housing for 12 months or more'.<sup>972</sup> The ability to vary the address during the course of the order, in this context, was also viewed as important.<sup>973</sup>

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis supported a 2-year order but did not provide any particular rationale for this.<sup>974</sup>

The QLS considered that as suitability for the order is likely to be limited to a small group of offenders, the maximum period of the order and maximum curfew periods should not be set by legislation.<sup>975</sup> However, the QLS favoured a 2-year maximum to align with the NSW model.<sup>976</sup> It was noted that the circumstances of the offender may change throughout the order (particularly if the order was lengthy) and provisions are required to allow for either the offender or QCS to apply to a court for variation or cancellation.<sup>977</sup>

FACAA suggested any order longer than 12 months would not be appropriate because 'it shouldn't be a softer option for serving time'.<sup>978</sup> If the period was set beyond this, FACAA suggested it be served as a combination of a custodial sentence and home detention at the end of the order.<sup>979</sup>

### 9.5.7 Monitoring arrangements

In its submission, the QPS called for clarity about responsibilities for service provision in the pre- and post-management of those in the community on community-based sentencing orders, including home detention orders. It noted any reforms:

will have an impact on the capacity of the Service to support the monitoring of offenders in the community and enforce compliance with community-based orders, if required to do so. For this reason, clarification of responsibilities for service provision ... is essential to inform operational resourcing requirements.<sup>980</sup>

The QPU suggested any savings realised through the use of home detention (in terms of prison beds required) could be reinvested 'to increase parole and police numbers to allow '24/7 random monitoring' of persons

<sup>969</sup> Ibid.

<sup>970</sup> Ibid 7.

<sup>971</sup> Ibid 6.

<sup>972</sup> Submission 6 (Legal Aid Queensland) 8.

<sup>973</sup> Ibid.

<sup>974</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 4.

<sup>975</sup> Submission 15 (Queensland Law Society) 8.

<sup>976</sup> Ibid.

<sup>977</sup> Ibid.

<sup>978</sup> Submission 4 (Fighters Against Child Abuse Australia) 16.

<sup>979</sup> Ibid 16–17.

<sup>980</sup> Submission 3 (Queensland Police Service) 2.

on home detention'.<sup>981</sup> They submitted: 'Such a scheme could operate similar to that already undertaken by police officers responsible for monitoring reportable offenders, provided it was properly resourced and funded'.<sup>982</sup>

## 9.6 Issues and options

The Council considers that it is important for any consideration of whether home detention is introduced in Queensland as a sentencing option is informed by evidence. The key findings of the literature review undertaken by QUT based on research into home detention are:

- Home detention as a front-end order is rarely used in Australia, despite having high rates of successful completion.
- The costs of home detention tend to be higher than for other orders served in the community, primarily due to the cost of EM.
- Home detention can place unintended burdens on other members of the household. Nonetheless, home detention can ease reintegration following prison, facilitate reconnection with pro-social family and activities, and deter future offending.
- While there is little research on the effectiveness of home detention among vulnerable cohorts, it may be useful for offenders who are unable to access other orders.
- Intensive case management, using a mix of surveillance and rehabilitative strategies, appears to be important for successful completion of home detention. Findings on other factors affecting completion of home detention have been inconsistent.<sup>983</sup>

The authors conclude: 'Despite mixed results and findings of increased stressors within the home detention household, the strongest of the research studies show that the advantages of home detention outweigh the disadvantages'.<sup>984</sup> In particular, 'home detention can aid in reintegration, can facilitate reconnection with pro-social family and activities, and can deter future offending'.<sup>985</sup>

Its use for vulnerable cohorts and its impact on other members of the household — particularly women and children — is less certain. The authors suggest 'all need further research and close consideration to guide home detention development, implementation and use'.<sup>986</sup>

### 9.6.1 Home detention in other jurisdictions

Home detention as a sentence or post-sentence option is currently available in three Australian jurisdictions:<sup>987</sup> Tasmania, SA and the NT.<sup>988</sup> In NSW, home detention is no longer a discrete sanction but may be incorporated as a component of an ICO.<sup>989</sup> It is also available as a separate sentencing order in NZ,<sup>990</sup> and in Canada as a condition of conditional sentences.<sup>991</sup>

<sup>981</sup> Submission 10 (Queensland Police Union of Employees) 7.

<sup>982</sup> Ibid.

<sup>983</sup> Gelb, Stobbs and Hogg (n 28) xi, xiii.

<sup>984</sup> Ibid 129–130.

<sup>985</sup> Ibid.

<sup>986</sup> Ibid.

<sup>987</sup> Home detention is also available in Western Australia as a pre-trial condition of bail: *Bail Act 1982* (WA) s 13(2).

<sup>988</sup> *Sentencing Act 1995* (NT) pt 3 div 5 sub-div 2; *Sentencing Act 2017* (SA) pt 3 div 7 sub-div 1; *Sentencing Act 1997* (Tas) pt 5A.

<sup>989</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2)(a) inserted by *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

<sup>990</sup> *Sentencing Act 2002* (NZ) s 10A.

<sup>991</sup> See *Criminal Code* R.S.C. 1985, c. C-46 s 742.3(2)(f) regarding 'such other reasonable conditions as the court considers desirable ... for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences'. A Canadian guideline judgment, *R v Proulx* [2000] 1 SCR 61, 88, 115 stated that conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty and conditions such as house arrest or strict curfews should be the norm, not the exception.

## South Australia

In SA, home detention was previously a ‘back-end’ option until 2016 when it was expanded as a sentencing option for courts.<sup>992</sup> A home detention order may be imposed where the court sentences a person to a period of imprisonment which is not suspended and the court considers the person is suitable.<sup>993</sup> If the person is sentenced to a non-parole period, the person is subject to the home detention order until released on parole.<sup>994</sup> The legislation provides that ‘[t]he paramount consideration for the court when determining whether to make a home detention order must be to protect the safety of the community (whether as individuals or in general)’.<sup>995</sup> The court must also take into consideration the impact of the order on any victim, spouse or domestic partner or co-resident, the pre-sentence report and any other matter.<sup>996</sup> The court must not make a home detention order if:

- the order would affect public confidence in the administration of justice;
- the non-parole period is 2 years or more for a ‘prescribed offence’;
- the offence is a serious sexual offence unless special reasons exist;
- the offence is a serious and organised crime offence or specified offence against police;
- the offence is a ‘designated offence’ and in the previous 5 years the person has been sentenced to imprisonment;
- the residence is not suitable;
- the home detention order is cumulative or concurrent with another term of imprisonment (which is not ordered to be served as a home detention order);
- adequate resources do not exist for the proper monitoring of the offender; and
- in the last 5 years there has not been a previous home detention order or ICO imposed for a designated offence.<sup>997</sup>

Home detention can be imposed where there is a prescribed minimum penalty, but the offences of murder, treason, terrorism or an offence that prohibits a penalty being mitigated are excluded.<sup>998</sup> A number of other offences are also excluded, including serious sexual offences unless particular circumstances apply, or the court is satisfied that ‘special reasons’ exist for the making of the order.<sup>999</sup>

A person subject to a home detention order must remain at the residence but is permitted to leave the residence for the purposes of:

- employment (as approved by the home detention officer);
- an urgent medical or dental appointment;
- attendance for a mental or physical health appointment, an intervention program or education, training or other activity; and
- as approved by the home detention officer.<sup>1000</sup>

<sup>992</sup> *Statutes Amendment (Home Detention) Act 2016* (SA). A home detention condition can also be imposed on breach of an ICO: *Sentencing Act 2017* (SA) ss 83(2)(b), 83(4).

<sup>993</sup> *Sentencing Act 2017* (SA) s 71(1).

<sup>994</sup> *Ibid* s 72(2).

<sup>995</sup> *Ibid* s 69(2).

<sup>996</sup> *Ibid* s 71(3).

<sup>997</sup> *Ibid* s 71(2).

<sup>998</sup> *Ibid* s 70.

<sup>999</sup> *Ibid* s 71(2)(b).

<sup>1000</sup> *Ibid* s 72.

A person subject to the home detention order is to submit to EM and is prohibited from possessing firearms, ammunition or drugs.<sup>1001</sup> The person must be under the supervision and obey the lawful directions of a home detention officer.<sup>1002</sup> A home detention officer may enter the residence, telephone the residence or any place where the person is permitted and question any person as to the whereabouts of the offender.<sup>1003</sup>

If an offender has breached a condition of the order or the residence is no longer suitable, 'the court must revoke the order and order that the balance of the sentence ... be served in custody'.<sup>1004</sup> The court must take into account the compliance and the period spent on the order or in custody pending the breach outcome, and may direct that the imprisonment is cumulative on any other sentence.<sup>1005</sup> In special circumstances the court may refrain from revoking the order.<sup>1006</sup>

Researchers in SA reviewed the effectiveness of the order for prisoners released on home detention as a 'back-end' order by Corrective Services prior to the legislative changes.<sup>1007</sup> Of the cohort sample, the study found that the type of offences given back-end home detention orders, 30.9 per cent were drug related (drug trafficking, manufacturing and possession), 21.8 per cent were for violent offences (assault and robbery), 19.2 per cent for administration offences (offences against justice procedures, licence and regulation offences) as well as theft offences (11.7%) and fraud offences (11.4%).<sup>1008</sup> Prisoners in the sample who were on home detention were mostly male (84.2%, with 15.8% female).<sup>1009</sup> These proportions were consistent with the male and female representation in the criminal justice system.<sup>1010</sup> Approximately 9 per cent of the sample were Aboriginal or Torres Strait Islander people (with no difference between the proportion of males and females).<sup>1011</sup> Aboriginal and Torres Strait Islander offenders on the order were overrepresented relative to the general population proportion but lower than the proportion of Aboriginal and Torres Strait Islander people in the criminal justice system.<sup>1012</sup>

### Northern Territory

In the NT, where a court imposes a term of imprisonment it may suspend the sentence upon the person entering into a home detention order.<sup>1013</sup> The maximum duration of the order is 12 months and the person must submit to EM and not leave the premises except as permitted by a parole and probation officer.<sup>1014</sup> The person subject to the order is required to consent and the court may only make a home detention order if a report is received from the Commissioner stating that the residence is suitable and the order will not pose a risk to co-residents or the community generally.<sup>1015</sup>

A person subject to the order or the Commissioner may make an application to the court seeking the order be discharged, revoked or varied having regard to circumstances that have arisen since the order was made.<sup>1016</sup> If the court is satisfied that the order is breached, the court must revoke the order and the person must be imprisoned for the term suspended, despite any period the person may have served under the order.<sup>1017</sup> If the breach is not a result of further offending punishable by imprisonment, the court may allow

---

<sup>1001</sup> Ibid ss 72(1)(e)–(h).

<sup>1002</sup> Ibid ss 72(1)(c)–(d).

<sup>1003</sup> Ibid s 76.

<sup>1004</sup> Ibid s 73(1).

<sup>1005</sup> Ibid s 73(4).

<sup>1006</sup> This applies if the breach was trivial or there were proper grounds for excuse: ibid ss 73(2).

<sup>1007</sup> Jesse Cale et al, *Evaluation of Home Detention in South Australia: Research Report 1 (Baseline Analysis)* (UNSW Social Policy Research Centre, 2017).

<sup>1008</sup> Ibid 13.

<sup>1009</sup> Ibid 11.

<sup>1010</sup> Ibid 24.

<sup>1011</sup> Ibid 11.

<sup>1012</sup> Ibid 24.

<sup>1013</sup> *Sentencing Act 1995* (NT) s 44(1).

<sup>1014</sup> Ibid ss 44(2)–(3).

<sup>1015</sup> Ibid s 45.

<sup>1016</sup> Ibid s 47.

<sup>1017</sup> Ibid ss 48(6)–(7).

the home detention order to continue, vary the order or make an order suspending the sentence and a new home detention order if the order has expired.<sup>1018</sup>

### Tasmania

In Tasmania, a court may make a home detention order if the court considers it would have sentenced the offender to a term of imprisonment.<sup>1019</sup> The court must consider a pre-sentence report, be satisfied the residence is suitable and the offender and co-residents have consented to the order.<sup>1020</sup> The court must be satisfied that where the offence is in relation to family violence or is a violent or a sexual offence and the residence is where the victim resides, there is not a significant risk the person may commit a violent or sexual offence during the period of the order.<sup>1021</sup>

A person subject to the order must abide by core conditions including:

- to reside at the address;<sup>1022</sup>
- submit to EM (unless the court determines there are suitable reasons for the person not to);
- comply with lawful directions of a probation officer including directions in respect to the kind and place of employment and engagement in a personal development activity, counselling or treatment; and
- permit a police officer to enter and search the premises, conduct a frisk search or take samples of substances found at the premises or on the person<sup>1023</sup>

A court can also impose special conditions such as requiring the person to appear before the court, abstain from alcohol, take medication as prescribed, or any other condition 'the court considers appropriate to reduce the likelihood of re-offending during the operational period of the order'.<sup>1024</sup>

A person may leave the premises for a 'relevant reason', which includes seeking urgent medical or dental treatment, if it is necessary to avoid or minimise risk of injury or death of the person or another person or if approval has been given by a probation officer.<sup>1025</sup> The order may be varied by application<sup>1026</sup> and on breach the court may confirm, vary or cancel the order.<sup>1027</sup>

In Tasmania — the most recent jurisdiction to introduce this order — the introduction of home detention followed a review by the Tasmanian Sentencing Advisory Council (TSAC) of intermediate sentencing orders in the context of a commitment by the Tasmanian Government to phase out suspended sentences. The TSAC found:

Home detention is an effective sentencing option in other jurisdictions with high completion rates and relatively low recidivism rates. It is able to address multiple aims of sentencing and provides an onerous sentencing order that both punishes an offender, deters the offender and others from committing offences, and assists in addressing the offender's rehabilitative needs. It allows the offender to maintain family and community connections and remain in employment. Conditions attached to the order also provide community protection by the supervision requirement and the restrictions placed on the movement and activities of the offender.<sup>1028</sup>

---

<sup>1018</sup> Ibid s 48(9).

<sup>1019</sup> *Sentencing Act 1997* (Tas) s 42AC(1).

<sup>1020</sup> Ibid s 42AC(2).

<sup>1021</sup> Ibid s 42AC(3).

<sup>1022</sup> This may include a boarding premises or group premises (such as a caravan park or premises for the purpose of care or mental health rehabilitation or alcohol or drug treatment).

<sup>1023</sup> *Sentencing Act 1997* (Tas) s 42AD.

<sup>1024</sup> Ibid s 42AE(2)(d).

<sup>1025</sup> Ibid s 42AD(4).

<sup>1026</sup> Ibid s 42AH.

<sup>1027</sup> Ibid s 42AI(4).

<sup>1028</sup> Sentencing Advisory Council (Tasmania) (n 80) 71.

The Tasmanian model is aligned to the NZ approach, where home detention rates have increased over time, from 3.1 per cent of all adults convicted in 2008 (n=2,633) to 5.5 per cent in 2019 (n=2,982).<sup>1029</sup>

While the numbers of those on orders in NZ give cause for optimism as to the extent to which such an order might be used, in Australia, the take up of home detention as a sentencing order has generally been modest at best. In some jurisdictions, it has also declined over time. For example, the use of home detention in NSW halved between 2005 and 2012 to only 161 offenders.<sup>1030</sup> Despite the decline in the use of home detention orders in NSW, the completion rate was 90.5 per cent in 2011–12.<sup>1031</sup>

### New South Wales

In 2018, home detention became a condition of the NSW form of ICO (which was also amended) rather than being retained as a sentencing order in its own right (see section 7.7.1).

The NSW sentencing reforms followed a 2013 review undertaken by the NSW Law Reform Commission (NSWLRC). The NSWLRC in its report noted the significant advantages that home detention and ICOs have over full-time custody including: allowing a person to retain employment; allowing a person to remain in contact with family networks; ‘avoiding any potential contaminating effects from offenders being imprisoned with other offenders’; allowing a person to maintain public housing; the ability to combine a benefit to the community (through community service work) with rehabilitation and punitive aspects; and that home detention costs less than full-time custody.<sup>1032</sup>

One of the main factors preventing use of the order identified by the NSWLRC was geographical location and the difficulties with EM in remote areas.<sup>1033</sup> In addition, practical issues such as housing (despite Corrective Services NSW being required to make all reasonable efforts to find suitable accommodation<sup>1034</sup>), supervision and an absence of landlines for telephone monitoring were also noted to be a barrier to using the order.<sup>1035</sup>

The NSWLRC further noted that legislative provisions restricted the availability of the order by excluding particular offences and providing for circumstances where the order is not available — for example, if a person has any previous conviction for murder, attempted murder or manslaughter, serious sexual assault, stalking or intimidation.<sup>1036</sup> The NSWLRC considered that while a small number of serious offences should be excluded (including domestic violence offences where the victim is a co-resident), they agreed with stakeholders that broad, generic exclusions were not necessary and that mandatory suitability assessments could assess the actual risk of a person.<sup>1037</sup> The NSWLRC recommended six targeted improvements to increase the availability of home detention<sup>1038</sup> and ultimately considered that home detention and ICOs should be replaced with a community detention order (being an order to replace home detention, ICOs and suspended sentences).<sup>1039</sup>

## 9.6.2 Options

There are various options that could be considered in Queensland for the introduction of home detention:

1. Provide for the continued availability of electronic monitoring and curfews to be attached in appropriate cases as conditions of parole orders, in effect operating as a form of ‘back-end’ home detention.

<sup>1029</sup> Gelb, Stobbs and Hogg (n 28) 56, citing Stats NZ, *Adults Convicted and Sentenced: Data Highlights for 2017/2018*.

<sup>1030</sup> NSW Law Reform Commission (n 76) 196, table 9.1.

<sup>1031</sup> Ibid 200 [9.18] citing the Australian Government, Productivity Commission, *Report on Government Services* (2013).

<sup>1032</sup> Ibid 199–200 [9.16]–[9.18].

<sup>1033</sup> Ibid 202 [9.25]–[9.26].

<sup>1034</sup> Ibid 214 [9.71].

<sup>1035</sup> Ibid 202 [9.25]–[9.26].

<sup>1036</sup> Ibid 203–204 [9.30].

<sup>1037</sup> Ibid 206 [9.39]–[9.43] and Recommendation 9.2.

<sup>1038</sup> Ibid xviii–xix [0.23]: 1) Permit alternative methods for supervision where electronic monitoring is not available; 2) reduce the offences excluded from the order; 3) extend the maximum period to 3 years; 4) permit home detention to include a residence at a drug rehabilitation institution; 5) increase the scope of activities for community service work and 6) require a head sentence for the imprisonment be set prior to requesting suitability for a home detention order.

<sup>1039</sup> Ibid 243 and Recommendation 11.1.

2. Allow a court, in making an ICO, to attach a home detention condition (NSW model).
3. Introduce home detention as a sentencing order that can be made in circumstances where the court has sentenced the person to immediate imprisonment (NT and SA).
4. As for Option 3 — but establish home detention as a sentencing order in its own right, rather than an alternative means of serving a prison sentence (NZ and Tasmanian model).

The Council's views on the introduction of home detention, and potential options for reform, are discussed below.

## 9.7 The Council's view

The Council acknowledges the wide range of stakeholder views on home detention — from vigorous opposition to enthusiastic support. The majority of legal and criminal justice stakeholders consulted were open to consideration of home detention as an option, while suggesting it is realistically only likely to be an option for a small number of offenders due to issues associated with housing problems experienced by those in the criminal justice system.

The divide between views at the extreme suggests that as a sentencing option, the introduction of home detention is likely to face a number of challenges.

There is also a question about the likely public acceptance of such an order. Whether being detained at home is accepted by the community as offering sufficient punishment and as a real alternative to imprisonment may depend on the type of offence involved and the other conditions to which the person is subject. These concerns have led to calls in some jurisdictions for home detention to exclude particular offences, or categories of offending.<sup>1040</sup> The *Sentencing Act 2017* (SA) not only excludes particular types of offences and forms of offending, it also includes an express direction that: 'a home detention order must not be made if the court considers that the making of such an order would, or may, affect public confidence in the administration of justice'.<sup>1041</sup>

Reflecting community views, courts have recognised home detention is less onerous than imprisonment. For example, in *R v Jurisic*, Sully J of the NSW Court of Criminal Appeal remarked:

I accept that the standard conditions of a home detention order are burdensome; but it seems to me that they are burdensome in the sense of being, by and large, inconvenient in their disruption of what would be the normal pattern and rhythm of the offender's life in his normal domestic and vocational environment. Any suggestion that such inconvenient limitations upon unfettered liberty equate in any way at all to being locked up full-time in the sort of prison cell and within the sort of gaol that are normal in New South Wales could not be accepted, in my respectful view, by anybody who has had the opportunity of going behind the walls of any one of those prison establishments; and of seeing, even from the limited point of view of a casual visitor, what is really entailed by a full-time custodial sentence.<sup>1042</sup>

Similarly, the Court of Criminal Appeal in SA has found that home detention 'involves a lower level of punishment, community protection and deterrence than a custodial sentence'.<sup>1043</sup>

While home detention would add an additional 'tool' to the 'toolbox' available to sentencing courts, based on the experience of other Australian jurisdictions, it may well be used only for a relatively small number of offenders.

Apart from the benefits of allowing offenders to maintain family and community connections and employment, the other commonly cited benefit of home detention is the value it can deliver in avoiding the

<sup>1040</sup> See, for example, South Australia, House of Assembly, *Parliamentary Debates*, 'Second Reading — Criminal Law (Sentencing) (Home Detention) Amendment Bill', 3 November 2016, 7621–3 (Dan Van Holst Pellekaan, Member for Stuart); and South Australia, House of Assembly, *Parliamentary Debates*, 'Second Reading Sentencing (Suspended and Community Based Custodial Sentences) Amendment Bill', 13 February 2019, 4598 (Vicki Chapman, Attorney-General).

<sup>1041</sup> *Sentencing Act 2017* (SA) s 71(2)(a). This requirement is unique to home detention and is not replicated in other sections dealing with the imposition of other forms of sentencing orders, although a similar form of words applies to provisions regarding sentence reductions for a guilty plea. See *Sentencing Act 2017* (SA) ss 39(4)(a), 40(5)(a).

<sup>1042</sup> *R v Jurisic* (1998) 45 NSWLR 209, 248–9 (Sully J).

<sup>1043</sup> *R v Hosking* (2017) SASR 37, 50 [59] (Blue J) citing as authority the earlier decision of *R v Dell* (2016) 126 SASR 571 [54] (Doyle J, Kelly and Parker JJ agreeing).

financial costs associated with imprisonment. While more costly than other forms of community-based orders, the costs of home detention are still generally well below that of actual imprisonment.

A limitation of the current form of ‘back-end’ home detention that exists in Queensland (in the form of EM, curfew and other conditions, such as residence restrictions that can be attached to parole orders) is its likely limited impact on prisoner numbers and days spent in custody. This is because these conditions apply once a person is released on parole, not to that part of the sentence that an offender is required to serve in custody prior to release on parole or becoming eligible to apply for release on parole. While for those prisoners with a parole eligibility date, rather than a parole release date, the ability to attach EM, curfew and residence restriction conditions may increase the likelihood of release on parole, for those prisoners with a fixed date of release this same benefit does not apply. Given that the majority of orders made are court ordered parole orders (based on 2017–18 QCS data, 79.4%, or 13,592 orders out of a total 17,107),<sup>1044</sup> the overall number of days that would have been spent in prison saved through the use of EM and other conditions therefore may be limited.

While not necessarily delivering significant cost savings, the Council acknowledges there are other good reasons why the availability of these types of restrictive conditions as conditions of parole are important — in particular, in the interests of victim and community safety.

The second option — to make home detention a condition of an ICO — holds some appeal should the Queensland Government wish to trial a ‘front-end’ form of home detention. However, for the reasons discussed in section 7.10, the Council does not consider the likely investment required to develop and embed any reforms to ICOs would be worthwhile in the short term. Instead, the Council recommends ICOs be retained in their current form, until the operation of the Council’s other reforms can be monitored and evaluated. Should ICOs be retained in the longer term, changes to allow for home detention to be available as a condition of an ICO could be reconsidered.

Of the final two options — to introduce home detention as a means of serving a prison sentence, or as a sentencing order that exists independently of imprisonment — the Council prefers the former.

Assuming a South Australian-style home detention model is adopted, it would mean any period the person would have been required to serve prior to release on parole would instead be required to be served by way of home detention. A reduction in restrictions on liberty could then be applied once the person reaches their parole release or eligibility date.

The alternative model, which would establish home detention as a sentence in its own right, in the Council’s view, is more likely to risk net widening from other orders (for example, home detention being ordered where previously a probation order, community service order or wholly suspended sentence would have been ordered). There is also the real possibility of courts imposing longer sentences than they otherwise might if the person was sentenced to an actual term of imprisonment, which may result in an order that overall is more onerous than a prison sentence, given that most offenders at some stage of their sentence are released on parole on less restrictive conditions than would be applied to someone on home detention.

While the Council has identified a preferred model, it is concerned that it has not been possible, given the broad scope of the Council’s Terms of Reference, to explore the range of matters that would be required for it to have confidence in the future effective operation of such an order.

Consequently, the Council recommends that more detailed work be undertaken prior to the Government committing to the introduction of home detention. The Council suggests this should include an assessment of:

- whether there is broad community support for home detention as an alternative to immediate imprisonment;
- the offenders for whom home detention is likely to be available if capped at either 12 months or 2 years, including offence types and proportion of those offenders who might otherwise be eligible but who are homeless or have insecure accommodation;
- how any potential exclusions might restrict the cohort of offenders who are otherwise eligible;

<sup>1044</sup> Submission 11 (Queensland Corrective Services) 21.

- with reference to those who might be eligible for such an order, how many days in custody (post-sentence) might be avoided under the proposed approach, when considered against any costs involved in establishing and maintaining arrangements for the monitoring of offenders, including EM costs and supervision;
- the most effective means of monitoring compliance with home detention orders, and potential monitoring and compliance arrangements;
- how any risks or barriers identified for vulnerable and disadvantaged groups, including women, Aboriginal and Torres Strait Islander offenders, people with caring responsibilities, and people affected by domestic and family violence, can best be minimised or avoided.

#### **RECOMMENDATION: HOME DETENTION**

34. Prior to consideration by the Government of the potential introduction of home detention in Queensland as a sentencing option, as recommended by the Queensland Productivity Commission in its *Draft Report: Inquiry into Imprisonment and Recidivism (2019)*, a review should be undertaken, either within government, or led by an appropriate research or policy body, to assess:
- whether there is broad community support for home detention as an alternative to immediate imprisonment;
  - which offenders home detention is likely to be available for if capped at either 12 months or 2 years, including offence types and proportion of those offenders who might otherwise be eligible but who are homeless or have insecure accommodation;
  - how any potential exclusions might restrict the cohort of offenders who are otherwise eligible;
  - with reference to those who might be eligible for such an order, how many days in custody (post-sentence) might be avoided under the proposed approach, when considered against any costs involved in establishing and maintaining arrangements for the monitoring of offenders, including electronic monitoring costs, and supervision;
  - the most effective means of monitoring compliance with home detention orders, and potential monitoring and compliance arrangements; and
  - how any of the risks identified for people experiencing disadvantage and circumstances of vulnerability, including women, Aboriginal and Torres Strait Islander people, people with caring responsibilities, and people affected by domestic and family violence, can best be minimised or avoided.

## Chapter 10 Suspended sentences

This chapter considers the current legal framework that supports the use of suspended sentences in Queensland, the current use of suspended sentences, and limitations relating to the power of courts to set conditions as part of, or at the same time as, suspending a term of imprisonment.

As mentioned in previous chapters, the Council was asked to examine potential issues and options relating to the current sentencing framework, including the removal of anomalies and current restrictions on imposing a term of imprisonment with a community-based order (in the interests of offender monitoring and management in the community as regards reintegration, rehabilitation and recidivism). This followed an earlier observation made by the Queensland Parole System Review about the potential benefits of introducing the ability to combine a suspended sentence and a probation order as an alternative to a sentence of imprisonment with a parole release date, thereby avoiding problems with offenders' parole orders being suspended and them serving more time in custody than they otherwise should.<sup>1045</sup>

The option of introducing a combined suspended sentence and community-based order for a single charge is discussed in this chapter, as are alternatives to such a proposal. The chapter also presents the Council's findings and recommendations about other potential areas for reform of suspended sentences.

### 10.1 Historical context

Suspended sentences were reintroduced in Queensland in 1992, having effectively been removed as a sentencing option in 1971 under changes to the then section 19(7) of the *Criminal Code* (Qld). Section 19, which dealt with the construction of provisions of the *Criminal Code* (Qld) dealing with punishments, relevantly provided:

whenever the Court shall sentence any person so convicted [upon indictment of an offence] to a term of imprisonment, it may further order that the offender be imprisoned for such portion of that term as it shall think fit and that the execution of the sentence for the remaining portion thereof be suspended upon his entering into a recognizance with sureties if so directed, as aforesaid, but further conditioned that, if called upon, he shall appear and receive judgment in respect of his service of the portion of his sentence so suspended, and any judge of the Court may, upon being satisfied that the offender has committed a breach of any of the conditions of the recognizance, forfeit the recognizance and commit him to prison to undergo the portion of his sentence so suspended, or any part thereof.

This provision, introduced in 1948, was considered by the Government in 1971 to no longer be appropriate given that the Parole Board had been reconstituted and provided with broader powers in relation to parole, and the assessed desirability of only one body determining the appropriate period to be served prior to release.<sup>1046</sup> While noting the increasing use of this provision (suggesting a number of judges considered some offenders should be released at a much earlier stage than after serving half of their sentence), the then Minister for Justice suggested this limitation could be overcome through the introduction of 'special circumstances' parole.<sup>1047</sup>

The rationale for the reintroduction of suspended sentences in 1992 was explained by the then Attorney-General in his Second Reading Speech as expanding the range of available sentencing options in circumstances where a significant penalty is warranted, but where there is benefit in providing the offender with an opportunity to remain in the community and to demonstrate his or her rehabilitation:

The reintroduction of the suspended sentence further enlarges the armoury of sentencing weapons available to courts, who may impose a considerable penalty on an offender which stops short of depriving the offender of liberty, employment and effective rehabilitation within the community. However, should

<sup>1045</sup> Queensland Parole System Review (n 10) 97–8 [476]–[477]. The proposal is discussed further at pages 100–1 of that report.

<sup>1046</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 'Introduction — The Criminal Code and the Offenders Probation and Parole Amendment Bill', 29 July 1971, 45 (Peter Delamothe, Minister for Justice).

<sup>1047</sup> *Ibid* 46.

the offender not grasp the chance being offered and commit another offence during the course of the suspended sentence, the appropriate court is empowered to imprison the offender forthwith.<sup>1048</sup>

Because of its non-conditional nature in Queensland, it has been suggested the apparent legislative intention was that: ‘the suspended sentence option not be used in the case of an offender requiring close supervision’.<sup>1049</sup> In these cases, it has been submitted:

Imprisonment of up to six months followed by probation (*Penalties and Sentences Act 1992*, s 92(1)(b)), an intensive correction order (s 112) or, if the offence is so serious as to require a longer period of imprisonment, a fixed term with a recommendation for parole, should be utilised in such a case. These orders ensure that at some stage, in all but the exceptional case, the offender will be released back into the community during the course of imprisonment, subject to supervision.<sup>1050</sup>

## 10.2 The current legal framework

Part 8 of the *Penalties and Sentences Act 1992* (Qld) (PSA) governs the use of suspended sentences in Queensland and powers on breach.

A suspended sentence is a term of imprisonment suspended for a set period (called the ‘operational period’). In Queensland, the maximum term of imprisonment that can be suspended is 5 years,<sup>1051</sup> including taking into account any other sentences of imprisonment ordered to be served cumulatively.<sup>1052</sup> A court may suspend the whole or part of the term of imprisonment imposed.<sup>1053</sup> A conviction must be recorded.<sup>1054</sup> The operational period starts on the day the order is made, and must not be less than the term of imprisonment imposed, nor more than 5 years.<sup>1055</sup>

A court must not suspend a term of imprisonment, unless satisfied it would be appropriate for the offender to be imprisoned for the period imposed, having regard to other provisions of the Act.<sup>1056</sup>

The courts have recognised that a suspended sentence is a significant punishment in itself<sup>1057</sup> and not a mere exercise in leniency.<sup>1058</sup> In *Director of Public Prosecutions v Buhagiar and Heathcote*,<sup>1059</sup> Batt and Buchanan JJA of the Victorian Court of Appeal observed:

[T]here are cases where a judge may reach the view that suspension of a sentence is appropriate, not because it would be less unpleasant for the offender, but because it may be productive of reformation, which offers the greatest protection to society ... A suspended sentence of imprisonment is not an unconditional release or a mere exercise in leniency. Rather it is an order made in the community’s interest and generally designed to prevent re-offending...

In deciding whether to suspend in whole or in part a term of imprisonment a judge is deciding whether, in all the circumstances, the offender should have the benefit of a special opportunity for reform, to rebuild his own life, or to make some recompense for the wrong done, or should have the benefit of the mercy ... or for some other sufficient reason should have this particular avenue open to him, provided the conditions of the suspension are observed.<sup>1060</sup>

<sup>1048</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, ‘Second Reading — Penalties and Sentences Bill’, 6 August 1992, 6303 (Dean Wells, Attorney-General and Minister for Justice).

<sup>1049</sup> John Robertson and Geraldine Mackenzie, Thomson Reuters, *Queensland Sentencing Manual* (at 15 February 2016) [15.70] (‘When should a suspended term be imposed?’).

<sup>1050</sup> *Ibid.*

<sup>1051</sup> *Penalties and Sentences Act 1992* (Qld) s 144(1).

<sup>1052</sup> See *R v Hamilton* [2009] QCA 391.

<sup>1053</sup> *Penalties and Sentences Act 1992* (Qld) s 144(3).

<sup>1054</sup> *Ibid* s 143.

<sup>1055</sup> *Ibid* s 144(6).

<sup>1056</sup> *Ibid* s 144(4).

<sup>1057</sup> *Elliott v Harris* (No. 2) (1976) 13 SASR 516; *DPP (Cth) v Carter* [1998] 1 VR 601; *Sweeney v Corporate Security Group* (2003) 86 SASR 425.

<sup>1058</sup> *Reilly v The Queen* [2010] VSCA 278 [36]; *DPP (Cth) v Carter* [1998] 1 VR 601, 607–8; *DPP v Buhagiar and Heathcote* [1998] 4 VR 540, 547 (Batt and Buchanan JJA).

<sup>1059</sup> [1998] 4 VR 540.

<sup>1060</sup> *Ibid* 547 (Batt and Buchanan JJA) (citations omitted).

The PSA provides specific guidance intended to limit the use of wholly suspended sentences<sup>1061</sup> in some circumstances — for example, in sentencing offenders for an offence of a sexual nature committed in relation to a child under 16 years. In these circumstances, the court must order the offender to serve an actual term of imprisonment (defined under s 9(12) as ‘a term of imprisonment served wholly or partly in a corrective services facility’), unless there are exceptional circumstances.<sup>1062</sup> In deciding whether exceptional circumstances exist, a court is permitted to consider the closeness in age between the offender and the child.<sup>1063</sup>

In addition to legislative restrictions on use, there are examples of other offence types, such as trafficking in schedule 1 drugs<sup>1064</sup> and burglary with the use of violence (‘home invasion’),<sup>1065</sup> for which the Queensland Court of Appeal has found that immediate suspension of a sentence of imprisonment should occur only in exceptional or rare circumstances. This is generally with reference to the seriousness of the offence and offending behaviour, and the need for denunciation and deterrence.

An offender is only liable to serve the term of imprisonment that is suspended if he or she commits another offence punishable by imprisonment during the operational period of the order.<sup>1066</sup> In this case, a court must order the offender to serve the whole of the term of imprisonment that was suspended, unless the court is of the opinion it would be unjust to do so,<sup>1067</sup> taking into account matters such as whether the offence was of a trivial nature, the seriousness of the original offence (including harm to a victim and any other loss or injury), or any special circumstance arising since the sentence was imposed.<sup>1068</sup>

When either whole or part of the original sentence of imprisonment is activated, the court must apply the parole provisions set out in Part 9, Division 3 of the Act.<sup>1069</sup> This includes in cases where activating a period of imprisonment of 3 years or less, setting a parole release date where required to do so.<sup>1070</sup>

This list of matters that courts must take into account under section 147(3) is not exhaustive,<sup>1071</sup> and includes that a parole release date or parole eligibility date is to be set, and when it is to be set, as part of the court’s exercise of its discretionary judgment.<sup>1072</sup>

If the court finds it unjust to activate the whole of the term suspended, the court may order the operational period be extended for up to one year (or if the period has expired when the court is dealing with the offender, may order that the term of imprisonment be suspended for a further period of up to one year) or order the offender to serve part of the term suspended.<sup>1073</sup> There is no power for a court in this circumstance to impose an intensive correction order (ICO) as a means of activating a suspended sentence in whole or part.<sup>1074</sup>

<sup>1061</sup> These types of orders are also sometimes referred to as ‘fully suspended sentences’. For the purposes of this report, the term ‘wholly suspended sentence’ has been adopted, meaning a sentence of imprisonment suspended in full.

<sup>1062</sup> *Penalties and Sentences Act 1992* (Qld) s 9(4)(b).

<sup>1063</sup> *Ibid* s 9(5).

<sup>1064</sup> See *R v Ritzau* [2017] QCA 17 8–9 [30] and [36] (Morrison JA, Gotterson JA and Bond J agreeing), citing *R v Dowel*; *Ex parte A-G* (Qld) [2013] QCA 8, 5 [16] (Muir JA, Fraser JA and Dalton J agreeing).

<sup>1065</sup> *R v Phillips*; *Ex parte A-G* (Qld) [2001] QCA 544, 12–13 (McMurdo P), 17 (de Jersey CJ), Williams JA agreeing.

<sup>1066</sup> *Penalties and Sentences Act 1992* (Qld) s 146.

<sup>1067</sup> *Ibid* s 147(2).

<sup>1068</sup> *Ibid* s 147(3).

<sup>1069</sup> See the definition of ‘impose a term of imprisonment’ in section 160 of the *Penalties and Sentences Act 1992* (Qld) and the definition of ‘period of imprisonment’ in the *Corrective Services Act 2006* (Qld) (s 4 and sch 4 — referring to the definition in s 4 of the *Penalties and Sentences Act 1992* (Qld)), which extends to the term of imprisonment imposed by a court at the time of sentence.

<sup>1070</sup> See *Penalties and Sentences Act 1992* (Qld) s 160B and *R v Newman* [2008] QCA 147 (6 June 2008).

<sup>1071</sup> See *R v Stevens* [2006] QCA 361.

<sup>1072</sup> *R v Norden* [2009] 2 Qd R 455, 459 [13]–[14] (Holmes JA, Keane and Fraser JJA agreeing), referring to *R v Stevens* [2006] QCA 361 in this regard.

<sup>1073</sup> *Penalties and Sentences Act 1992* (Qld) ss 147(1)(a), 147(1)(c).

<sup>1074</sup> *R v Muller* [2006] 2 Qd R 126, 130 [7] (Williams JA), 139–40 [47]–[48] (Jerrard JA) and 143 [62] (Atkinson J); applying *R v Waters* [1998] 2 Qd R 442; see 445 (Pincus JA) and 446 (McPherson JA) and *R v Skinner*, *Ex parte A-G* (Qld) [2001] 1 Qd R 322, 324–5 [12] (de Jersey CJ, Davies and Pincus JJA).

The decision concerning whether it is unjust for the court to activate the whole of the suspended term of imprisonment upon breach: 'includes consideration of whether a parole release date or parole eligibility date is to be set, and when it is to be set'.<sup>1075</sup>

Unlike those Australian states and territories that have retained suspended sentences as a sentencing option — the ACT, the NT, SA, Tasmania and WA — there is no requirement or power in Queensland for additional supervisory, program or community service conditions to attach to a suspended sentence, or another order made in combination with a suspended sentence order when sentencing an offender for a single offence (drug and alcohol treatment orders discussed below are an exception to this).

The court has greater flexibility in imposing a supervised form of order when sentencing an offender for two or more offences. In *R v Hood*,<sup>1076</sup> the Queensland Court of Appeal reconsidered previous authorities, determining that in circumstances where an offender is sentenced for more than one offence, the following orders can be made (with the primary consideration being whether the orders are compatible, or at least not inconsistent, with each other):

- A wholly suspended sentence at the same time as probation for other offences;
- A partially suspended sentence of up to 12 months with probation for other offences, with or without imprisonment on those other offences prior to release on probation; and
- A community service order concurrently with wholly (or partially) suspended sentences for other offences (*R v Vincent; Ex parte Attorney-General*<sup>1077</sup>).

Other principles articulated in *Hood* relevant to suspended sentences included:

- where a suspended sentence is activated in whole or part on breach, the suspended sentence should be imposed first, and then any new sentence imposed should be ordered to be served concurrently or cumulatively (*R v Chard; Ex parte Attorney-General (Qld)*;<sup>1078</sup> *R v Gander*<sup>1079</sup>); and
- an ICO can be imposed cumulatively on an activated suspended sentence<sup>1080</sup> on the basis that activating a suspended sentence in whole or part involves 'dealing' with it (making an order pursuant to a sentence already imposed), as opposed to sentencing afresh.<sup>1081</sup>

Drug and alcohol treatment orders, which commenced operation in January 2018, operate as a form of conditional suspended sentence but are only available to offenders sentenced by the Queensland Drug and Alcohol Court in Brisbane who meet other suitability and eligibility criteria set out under the PSA.<sup>1082</sup> In making a drug and alcohol treatment order, the court must sentence the person to a term of imprisonment of 4 years or less and order the sentence be suspended for an operational period of 2 to 5 years.<sup>1083</sup> The court must also state the period (not more than 2 years) within which the treatment program must be completed and may include any conditions it considers necessary to achieve the purposes of the order.<sup>1084</sup>

While subject to the treatment order, offenders must comply with core conditions (including appearing before the court at the times directed — as a form of judicial monitoring) and to comply with conditions of treatment set by the court.<sup>1085</sup> The core conditions and treatment conditions are referred to under the Act as the 'rehabilitation part' of the order.<sup>1086</sup>

<sup>1075</sup> *R v Norden* [2009] 2 Qd R 455, 459 [14] (Holmes JA, Keane and Fraser JJA agreeing).

<sup>1076</sup> [2005] 2 Qd R 54.

<sup>1077</sup> [2001] 2 Qd R 327.

<sup>1078</sup> [2004] QCA 372.

<sup>1079</sup> [2005] 2 Qd R 317.

<sup>1080</sup> *R v Skinner; Ex parte A-G (Qld)* [2001] Qd R 322, 325–6 [15] (de Jersey CJ, Davies and Pincus JJA).

<sup>1081</sup> *Ibid* 324–5 [12] (de Jersey CJ, Davies and Pincus JJA).

<sup>1082</sup> *Penalties and Sentences Act 1992* (Qld) ss 151E–151F.

<sup>1083</sup> *Ibid* s 151N.

<sup>1084</sup> *Ibid* s 151S(1).

<sup>1085</sup> *Ibid* ss 151R–151S.

<sup>1086</sup> *Ibid* s 151Q(2).

Once the rehabilitation part of the order expires or is cancelled (for example, due to the offender's good progress on the order), the person is subject to the same standard condition as applies to all suspended sentence orders if any operational period is remaining (not to commit another offence punishable by imprisonment).<sup>1087</sup>

## 10.3 The approach in other jurisdictions

### 10.3.1 Jurisdictions with and without suspended sentences

A form of suspended sentence order exists in most Australian jurisdictions (ACT, NT, SA, Tasmania and WA) and is also available under the *Crimes Act 1914* (Cth) for the sentencing of offenders for Commonwealth offences in the form of a recognizance release order.<sup>1088</sup>

Victoria abolished suspended sentences on 1 September 2014.<sup>1089</sup> NSW removed the ability to suspend a sentence of imprisonment on 24 September 2018, at the same time as a number of other reforms came into effect, including the introduction of community correction orders (CCOs) and an enhanced form of ICO.<sup>1090</sup>

The Tasmanian Government has signalled its intention to phase out suspended sentences, and legislation has now been passed to achieve this outcome.<sup>1091</sup> However, following amendments made during consideration of the Bill by the Tasmanian Legislative Council, the Act requires that the Attorney-General request the Tasmanian Sentencing Advisory Council (TSAC) review the operation of two new forms of orders (CCOs and home detention orders) within two years of their commencement, and that the review report be laid before both Houses of Parliament prior to the proposed changes to restrict the use of suspended sentences for a range of serious offences come into effect.<sup>1092</sup> The legislation also includes an option for either House of Parliament to disallow the commencement of the relevant provisions of the Act after a notice of intention to commence the relevant sections has been laid before the House.<sup>1093</sup>

Of those international jurisdictions reviewed, England and Wales have a form of suspended sentence order,<sup>1094</sup> while NZ abolished suspended sentences on the commencement of its current *Sentencing Act 2002* on 30 June 2002. Canada's conditional sentence of imprisonment is sometimes described as a suspended sentence but is more closely analogous to an intensive correction order or ICO.<sup>1095</sup>

More information about the structure of suspended sentence orders in other Australian jurisdictions and in England and Wales is set out in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council's website.

<sup>1087</sup> See ss 151N(1)(c), 151N(3), 151Q(3), 151U.

<sup>1088</sup> *Crimes Act 1914* (Cth) s 20(1)(b). See also *Crimes Act 1914* (Cth) s 19AC for when a recognizance release order must be made instead of a non-parole period.

<sup>1089</sup> Following an extensive review of suspended sentences and other intermediate sentencing orders, the Victorian Sentencing Advisory Council (by a majority) recommended the phasing out of suspended sentences in conjunction with broader sentencing reforms: Sentencing Advisory Council, Victoria, *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report Part 1* (2006). Recommendations are at xxv–xxvi. The Council's recommendation was adopted, with suspended sentences being progressively phased out from 2011, and abolished for all offences committed from 1 September 2014: *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic).

<sup>1090</sup> *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) assented to 24 October 2017, date of commencement 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 – commencement proclamation).

<sup>1091</sup> *Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (Tas).

<sup>1092</sup> *Ibid* ss 2(2), (5), (6), (8).

<sup>1093</sup> *Ibid* s 2(9).

<sup>1094</sup> *Criminal Justice Act 2003* (UK) pt 12 ch 3.

<sup>1095</sup> See further *Criminal Code*, RSC 1985, c C-46, s 742.1 and *Community-based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis* available on the Council's website.

### 10.3.2 Availability of conditions

Of those Australian states and territories that have retained suspended sentences in some form, all (with the exception of Queensland) require or allow for the making of some form of conditional suspended sentence order. England and Wales also have a conditional form of suspended sentence order.

The current approach that guides the setting of conditions in these jurisdictions is discussed in section 10.12.2.

### 10.3.3 Maximum and minimum terms and operational periods

The maximum and minimum terms that can be suspended vary between jurisdictions, as do the operational periods.

Queensland, NT and WA all set a 5-year limit on the maximum term of imprisonment that can be suspended.<sup>1096</sup> However, in contrast to Queensland and the NT, the maximum operational period of the order in WA is 2 years, rather than 5 years.<sup>1097</sup>

Tasmania does not set any limit on the maximum term of imprisonment that can be suspended or the maximum operational period. TSAC, as part of a review of suspended sentences, reported that based on its analysis of sentencing outcomes; ‘only 2% of offenders [sentenced in the Supreme Court] received [wholly suspended sentences] for a period exceeding 18 months and no such sentences exceeded three years’.<sup>1098</sup> In the case of partially suspended sentences, there were only three sentences exceeding 3 years (1.5%).<sup>1099</sup> In the Magistrates Court, ‘there were no partially suspended sentences imposed longer than two years, and only 0.4% of offenders received [wholly suspended sentences] exceeding 18 months’.<sup>1100</sup> Operational periods in the Supreme Court for wholly suspended sentences range from 12 to 60 months (with a median of 24 months), while for partially suspended sentences, they ranged from 12 to 36 months (with a median of 24 months).<sup>1101</sup>

The maximum term of imprisonment that can be suspended in England and Wales is shorter than in most Australian jurisdictions (a maximum of 2 years).<sup>1102</sup> The maximum operational period for suspended sentence orders is 2 years.<sup>1103</sup>

### 10.3.4 Power to partially suspend

In Queensland, the NT<sup>1104</sup> and Tasmania,<sup>1105</sup> a sentencing court can partially suspend a term of imprisonment. In contrast, in WA and England and Wales, courts have no such power. In those jurisdictions, courts must either suspend a prison sentence imposed in full or order the offender to serve it (with the ordinary powers relating to parole applying in this circumstance).<sup>1106</sup> This was also the case in NSW, until suspended sentences were abolished.<sup>1107</sup>

For Commonwealth offences, a partially suspended sentence can be achieved through a recognizance release order, imposed under section 20(1)(b) of the *Crimes Act 1914* (Cth). Where a court orders a term of

<sup>1096</sup> *Sentencing Act 1995* (NT) s 40(4); *Penalties and Sentences Act 1992* (Qld) s 144(1); *Sentencing Act 1995* (WA) ss 76(1), 81(1).

<sup>1097</sup> *Sentencing Act 1995* (WA) ss 76(1) (suspended imprisonment) and 81(1) (conditional suspended imprisonment).

<sup>1098</sup> Sentencing Advisory Council (Tasmania) (n 80) 22 [3.3.4].

<sup>1099</sup> *Ibid.*

<sup>1100</sup> *Ibid.*

<sup>1101</sup> *Ibid.*

<sup>1102</sup> *Criminal Justice Act 2003* (UK) s 189(1). The minimum term that may be suspended under this section is 14 days.

<sup>1103</sup> *Ibid* s 189(3). A minimum operational period of 6 months also applies.

<sup>1104</sup> *Sentencing Act 1995* (NT) s 40(2).

<sup>1105</sup> *Sentencing Act 1997* (Tas) s 7(b).

<sup>1106</sup> *Criminal Justice Act 2003* (UK) s 189(1); *Sentencing Act 1995* (WA) ss 76(1), 81(1).

<sup>1107</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1)(a), repealed by sch 1 [14] of the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW). Date of commencement, 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 — commencement proclamation).

imprisonment of 3 years or less it must order that a person be released forthwith or after a specified period upon giving security and to be of good behaviour for a period not exceeding 5 years.<sup>1108</sup>

## 10.4 How often are suspended sentences being used?

### 10.4.1 National trends

Annual national data compiled by the Australian Bureau of Statistics (ABS) allow for some comparisons to be made across jurisdictions about the use of suspended sentence orders. Due to the different offence and sentencing regimes that exist in jurisdictions examined,<sup>1109</sup> some caution should be exercised in drawing conclusions based on these national data.

The published data on custodial sentence types distinguish only between ‘custody in a correctional institution’ (including both imprisonment and partially suspended sentences), ‘custody in the community’ (such as under an ICO or, in some jurisdictions, home detention) and ‘fully suspended sentences’.

Based on these data, summarised in Table 10-1 below, Queensland ranks fifth in its use of wholly suspended sentences as a proportion of all penalties imposed in the District and Supreme Courts, and fifth in its use of wholly suspended sentences in the Magistrates Courts. When considered as a percentage of custodial penalties imposed, the picture is slightly different, with Queensland ranking slightly higher among jurisdictions most likely to impose a wholly suspended sentence.

**Table 10-1: Use of wholly suspended sentences by principal sentence (selected offences), Australia, 2017–18**

| Court Type                         | Total penalties | Wholly suspended sentences | Wholly suspended sentences as % of all penalties | Wholly suspended sentences as % of custodial penalties |
|------------------------------------|-----------------|----------------------------|--|--|
| <b>District and Supreme Courts</b> |                 |                            |  |  |
| Australian Capital Territory       | 185             | 29                         | 15.7   | 17.1   |
| New South Wales                    | 4,014           | 497                        | 12.4   | 13.8   |
| Northern Territory                 | 408             | 31                         | 7.6  | 8.0  |
| Queensland                         | 5,181           | 684                        | 13.2   | 15.2   |
| South Australia                    | 1,172           | 163                        | 13.9   | 14.6   |
| Tasmania                           | 323             | 84                         | 26.0   | 30.0   |
| Western Australia                  | 2,414           | 463                        | 19.2   | 20.6   |
| <b>Magistrates Courts</b>          |                 |                            |  |  |
| Australian Capital Territory       | 4,350           | 212                        | 4.9  | 28.8   |
| New South Wales                    | 131,188         | 4,760                      | 3.6  | 29.8   |
| Northern Territory                 | 8,619           | 655                        | 7.6  | 16.1   |
| Queensland                         | 120,859         | 4,779                      | 4.0  | 34.5   |
| South Australia                    | 23,147          | 1,991                      | 8.6  | 46.3   |
| Tasmania                           | 10,357          | 1,063                      | 10.3   | 54.8   |
| Western Australia                  | 78,736          | 2,449                      | 3.1  | 47.5   |

Source: Australian Bureau of Statistics, Criminal Courts Australia, 2017–18, Cat No. 4513.0, Table 8.

### 10.4.2 Queensland trends

The Council has reviewed data on offence and sentencing trends for adults in the Supreme and District Courts (combined) and the Magistrates Courts, covering a 13-year period (1 July 2005 to 30 June 2018). The Magistrates Courts dealt with the overwhelming majority of adult offenders, sentencing events, offences and penalties (well over 90% of each).

<sup>1108</sup> *Crimes Act 1914* (Cth) ss 19AC, 20(1)(b). Note that where the sentence is 6 months or less, the court does not need to make a recognizance release order: *Crimes Act 1914* (Cth) s 19AC(3).

<sup>1109</sup> Information about the structure of suspended sentence orders in Australian jurisdictions is set out in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council's website.

Table 10-2 shows that 0.3 per cent (4,633) of sentencing events in the Magistrates Courts resulted in a partially suspended sentence, while 2.8 per cent (50,702) resulted in a wholly suspended sentence. In the District and Supreme Courts 14.5 per cent (7,987) of sentencing events resulted in a partially suspended sentence and 14.8 per cent (8,139) resulted in a wholly suspended sentence.

**Table 10-2: Proportion of suspended sentences by offenders, events, offences and penalties, 2005–06 to 2016–17**

| Court type                              | Adult offenders | Sentencing events | Offences         | Penalties        |
|---|-----------------|-------------------|------------------|------------------|
| <b>District and Supreme Courts (N)</b>  | <b>44,287</b>   | <b>55,112</b>     | <b>240,086</b>   | <b>271,303</b>   |
| - Partially suspended sentence (% of N) | 17.7%           | 14.5%             | 10.2%            | 9.0%             |
| - Wholly suspended sentence (% of N)    | 18.1%           | 14.8%             | 8.3%             | 7.4%             |
| <b>Magistrates Courts (N)</b>           | <b>714,704</b>  | <b>1,793,180</b>  | <b>3,366,587</b> | <b>4,499,371</b> |
| - Partially suspended sentence (% of N) | 0.6%            | 0.3%              | 0.4%             | 0.3%             |
| - Wholly suspended sentence (% of N)    | 5.4%            | 2.8%              | 3.2%             | 2.4%             |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

As shown in Table 10-3, in the District and Supreme Courts, the number of sentencing events involving partially suspended sentence orders decreased by 35 per cent, from 1,107 in 2005–06 to 719 in 2017–18. The number of sentencing events involving wholly suspended sentence orders also decreased, from 1,048 in 2005–06 to 717 in 2017–18 (a decrease of 32%). In the Magistrates Courts, the number of sentencing events involving a partially suspended sentence decreased by 29 per cent, from 649 in 2005–06 to 461 in 2017–18. The number of sentencing events involving wholly suspended sentences increased by 68 per cent, from 3,518 in 2005–06 to 5,922 in 2017–18.

**Table 10-3: Change in suspended sentences over time, 2005–06 to 2017–18**

| Court Type                         | Number of sentencing events involving a suspended sentence |         |          | Suspended sentences as a proportion of all custodial sentences |         | Suspended sentences as a proportion of all sentences |         |
|------------------------------------|--|---------|----------|--|---------|--|---------|
|                                    | 2005–06  | 2017–18 | % Change | 2005–06  | 2017–18 | 2005–06  | 2017–18 |
| <b>District and Supreme Courts</b> |  |         |          |  |         |  |         |
| - Partially suspended sentences    | 1,107  | 719     | ▼ -35%   | 29.8%  | 15.9%   | 20.6%  | 13.0%   |
| - Wholly suspended sentences       | 1,048  | 717     | ▼ -32%   | 28.2%  | 15.8%   | 19.5%  | 13.0%   |
| <b>Magistrates Courts</b>          |  |         |          |  |         |  |         |
| - Partially suspended sentences    | 649  | 461     | ▼ -29%   | 8.0%   | 3.0%    | 0.5%   | 0.4%    |
| - Wholly suspended sentences       | 3,518  | 5,922   | ▲ 68%    | 43.3%  | 38.6%   | 2.6%   | 4.6%    |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

These trends are explored further in section 10.6 below. The remainder of this chapter focuses on the principal offence or most serious offence (MSO).

## 10.5 Average sentence length for suspended sentences in Queensland

As shown in Table 10-4 below, the median term of imprisonment suspended in the Magistrates Courts was 3.0 months, compared to 1.0 year in the District and Supreme Courts. Comparatively, the median term for sentences of imprisonment that were not suspended in the Magistrates Courts was 6.0 months, and 2.0 years in the District and Supreme Courts.

**Table 10-4: Length and count of wholly suspended sentences (MSO), 2005–06 to 2017–18**

| Court type                  | No.    | Average term | Median term | Minimum term | Maximum term |
|-----------------------------|--------|--------------|-------------|--------------|--------------|
| District and Supreme Courts | 8224   | 1.2 years    | 1.0 year    | 2 days       | 5 years      |
| Magistrates Courts          | 52,633 | 3.7 months   | 3.0 months  | 1 day        | 3 years      |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Excludes offences where a Commonwealth offence was the MSO.

Table 10-5 shows sentence lengths and the term of imprisonment required to be served prior to suspension for partially suspended sentences. This shows that the term of imprisonment imposed as part of a partially suspended sentence is, on average, significantly longer than where that term is suspended in whole (a

median of 2.5 years for partially suspended sentences imposed in the District and Supreme Courts, and 6 months for those ordered in the Magistrates Courts).

**Table 10-5: Length and count of partially suspended sentences (MSO), 2005–06 to 2017–18**

| Court type                               | No.   | Average term | Median term | Minimum term | Maximum term |
|--|-------|--------------|-------------|--------------|--------------|
| <b>Head sentence</b>                     |       |              |             |              |              |
| District and Supreme Courts              | 8,012 | 2.6 years    | 2.5 years   | 1 month      | 5 years      |
| Magistrates Courts                       | 4,619 | 8.2 months   | 6 months    | 2 days       | 3 years      |
| <b>Time to serve prior to suspension</b> |       |              |             |              |              |
| District and Supreme Courts              | 8,012 | 8.7 months   | 7.3 months  | 1 day        | 3.5 years    |
| Magistrates Courts                       | 4,616 | 2.5 months   | 2 months    | 1 day        | 2.5 years    |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Excludes offences where a Commonwealth offence was the MSO.

## 10.6 How has the use of suspended sentences changed over time?

### 10.6.1 Magistrates Courts

The use of suspended sentences in the Magistrates Courts in Queensland has steadily increased since 2009–10 when 2,010 legislative amendments,<sup>1110</sup> referred to as the ‘Moynihan reforms’,<sup>1111</sup> came into effect — representing an increase from 2.3 per cent of all penalties in 2009–10 (the financial year immediately prior to these reforms coming into effect), to 4.8 per cent of all penalties in 2017–18.<sup>1112</sup>

The Moynihan reforms resulted in significant expansion of the Magistrates Courts’ jurisdiction to determine indictable offences in the *Criminal Code* (Qld) and *Drugs Misuse Act 1986* (Qld), resulting in many matters previously dealt with in the District Court being dealt with instead in a Magistrates Court. This means that the overall profile of offences dealt with in the Magistrates Courts is likely to have changed to include more serious forms of offending.

As shown in Figure 10-1, the use of wholly suspended sentences has been the primary driver of the increasing use of suspended sentences by Magistrates Courts. There was a 64.5 per cent increase in the use of wholly suspended sentences over the period 2005–06 to 2017–18, from 3,400 orders in 2005–06 to 5,593 orders in 2017–18. Over this same 13-year period, the number of prison sentences imposed in the Magistrates Courts increased at an even faster rate (from 3,418 prison sentences imposed in 2005–06 to 9,053 in 2017–18 — representing a 164.9% increase).

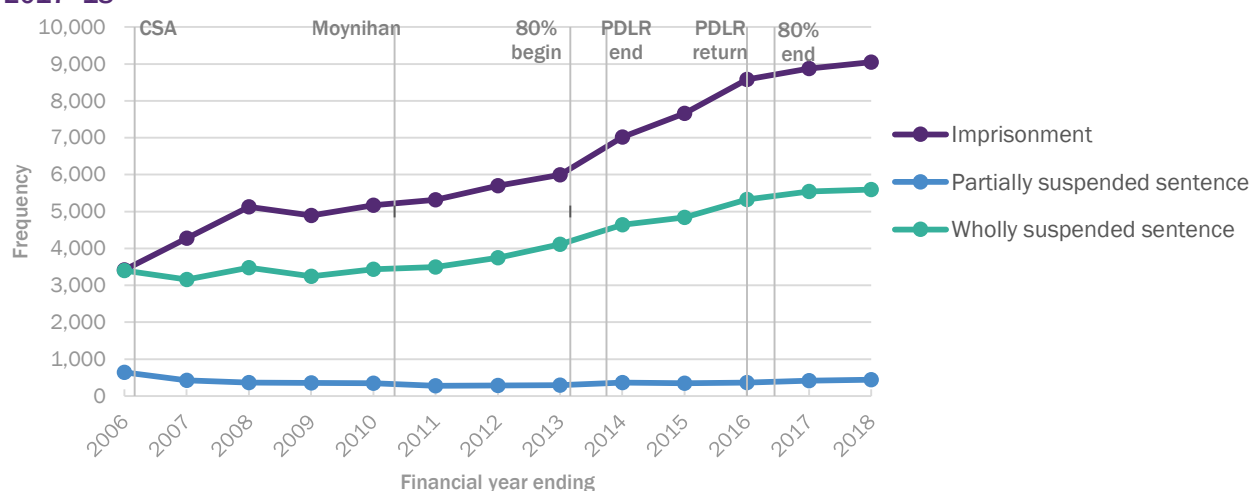
The trends for partially suspended sentences are markedly different. Apart from a small dip in their use following the introduction of court ordered parole in 2006–07, the overall number of partially suspended sentences imposed has remained relatively stable. The drop in the use of partially suspended sentences following the introduction of court ordered parole can be understood in light of the same sentencing outcome (a period in custody, followed by release into the community on a date fixed by the court) being able to be achieved through the use of court ordered parole. However, unlike a person subject to a partially suspended sentence, a person sentenced to imprisonment with a court ordered parole release date does not have the remaining period of the sentence suspended and must comply with the conditions of their parole order if they are to avoid being returned to custody.

<sup>1110</sup> *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld). Relevant provisions commenced on 1 November 2010.

<sup>1111</sup> The report that formed the basis of these reforms was undertaken by the Hon Martin Moynihan AO — see n 5.

<sup>1112</sup> See section 8.4 of this report, Figure 8-4.

**Figure 10-1: Custodial penalty type by most serious offence (MSO), Magistrates Courts, 2005–06 to 2017–18**



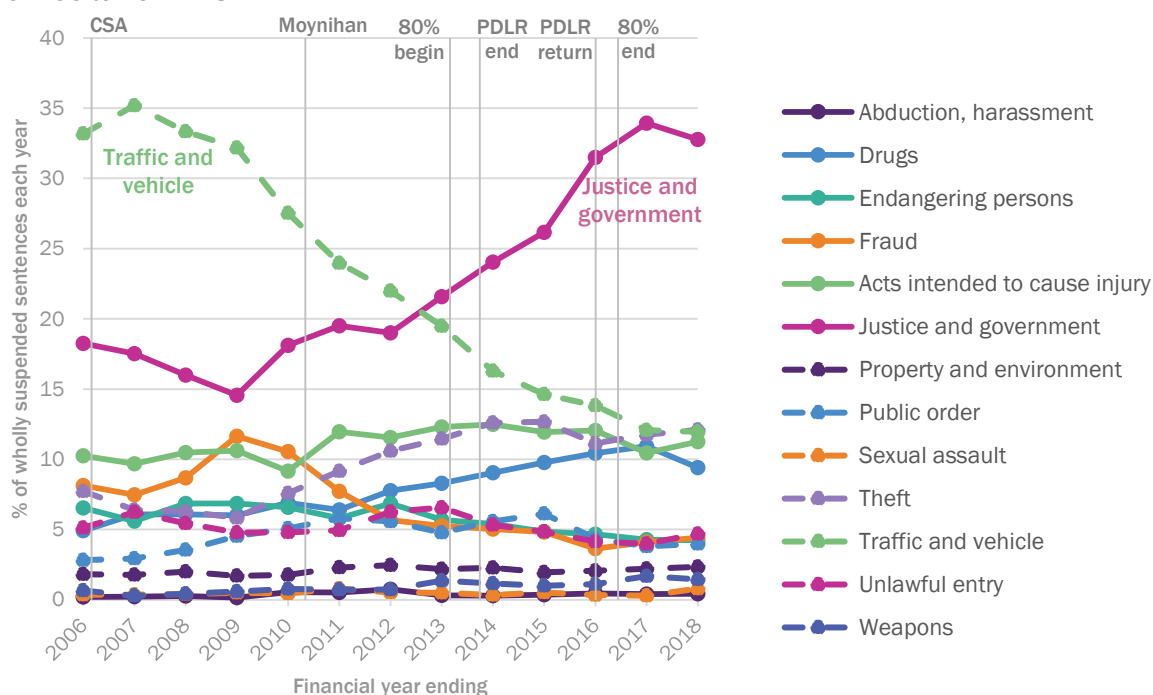
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: The lines depict various reforms that could affect the data:

- 'CSA': *Corrective Services Act 2006* (Qld); parole regime (*Penalties and Sentences Act 1992* (Qld) pt 9 div 3). Commenced 28 August 2006.
- 'Moynihan': amendments commenced 1 November 2010. Magistrates Courts jurisdiction expanded: indictable offences in *Criminal Code* (Qld) and *Drugs Misuse Act 1986* (Qld). District Court's criminal jurisdiction increased: offences with maximum penalty of 20 years or less (up from 14 years or less).
- '80%' drug trafficking rule — commenced 29 August 2013; removed 9 December 2016. This required the court to order that drug traffickers sentenced to an actual term of imprisonment (not an ICO or a suspended sentence) must not be released until the person has served a mandatory minimum non-parole period of 80% of their sentence.
- 'PDLR': prison/detention last resort. Removed 28 March 2014; reintroduced 1 July 2016. *Penalties and Sentences Act 1992* (Qld) s 9(2)(a): imprisonment as last resort; preference for sentence served in community. Exceptions regarding violence, child sexual offending/child exploitation material remain.

Figure 10-2 (below) shows that as a proportion of all wholly suspended sentences imposed, the offence category driving the increase in the use of wholly suspended sentences is 'justice and government' offences. This offence category includes breaches of custodial and community-based orders, breach of domestic violence orders and other justice-procedure-related offences. The apparent decreasing use of wholly suspended sentences for the category of offences falling under 'traffic and vehicle' mirrors the increasing proportion of wholly suspended sentence orders made for justice and government offences. The number of justice and government offences that received a wholly suspended sentence increased 299 per cent, from a low of 472 in 2008–09 to a peak of 1,882 in 2016–17. The number of traffic and vehicle offences that received a wholly suspended sentence peaked at 1,161 in 2007–08 and decreased 42 per cent, to 669 in 2017–18.

**Figure 10-2: Offence type (MSO) for offences attracting a wholly suspended sentence, Magistrates Courts, 2005–06 to 2017–18**



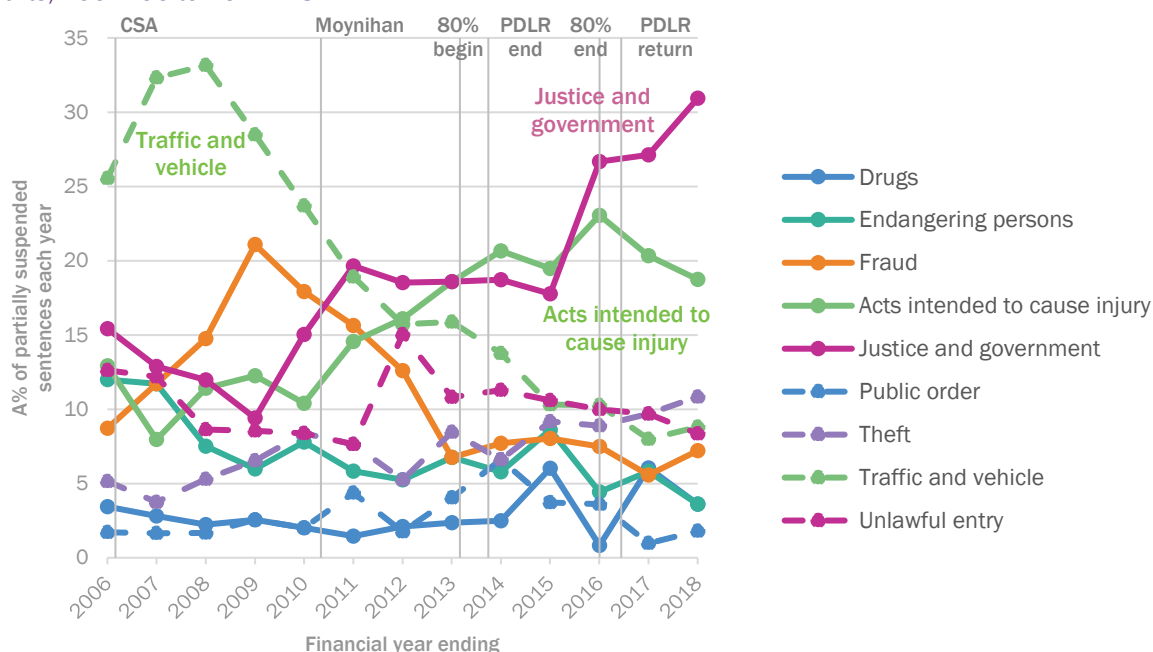
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

Notes:

- 1) Offences where less than 100 cases received a wholly suspended sentence in the lower courts across the 13-year period have been excluded from this graph (homicide offences, miscellaneous offence, and robbery and extortion offences).
- 2) For an explanation of lines representing key legislative reforms, see Figure 10-1 above.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Similar trends can be observed when the use of partially suspended sentences in the Magistrates Courts is examined, although there are some differences. In particular, an increasing proportion of partially suspended sentences were imposed for the offence category of ‘acts intended to cause injury’ (encompassing offences such as common assault, assault occasioning bodily harm, grievous bodily harm, wounding and stalking) from 2009–10, before the proportion of partially suspended sentence for this offence started to decline in 2016–17 (see Figure 10-3 below). In terms of numbers of MSOs receiving a partially suspended sentence, ‘acts intending to cause injury’ was lowest in 2006–07 at 34, peaking in 2016–17 at 84, an increase of 147 per cent, and remaining steady at 83 cases in 2017–18.

**Figure 10-3: Offence type (MSO) for offences attracting a partially suspended sentence, Magistrates Courts, 2005–06 to 2017–18**



Source: QGS0, Queensland Treasury — Courts Database, extracted September 2018.

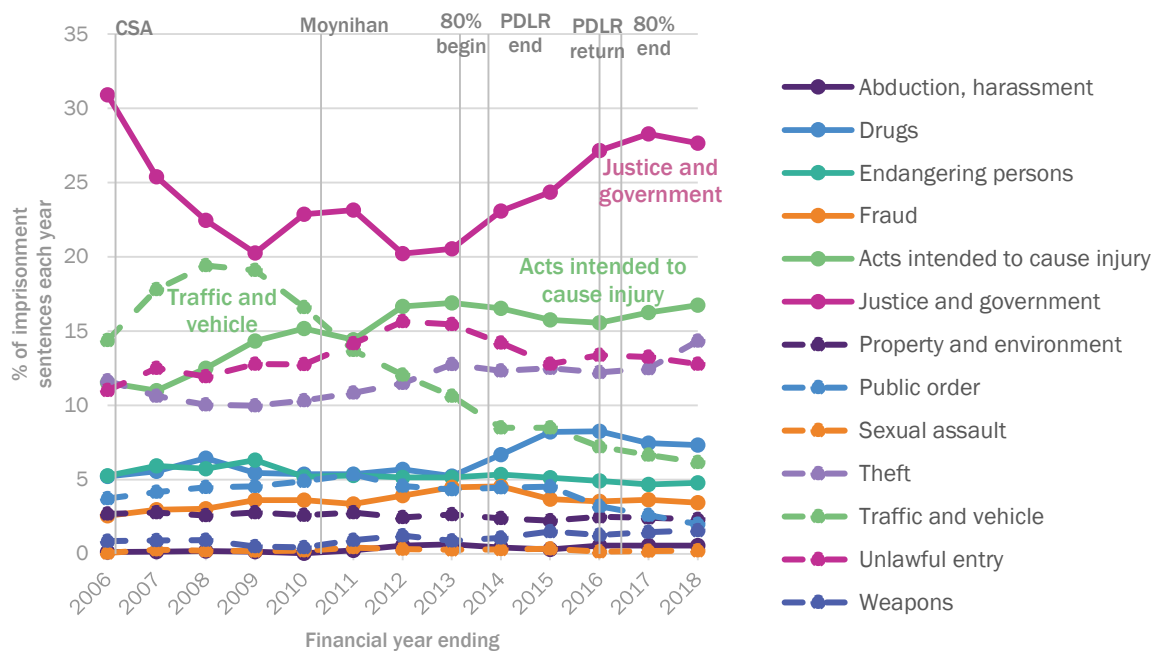
Notes:

- 1) Offences where less than 100 cases received a partially suspended sentence in the lower courts across the 13-year period have been excluded from this graph (abduction and harassment offences, homicide offences, miscellaneous offences, property and environment offences, robbery and extortion offences, sexual assault offences, weapons offences).
- 2) For an explanation of lines representing key legislative reforms, see Figure 10-1 above.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

As shown in Figure 10-4, the highest proportion of prison sentences imposed by the Magistrates Courts was for 'justice and government' offences,<sup>1113</sup> fluctuating from a high of 30.9 per cent in 2005–06 to a low of 20.2 per cent in 2011–12, rising again to 28.3 per cent in 2016–17. The other offences making up the highest proportion of prison sentences since the Moynihan reforms were for 'acts intended to cause injury', 'theft' and 'unlawful entry'. Together with 'justice and government', they account for over 70 per cent (71.4) of prison sentences (by MSO) in the 2017–18 financial year. Prior to November 2010 when the Moynihan reforms came into effect, the second most common offence category (as a proportion of all prison sentences imposed) was 'traffic and vehicle', reaching a high of 19.4 percent in 2007–08. By 2017–18, this offence category represented only 6.2 per cent of all prison sentences imposed.

<sup>1113</sup> This offence category includes breaches of custodial and community-based orders, breach of domestic violence orders and other justice-procedure-related offences.

**Figure 10-4: Offence type (MSO) for offences attracting imprisonment, Magistrates Courts, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

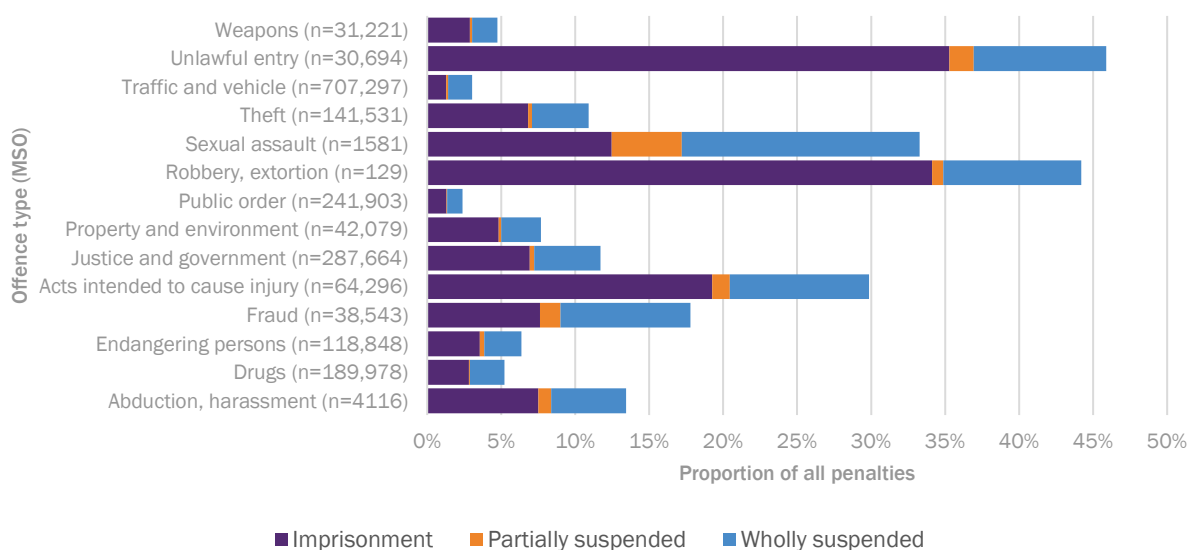
- 1) Offences where less than 100 cases received a partially suspended sentence in the lower courts across the 13-year period have been excluded from this graph (homicide offences, miscellaneous offences, and robbery and extortion offences)
- 2) For an explanation of lines representing key legislative reforms, see Figure 10-1 above.

As shown in Figure 10-5, the offences most likely to result in either a wholly or partially suspended sentence of imprisonment being imposed in the Magistrates Courts (by offence type, rather than volume) were:

- sexual assaults (20.8%);
- unlawful entry offences (10.6%);
- acts intended to cause injury (10.6%); and
- fraud offences (10.2%).

Unlawful entry offences were most likely to receive an immediate imprisonment sentence in the Magistrates Courts (35.3%), closely followed by robbery and extortion offences (34.1%).

**Figure 10-5: Proportion of penalties given in Magistrates Courts by offence type (MSO), 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 10.6.2 Supreme and District Courts

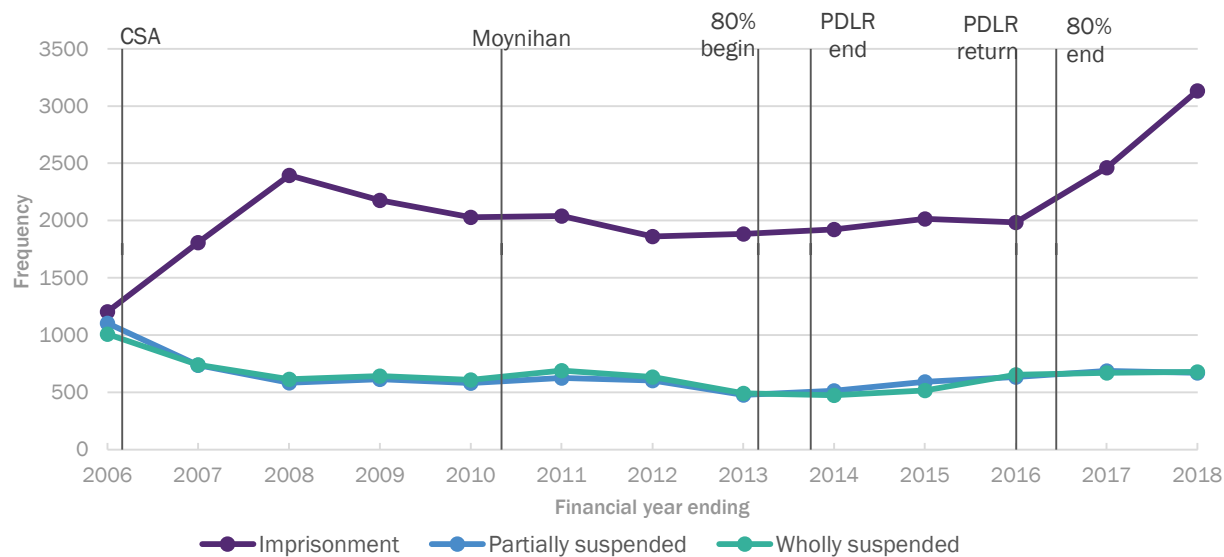
As shown in Figure 10-6, the use of suspended sentences (by MSO) in the higher courts has remained relatively constant since 2007–08 (the year after court ordered parole was introduced). The drop following the introduction of court ordered parole in the use of suspended sentences (both wholly suspended sentences and partially suspended sentences) suggests that some offenders who previously would have been sentenced to a term of imprisonment that was suspended were sentenced instead to imprisonment with a court ordered parole release date.

In 2017–18, 678 wholly suspended sentences were imposed for the MSO sentenced at that court event, with a similar number of partially suspended sentences (669).

From 2015–16 to the most recent financial year, there has been a notable jump in the higher courts in the number of imprisonment sentences imposed — rising from 1,984 in 2015–16 to 3,132 in 2017–18. Based on the offence categories representing the largest proportion of prison sentences imposed (Figure 10-10 below), it seems likely that sentencing practices for drug offences has been the largest contributor to this increase. The number of drug offences (MSO) sentenced in higher courts has increased steadily from a low in 2005–06 (n=680) to a high in 2017–18 (n=1,971). Of these drug offences (MSO), the proportion that resulted in an immediate imprisonment sentence also increased, from 17.7 per cent in 2005–06 to 64.9 per cent in 2017–18. The higher proportion of drug offences in the higher courts attracting a term of imprisonment may be explained in part by the significant changes made to the jurisdiction of Queensland courts with the commencement of the Moynihan reforms in November 2010. As a result of these reforms, the Magistrates Courts can now deal with a broader range of drug possession charges (those carrying a maximum penalty above 15 years' imprisonment) so long as the prosecution does not allege a commercial purpose.<sup>1114</sup>

<sup>1114</sup> *Drugs Misuse Act 1986* (Qld) s 14. For more information on the Moynihan reforms, see Figure 10.1 above.

**Figure 10-6: Custodial penalty type for most serious offence (MSO), higher courts, 2005-06 to 2017-18**



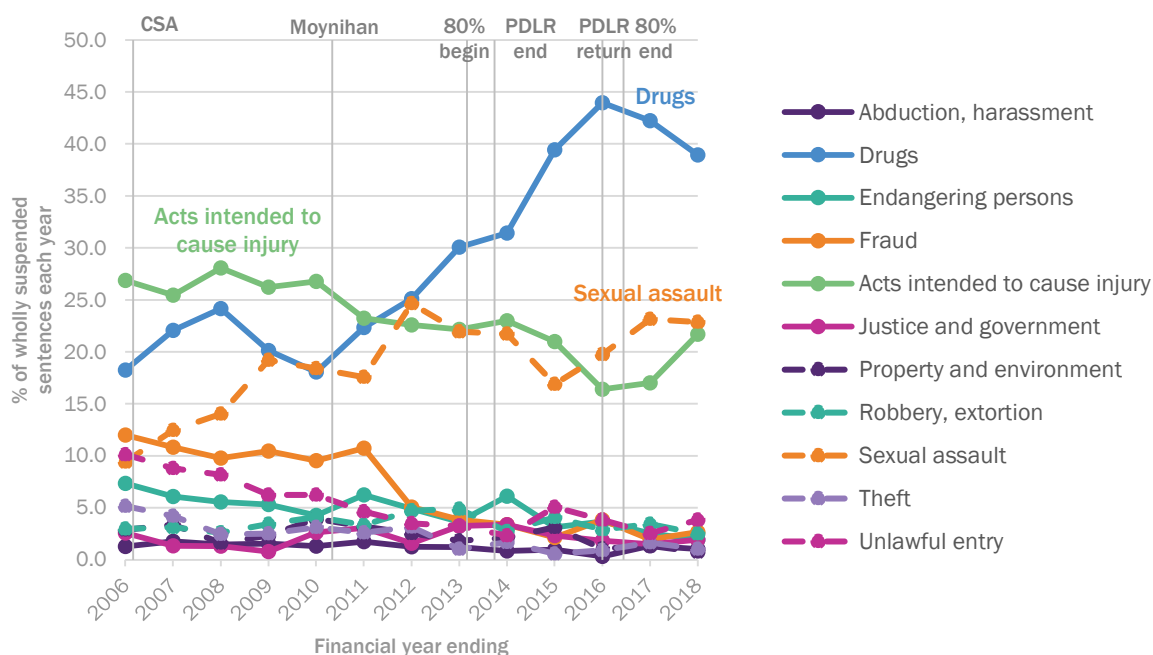
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) For an explanation of lines representing key legislative reforms, see Figure 10-1 above.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Figure 10-7 (below) shows that as a proportion of all wholly suspended sentences imposed in 2017-18, the offence category with the highest overall numbers of wholly suspended sentences imposed was drug offences (38.9%), followed by sexual assault (22.9%) and acts intended to cause injury (21.7%). Together, these three offence categories account for 83.5 per cent of all wholly suspended sentences imposed in the higher courts in 2017-18. These categories of offence are also the most commonly dealt with in the higher courts, together accounting for 71.6 per cent of all offences (MSO) sentenced in Queensland higher courts in 2017-18 (35.9% drugs, 21.9% acts intended to cause injury, 12.8% sexual assault offences).

**Figure 10-7: Offence type (MSO) for offences receiving a wholly suspended sentence, higher courts, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

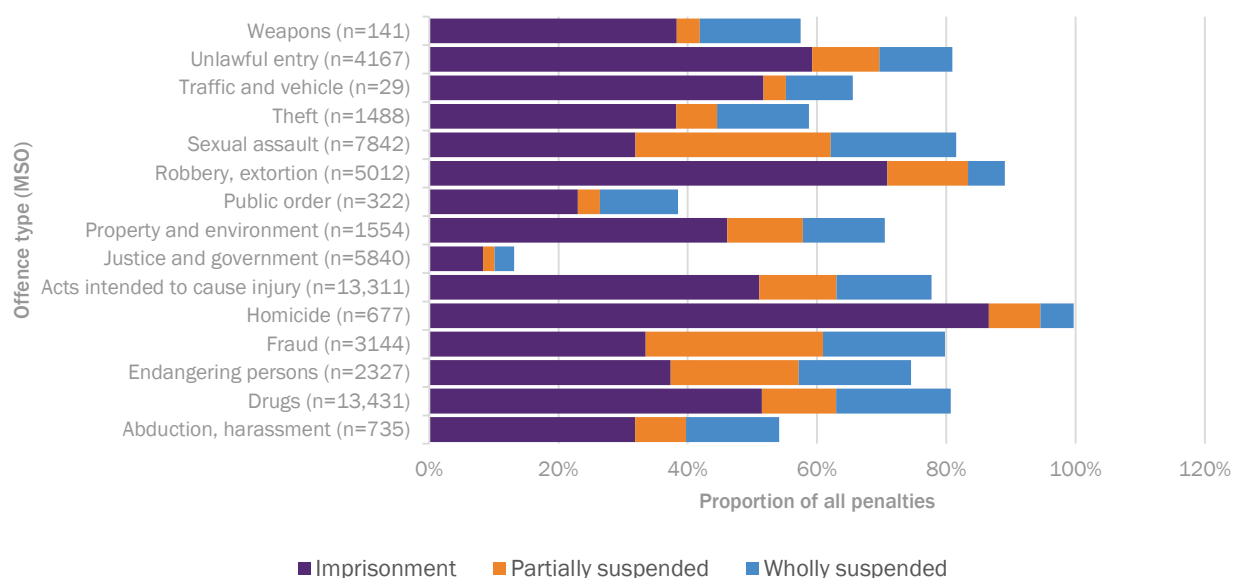
- 1) Offences where less than 100 cases received a wholly suspended sentence in the higher courts across the 13-year period have been excluded from this graph (homicide offences, miscellaneous offences, public order offences, traffic and vehicle offences, and weapons offences).
- 2) For an explanation of lines representing key legislative reforms, see Figure 10-1 above.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Figure 10-8 shows that the offences most likely to result in either a wholly or partially suspended sentence of imprisonment being imposed in the higher courts (by offence type, rather than volume) were:

- sexual assault offences (49.6%);
- fraud offences (46.3%);
- acts endangering persons offences (37.2%).

In contrast, the offences most likely to result in an immediate term of imprisonment being imposed were homicide offences (86.6%) and robbery and extortion offences (70.9%).

**Figure 10-8: Proportion of penalties given in higher courts by offence type (MSO), 2005–06 to 2017–18**



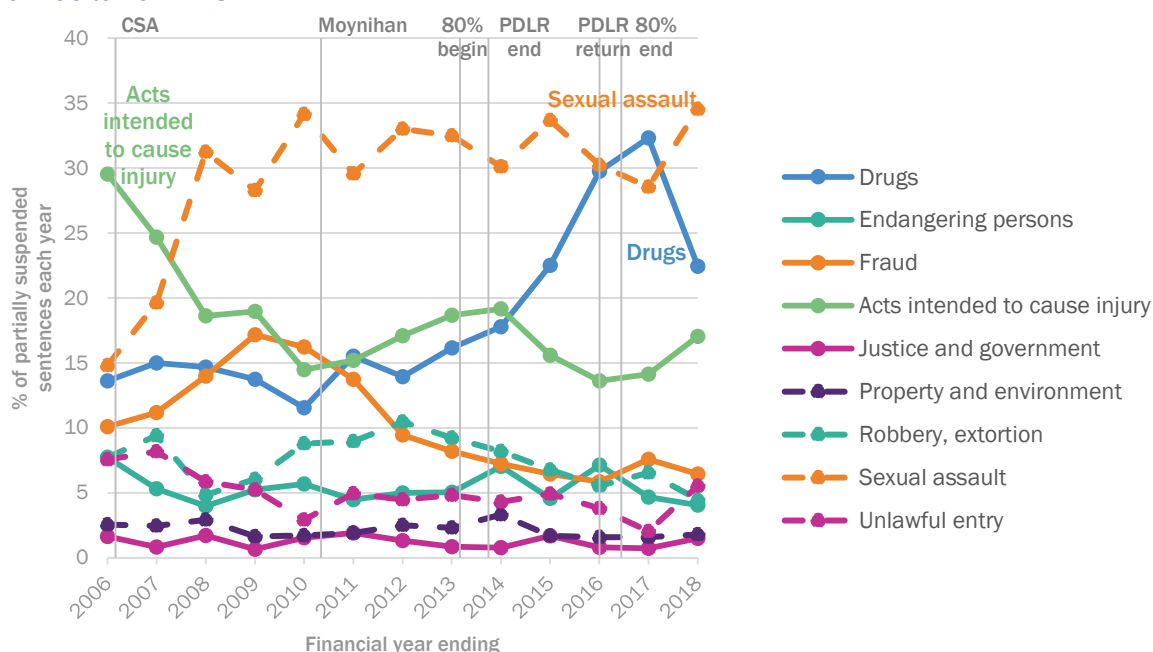
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

As shown in Figure 10-9, the introduction of court ordered parole in 2006–07 was followed by a jump in the overall share of partially suspended sentences imposed for a sexual assault offence. Court ordered parole is not available to courts when sentencing offenders for sexual offences, which may explain this trend. The proportion of partially suspended sentences imposed for drug offences has increased substantially since 2009–10 when they represented 11.6 per cent of all partially suspended sentences imposed by the higher courts, to a high of 32.3 per cent in 2016–17 before dropping in 2017–18 to 22.4 per cent of partially suspended sentences imposed.

As illustrated earlier in Figure 2-3, the number of drug offences (MSO) sentenced in Queensland higher courts has increased by 65 per cent, from 680 offences sentenced in 2005–06 to 1971 offences sentenced in 2017–18. As a proportion of offences (MSO) sentenced in Queensland higher courts, the proportion of drug offences has increased almost every year (2005–06: 12.7%; 2017–18: 35.9%).

**Figure 10-9: Offence type (MSO) for offences receiving a partially suspended sentence, higher courts, 2005–06 to 2017–18**



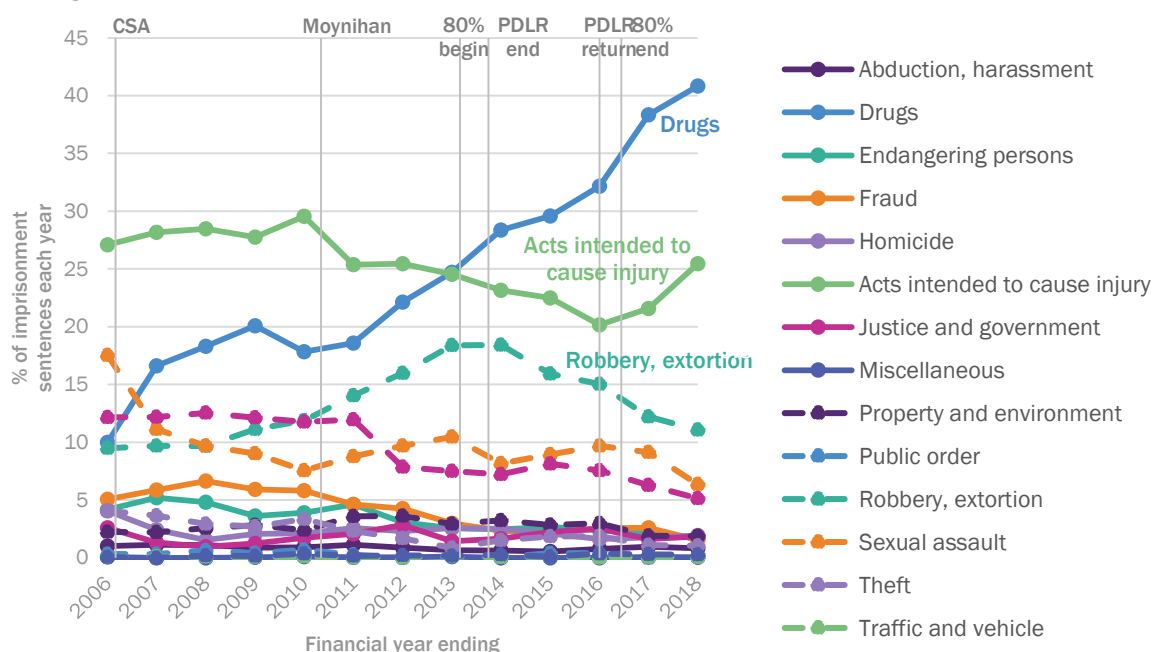
Source: QGS0, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) Offences where less than 100 cases received a partially suspended sentence in the higher courts across the 13-year period have been excluded from this graph (abduction and harassment offences, homicide offences, miscellaneous offences, public order offences, theft offences, traffic and vehicle offences, and weapons offences).
- 2) For an explanation of lines representing key legislative reforms, see Figure 10-1 above.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

As shown in Figure 10-10, the greatest share of prison sentences imposed in the higher courts were for drug offences, acts intended to cause injury, and robbery and extortion. In 2017–18, these offences represented 40.8 per cent (drug offences), 25.5 per cent (acts intended to cause injury) and 11.1 per cent (robbery, extortion) of all prison sentences imposed by the higher courts, and together accounted for over three in every four prison sentences imposed (77.4%). Over this same year, these three offences were also the most common offences sentenced in Queensland higher courts (excluding sexual assault offences prior to 2009).

**Figure 10-10: Offence type (MSO) for offences receiving imprisonment, higher courts, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) Offences where less than 100 cases received an imprisonment sentence in the higher courts across the 13-year period have been excluded from this graph (miscellaneous offences, public order offences, traffic and vehicle offences and weapons offences).
- 2) For an explanation of lines representing key legislative reforms, see Figure 10-1 above.

## 10.7 How often are suspended sentences being combined with other penalty types?

As discussed below, courts commonly sentence offenders for multiple offences at the same court event, which results in a number of sentencing orders being made. The most common outcome is for a court to impose the same penalty type for different offences dealt with at the same time as the MSO (for example, a wholly suspended sentence with a wholly suspended sentence, or a partially suspended sentence with a partially suspended sentence).

### 10.7.1 Wholly suspended sentences

Of the 60,857 court events involving Queensland offences that resulted in a wholly suspended sentence as the most serious penalty, 14,329 (23.5%) had no other penalties imposed (22.1% of cases sentenced in the Magistrates Courts and 32.5% of cases sentenced in the higher courts).

Additional penalties were given in 76.5 per cent of court events where a wholly suspended sentence was the most serious penalty (77.9% of cases for Queensland offences sentenced in the Magistrates Courts, and 67.5% of cases for Queensland offences sentenced in a higher court).

Considering all cases involving Queensland offences where multiple penalties were given in the same court event as a wholly suspended sentence (MSO) (N=46,528), nearly half (49.4%) received further wholly suspended sentences for separate offences (see Table 10-6). The next most frequently applied penalties in combination with a wholly suspended sentence were fines (33.3%) and a conviction with no further punishment (18.0%).

This pattern of additional penalties was the same for the Magistrates Courts, with 47.2 per cent of cases receiving a further wholly suspended sentence, 37.5 per cent receiving a fine and 17.4 per cent receiving a conviction with no further punishment.

In the higher courts, a further wholly suspended sentence remained the most frequent additional penalty with close to two-thirds of cases (66.1%) recording at least one additional wholly suspended sentence. Probation and conviction with no further punishment were the next most frequently applied in combination with a wholly suspended sentence with 22.5 per cent of cases recording each of these combinations of penalties (see Table 10-6).

Community service is rarely ordered at the same time as a wholly suspended sentence imposed for the MSO, with only 2.6 per cent of Queensland cases where a wholly suspended sentence is applied with a community service order. The use of community service orders in combination with a wholly suspended sentence occurs more frequently in the higher courts (4.3%) than in the Magistrates Courts (2.4%).

**Table 10-6: Penalties sentenced in the same court event as a wholly suspended sentence (MSO), Queensland, 2005–06 to 2017–18**

| Penalty type                    | All Queensland offences |            | Magistrates Courts (Queensland offences) |            | Higher Courts (Queensland offences) |            |
|---------------------------------|-------------------------|------------|--|------------|-------------------------------------|------------|
|                                 | N                       | %          | N  | %          | N                                   | %          |
| Wholly suspended sentence       | 23,003                  | 49.4       | 19,332                                   | 47.2       | 3,671                               | 66.1       |
| Community service               | 1,222                   | 2.6        | 981                                      | 2.4        | 241                                 | 4.3        |
| Probation                       | 5,908                   | 12.7       | 4,657                                    | 11.4       | 1,251                               | 22.5       |
| Fine                            | 15,500                  | 33.3       | 15,369                                   | 37.5       | 131                                 | 2.4        |
| Good behaviour, recognisance    | 514                     | 1.1        | 343                                      | 0.8        | 171                                 | 3.1        |
| Convicted, not further punished | 8,362                   | 18.0       | 7,111                                    | 17.4       | 1,251                               | 22.5       |
| <b>TOTAL</b>                    | <b>46,528</b>           | <b>100</b> | <b>40,976</b>                            | <b>100</b> | <b>5,552</b>                        | <b>100</b> |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) Multiple non-MSO penalties can be applied per court event; therefore, percentages add to more than 100%.
- 2) If more than one penalty has been applied for one offence, each penalty has been counted separately.
- 3) Rising of the court has been excluded.
- 4) Any juvenile penalties have been excluded.
- 5) Commonwealth offences have been excluded.
- 6) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 10.7.2 Partially suspended sentences

Of the 12,631 court events sentenced for a Queensland offence that resulted in a partially suspended sentence as the most serious penalty, 2,671 (21.1%) received no other penalties (MSO only). For Queensland offences, the proportion of cases with no additional penalty imposed was lower in the Magistrates Courts (14.7%) than in the higher courts (24.9%).

Additional penalties were given in 78.9 per cent of court events where a partially suspended sentence was the most serious penalty (85.3% of cases for Queensland offences sentenced in the Magistrates Courts, and 75.1% of cases for Queensland offences sentenced in a higher court).

As Table 10-7 shows, the most common additional penalty when considering all Queensland offences was a further partially suspended sentence (61.2%). The second most frequently applied penalty in combination with a partially suspended sentence was conviction with no further punishment (29.3%), followed closely by imprisonment (29.1%).

Although the most common additional penalty in combination with a partially suspended sentence across the Magistrates Courts and the higher courts was a further partially suspended sentence (56.9% of cases in the Magistrates Courts and 64.0% of cases in the higher courts), the next most frequent combinations differed. In the Magistrates Courts, the next most frequently applied penalties in combination with a partially suspended sentence were conviction with no further punishment (31.7%) and a fine (26.8%). In the higher courts, the second most commonly applied penalty in addition to a partially suspended sentence was imprisonment (34.2%), followed by conviction with no further punishment (27.8%).

As for wholly suspended sentences, community service is rarely given as an additional penalty where a partially suspended sentence is imposed for the MSO (0.8% of all partially suspended sentences imposed

for an MSO with an additional penalty given). Probation is more commonly combined with a partially suspended sentence (MSO), with 16.1 per cent of cases where a partially suspended sentence was ordered for an MSO with additional penalties involving probation. This is much more common for cases sentenced in higher courts (20.3%) than the Magistrates Courts (9.8%).

**Table 10-7: Penalties sentenced in the same court event as a partially suspended sentence (MSO), Queensland, 2005–06 to 2017–18**

| Penalty type                    | All Queensland offences |            | Magistrates Courts (Queensland offences) |            | Higher Courts (Queensland offences) |            |
|---------------------------------|-------------------------|------------|--|------------|-------------------------------------|------------|
|                                 | N                       | %          | N  | %          | N                                   | %          |
| Imprisonment                    | 2,897                   | 29.1       | 836                                      | 21.2       | 2,061                               | 34.2       |
| Partially suspended sentence    | 6,096                   | 61.2       | 2,242                                    | 56.9       | 3,854                               | 64.0       |
| Wholly suspended sentence       | 347                     | 3.5        | 249                                      | 6.3        | 98                                  | 1.6        |
| Community service               | 78                      | 0.8        | 49                                       | 1.2        | 29                                  | 0.5        |
| Probation                       | 1,606                   | 16.1       | 386                                      | 9.8        | 1,220                               | 20.3       |
| Fine                            | 1,076                   | 10.8       | 1,055                                    | 26.8       | 21                                  | 0.3        |
| Good behaviour, recognisance    | 228                     | 2.3        | 27                                       | 0.7        | 201                                 | 3.3        |
| Convicted, not further punished | 2,922                   | 29.3       | 1,247                                    | 31.7       | 1,675                               | 27.8       |
| <b>TOTAL</b>                    | <b>9,960</b>            | <b>100</b> | <b>3,939</b>                             | <b>100</b> | <b>6,021</b>                        | <b>100</b> |

Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) Multiple non-MSO penalties can be applied per court event; therefore, percentages add to more than 100%.
- 2) If more than one penalty has been applied for one offence, each penalty has been counted separately.
- 3) Rising of the court has been excluded.
- 4) Any juvenile penalties have been excluded.
- 5) Commonwealth offences have been excluded.
- 6) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

## 10.8 Who receives a suspended sentence?

When examining key demographic characteristics of people sentenced to imprisonment (5 years or less), partially suspended sentences, and wholly suspended sentences, it appears that:

- there are no differences based on gender in the proportion of imprisonment sentences and partially suspended sentences imposed, although women appear more likely than men to receive a wholly suspended sentence than either imprisonment or a partially suspended sentence;
- of people receiving a prison sentence, Aboriginal and Torres Strait Islander offenders are more likely to receive a sentence of immediate imprisonment compared to non-Indigenous offenders.

These findings do not take into account different offence or offending profiles, or other factors that may influence the sentence (such as prior criminal history).

Figure 10-11 below shows that Aboriginal and Torres Strait Islander offenders are less likely to receive a suspended sentence and more likely to receive an imprisonment sentence compared to their non-Indigenous counterparts. Male Aboriginal and Torres Strait Islander offenders are the most likely to receive an imprisonment sentence, while non-Indigenous females are the most likely to receive a wholly suspended sentence and non-Indigenous males are the most likely to receive a partially suspended sentence.

**Figure 10-11: Proportion of sentences resulting in suspended sentences compared with terms of imprisonment 5 years or less, by gender and Aboriginal and Torres Strait Islander status, 2005–06 to 2017–18**

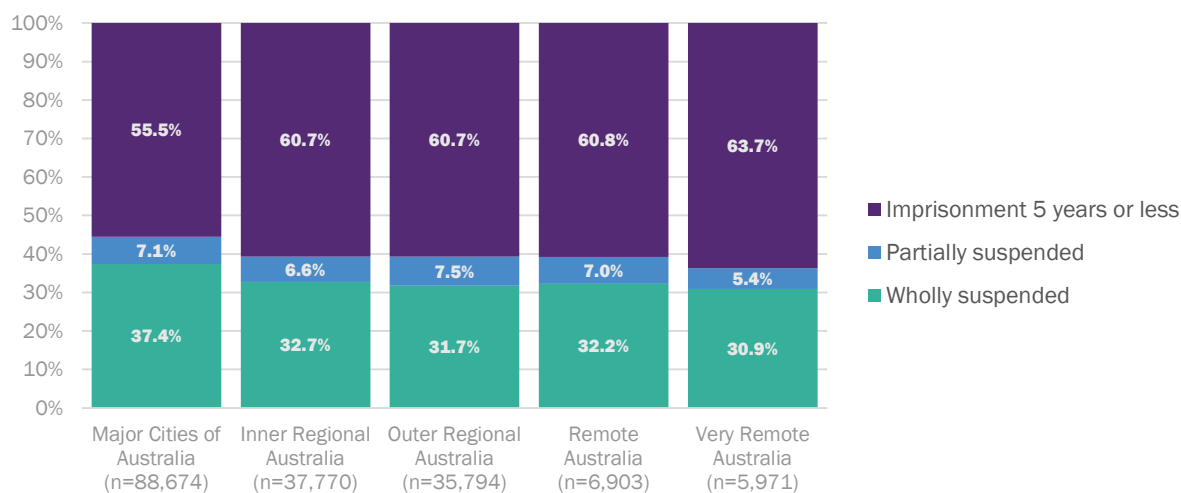


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

## 10.9 Impact of remoteness on use of suspended sentences

Across all remoteness areas, as a proportion of custodial sentences of 5 years or less, offenders are more likely to receive a sentence of imprisonment than a suspended sentence. Figure 10-12 shows those offenders living in very remote areas are slightly less likely to receive a partially suspended sentence or a wholly suspended sentence. Offenders living in major cities sentenced to a term of imprisonment are the least likely to receive an immediate sentence of imprisonment and most likely to have their term of imprisonment wholly suspended.

**Figure 10-12: Type of imprisonment sentence by remoteness area, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

As with the findings in relation to the gender and Aboriginal and Torres Strait Islander status of people receiving suspended sentences, these findings do not take into account the offence and offender-related variables that may account for these differences.

## 10.10 Recidivism and breach rates

### 10.10.1 Recidivism of offenders in Queensland

As discussed in Chapter 3 of this report (see section 3.3), evidence suggests:

- a small but statistically significant positive effect on recidivism by offenders serving wholly suspended sentences compared with offenders who serve a period of imprisonment — this is thought to be linked to the fact that offenders on wholly suspended sentences are able to maintain family connections, employment and accommodation;
- higher recidivism rates for those serving partially suspended sentences compared with those who served a wholly suspended sentence, particularly in the case of young offenders and those with a criminal history.

Chapter 3 (see section 3.4) also presented the findings of the Council's analysis of court data on the reoffending of a two-year cohort (2010–2011 to 2011–12). It showed, contrary to other research findings, that offenders sentenced to a wholly suspended sentence were more likely to reoffend (44.6%) than those sentenced to a partially suspended sentence (31.7%). Offenders sentenced to a suspended sentence combined with a community-based order were slightly less likely to reoffend (45.6%) than offenders who did not have a community-based sentencing order imposed (47.6%).

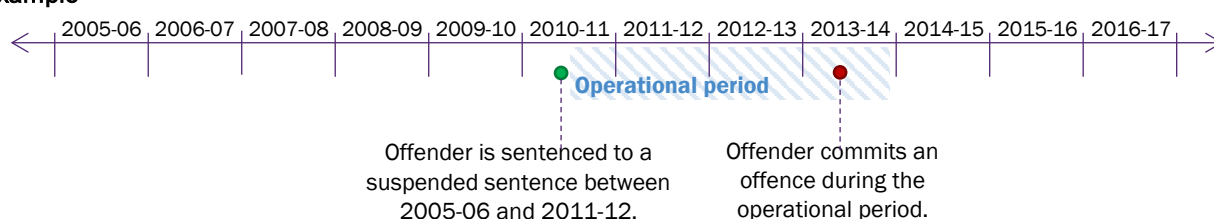
Because the current form of suspended sentences has been available in Queensland for over 25 years, since it was introduced in the current PSA in 1992, it has not been possible for the Council to consider the extent to which suspended sentences are being used in place of sentences of immediate imprisonment or used in place of non-custodial orders. This 'net widening' effect has been one of the major criticisms of suspended sentences, with the suggestion that far from reducing prisoner numbers, suspended sentences have actually contributed to increasing rates of imprisonment.<sup>1115</sup> This is discussed further below.

### 10.10.2 Breach rates in Queensland

This section follows a cohort of offenders that were sentenced to a suspended sentence in 2005–06 and 2011–12 (32,178 cases) and investigates whether offenders reoffend during the operational period of the suspended sentence.

Any breaches involving offences against justice procedures are excluded from this analysis to remove court proceedings involving breaches of other court orders. Reoffending that had not proceeded to sentence by June 2017 are not included in this analysis, although the practical impact from this is expected to be minimal. Note that while this analysis can be used as a proxy for breach of suspended sentence, this analysis does not distinguish reoffending that is punishable by imprisonment, as is required to trigger a breach.

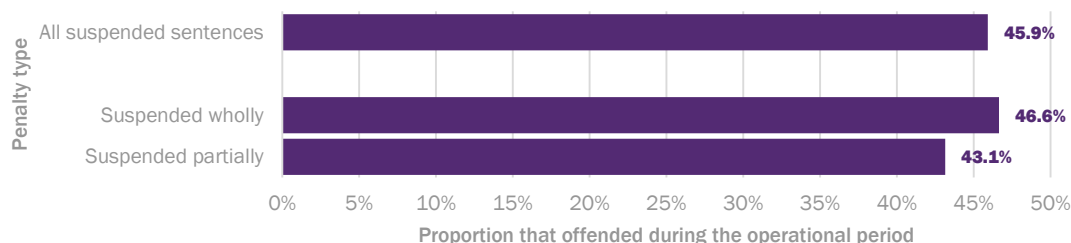
#### Example



<sup>1115</sup> See, for example, Patricia Menéndez and Don Weatherburn, 'The Effect of Suspended Sentences on Imprisonment' (Bureau Brief Issue Paper No. 97, NSW Bureau of Crime Statistics and Research, 2014); and Lia McInnis and Craig Jones, 'Trends in the Use of Suspended Sentences in NSW' (Bureau Brief Issue Paper No. 47, NSW Bureau of Crime Statistics and Research, 2010). See also the Sentencing and Parole Reform Bill 2002 (NZ) — as reported from the Justice and Electoral Committee (Commentary) at page 26, which refers to research published by the Ministry of Justice showing that in 65 to 75 per cent of cases, suspended sentences had been imposed on offenders who were unlikely, in the absence of such a sentence, to have received a sentence of imprisonment. It further refers to reoffending (about 50%) and activation rates (48 to 58%), meaning that approximately 24 to 29 per cent of people subject to these orders had the sentence activated in full or in part, and also usually received a cumulative sentence or longer concurrent sentence for the new offence as a consequence of it breaching an earlier imposed suspended sentence.

Overall, 45.9 per cent of offenders who were sentenced to a suspended sentence between 2005–06 and 2011–12 were later sentenced for an offence committed during the operational period of the order. Wholly suspended sentences had a slightly higher proportion of those reoffending, with 46.6 per cent of offenders reoffending during the operational period, compared to 43.1 per cent for partially suspended sentences.

**Figure 10-13: Proportion of offenders that were sentenced for an offence committed during the operational period of the suspended sentence (MSO) between 2005–06 and 2011–12**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from Queensland Wide Interlinked Courts (QWIC), February 2019.

Notes:

- 1) Includes suspended sentences issued between 2005–06 and 2011–12.
- 2) Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Suspended sentences issued by the Magistrates Courts had a higher number of offenders commit an offence during the operational period of the order (50.8%) compared to those issued by the higher courts (33.4%) — see Table 10-8.

**Table 10-8: Offences committed during the operational period of suspended sentences (MSO) by court type, 2005-06 to 2017–18**

| Penalty type                   | Higher Courts |              |               | Magistrates Courts |               |               |
|--------------------------------|---------------|--------------|---------------|--------------------|---------------|---------------|
|                                | Breaches<br>n | Cases<br>n   | Breaches<br>% | Breaches<br>n      | Cases<br>n    | Breaches<br>% |
| Partially suspended sentence   | 1,613         | 4,361        | 37.0%         | 1,214              | 2,193         | 55.4%         |
| Wholly suspended sentence      | 1,403         | 4,670        | 30.0%         | 10,547             | 20,954        | 50.3%         |
| <b>All suspended sentences</b> | <b>3,016</b>  | <b>9,031</b> | <b>33.4%</b>  | <b>11,761</b>      | <b>23,147</b> | <b>50.8%</b>  |

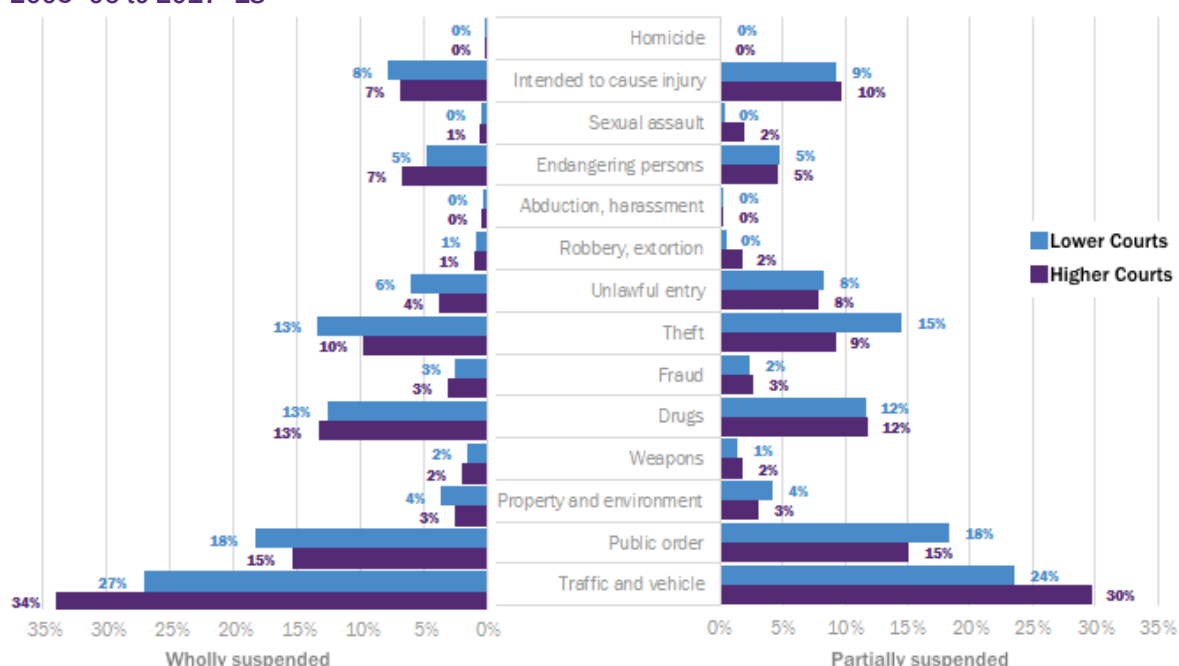
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

Notes:

- 1) Includes suspended sentences issued between 2005–06 and 2011–12.
- 2) Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Figure 10-14 shows which offences were committed during the operational period of a suspended sentence. In the higher courts, approximately one-third of the offences committed during the operational period of a suspended sentence were traffic offences; in the lower courts approximately one-quarter were traffic offences. Following traffic offences, the most common offences committed while on a suspended sentence were public order offences, drug offences and theft offences.

**Figure 10-14: Type of offences committed during the operational period of suspended sentences, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

Notes:

- 1) Includes suspended sentences issued between 2005–06 and 2011–12.
- 2) Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
- 3) Court type indicates the court that issued the original suspended sentence.

For offences committed during the operational period of a suspended sentence imposed by the higher courts, in 82 per cent of cases the new offence was less serious than the prior offence — see Table 10-9.

**Table 10-9: Suspended sentences that have offences committed during the operational period by seriousness of offending, 2005–06 to 2017–18**

| Penalty type                   | Less serious | Equally serious | More serious |
|--------------------------------|--------------|-----------------|--------------|
| <b>Higher courts</b>           |              |                 |              |
| Partially suspended sentence   | 82%          | 8%              | 9%           |
| Wholly suspended sentence      | 83%          | 6%              | 12%          |
| <b>All suspended sentences</b> | 82%          | 7%              | 10%          |
| <b>Magistrates Courts</b>      |              |                 |              |
| Partially suspended sentence   | 48%          | 19%             | 33%          |
| Wholly suspended sentence      | 42%          | 18%             | 40%          |
| <b>All suspended sentences</b> | 42%          | 18%             | 39%          |

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

Notes:

- 1) Includes suspended sentences issued between 2005–06 and 2011–12.
- 2) Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

A theme to bear in mind while reading the following tables is that the longer an operational period, the more time and opportunity an offender has to reoffend. However, as discussed in section 3.4.5 of this report, the majority of reoffending occurs within the first 6 months of an offender's release from custody.

For all suspended sentences, offenders with longer head sentences are less likely to reoffend compared to offenders with shorter head sentences for cases with operational periods of similar length — see Figure 10-15.

**Figure 10-15: Percentage of offenders that commit an offence during the operational period of a partially suspended sentence (MSO), by head sentence length and operational period length, 2005–06 to 2011–12**

| Partially suspended sentences |     | Head sentence (years) |     |     |     |     |
|-------------------------------|-----|-----------------------|-----|-----|-----|-----|
|                               |     | 0–1                   | 1–2 | 2–3 | 3–4 | 4–5 |
| Operational period (years)    | 0–1 | 44%                   |     |     |     |     |
|                               | 1–2 | 50%                   | 35% |     |     |     |
|                               | 2–3 | 52%                   | 40% | 36% |     |     |
|                               | 3–4 | *                     | 48% | 45% | 40% |     |
|                               | 4–5 | *                     | *   | 50% | 43% | 43% |

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

Notes:

1. Includes suspended sentences issued between 2005–06 and 2011–12.
  2. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
  3. Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.
- \* Small cell sizes (fewer than 30 cases).

For wholly suspended sentences, there are many more offenders who are sentenced to a short period of imprisonment with an operational period many times longer than the head sentence. Figure 10-16 (below) shows that offenders with longer operational periods generally are more likely to reoffend than those with shorter operational periods.

**Figure 10-16: Percentage of offenders that commit an offence during the operational period of a wholly suspended sentence (MSO), by head sentence length and operational period length, 2005–06 to 2011–12**

| Wholly suspended sentences |     | Head sentence (years) |     |     |     |     |
|----------------------------|-----|-----------------------|-----|-----|-----|-----|
|                            |     | 0–1                   | 1–2 | 2–3 | 3–4 | 4–5 |
| Operational period (years) | 0–1 | 44%                   |     |     |     |     |
|                            | 1–2 | 50%                   | 26% |     |     |     |
|                            | 2–3 | 54%                   | 32% | 37% |     |     |
|                            | 3–4 | 59%                   | 40% | 30% | *   |     |
|                            | 4–5 | 43%                   | 32% | *   | *   | *   |

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

Notes:

1. Includes suspended sentences issued between 2005–06 and 2011–12.
  2. Reoffending encompasses any offences committed during the operational period, where the offence was sentenced before 30 June 2017.
  3. Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.
- \* Small cell sizes (fewer than 30 cases).

### 10.10.3 Breach rates and outcomes in other jurisdictions

#### New South Wales

Prior to the removal of suspended sentences as a sentencing option in NSW in 2018, there were three reviews that examined breach rates undertaken by the Judicial Commission of NSW (2005),<sup>1116</sup> the NSW Sentencing Council (2011),<sup>1117</sup> and the New South Wales Law Reform Commission (NSWLRC) (2013).<sup>1118</sup>

The Judicial Commission study examined the successful completion rates for supervised suspended orders in 2003 and 2004 for both the Local Court (equivalent to Queensland Magistrates Courts) and higher courts, and found overall, 84 per cent of orders were successfully completed and 16 per cent of suspended sentences were breached.

The later 2011 study conducted by the NSW Sentencing Council, which examined the breach rates of suspended sentences imposed in the Local Courts in 2008, found that overall, 75.5 per cent of offenders did not commit an offence during the operational period. The success rates were slightly higher for offenders serving a suspended sentence without supervision (77.9%), with the NSWLRC attributing this finding to the 'higher risk characteristics of offenders subject to a supervision condition and the higher likelihood of breaches being detected when the sentence is supervised'.<sup>1119</sup> Of those dealt with for breach of the order (where the principal proven offence at that court event) during the period 2000–10, between 69 per cent and 79 per cent of offenders dealt with in the Local Court for breach of a suspended sentence were imprisoned.

The NSWLRC examined data for breach in 2012, which showed that of the 824 offenders dealt with for breach of a suspended sentence, 59 per cent were imprisoned, 21 per cent were required to serve the order by way of home detention or ICO, and 16 per cent of offenders remained subject to the suspended sentence as the court declined to revoke the bond.

In 2014, the NSW Bureau of Crime Statistics and Research published a study<sup>1120</sup> that provided evidence forming the basis of the decision to abolish suspended sentences in that State. Using a regression analysis, it found that for every 10 offenders given a suspended sentence, an additional 3.6 offenders were sent to prison.<sup>1121</sup> An earlier study had found that the introduction of suspended sentences led to a decrease in the use of non-custodial orders — in particular, community service orders.<sup>1122</sup> The 2014 study concluded:

Our findings suggest that, far from reducing the rate of imprisonment, suspended sentences have increased it. This suggests that one way of reducing the rate of imprisonment is to abolish or curtail the use of suspended sentences in favour of sanctions (e.g. community service orders) that, if breached, do not automatically result in imprisonment.<sup>1123</sup>

#### Victoria

As part of its extensive review of suspended sentences, VSAC conducted a preliminary breach study in 2005 and a more thorough analysis in 2007 using better quality data that examined the rates of breach for suspended sentences in the higher courts and the Magistrates' Court.<sup>1124</sup> The 2007 review found that:

<sup>1116</sup> Patricia Poletti and Sumitra Vignaendra, 'Trends in the Use of s 12 Suspended Sentences' (Sentencing Trends & Issues No. 34, Judicial Commission of NSW, 2005).

<sup>1117</sup> NSW Sentencing Council, *Suspended Sentences: A Background Report by the NSW Sentencing Council* (2011).

<sup>1118</sup> NSW Law Reform Commission (n 76).

<sup>1119</sup> Ibid [10.17].

<sup>1120</sup> Menéndez and Weatherburn (n 1115).

<sup>1121</sup> Ibid 1.

<sup>1122</sup> McInnis and Jones as cited in Menendez and Weatherburn (n 1115) 1–2.

<sup>1123</sup> Menéndez and Weatherburn (n 1115) 5.

<sup>1124</sup> The findings of the 2005 study were reported in Sentencing Advisory Council (Victoria), *Suspended Sentences: Discussion Paper* (2005). The 2007 findings are report in Nick Turner, 'Suspended Sentences in Victoria: A Statistical Profile' (Sentencing Advisory Council, Victoria, 2007).

- 'Just over one in four (27.5%) of all suspended sentences imposed during 2000–01 and 2001–02 were breached by the offender committing further offences during the operational period of the order';<sup>1125</sup>
- 'The breach rate for suspended sentences imposed in the Magistrates' Court (29.1%) was substantially higher than for sentences imposed by the higher courts (8.6%);'<sup>1126</sup>
- The breach rate for partially suspended sentences was higher than the breach rate for wholly suspended sentences for both the Magistrates' Court (31.8% vs 28.7%) and higher courts (10% vs 8.2%);<sup>1127</sup>
- Offenders under 25 had a higher breach rate than those aged over 25 in both the Magistrates' Court (34.3% vs 26.9%) and higher courts (13.5% vs 6.7%);<sup>1128</sup>
- 'Nearly two-thirds (62.8%) of breached suspended sentences imposed in 2000–01 and 2001–02 were restored on breach with the offender ordered to serve the sentence in prison. This [represented] 17.3 per cent of all suspended sentences imposed<sup>1129</sup>; and
- there was '[a] higher percentage of partially suspended sentences restored on breach than wholly suspended sentences.'<sup>1130</sup>

### Australian Capital Territory

An analysis undertaken by the ACT Office of the Director of Public Prosecutions found that of 23 breaches of fully suspended sentences that came before the ACT Supreme Court in 2009, the original suspended sentence was activated (in whole or part) in just over a quarter (26%) of cases.<sup>1131</sup> Unlike Queensland, there is no legislative presumption in the ACT of activating the original sentence on breach.

### Tasmania

A study of breaches of suspended sentences imposed by the Supreme Court of Tasmania from 1 July 2002 to 30 June 2004<sup>1132</sup> found that suspended sentences were activated in relation to very few offenders who had breached the order — largely as a result of very few breaches resulting in breach proceedings being instituted. While 41 per cent of the 229 offenders who received a wholly suspended sentence in the Supreme Court over the two-year period (n=94) breached their sentence by committing a further imprisonable offence, only 5 per cent (n=5) were subject to breach proceedings, of whom two had their sentence activated in whole or in part. There was a similar finding in relation to 81 offenders on partially suspended sentences, of whom 32 (40%) breached their sentence by further offending, but only two offenders (6%) had breach proceedings initiated. Both these sentences were activated.

---

<sup>1125</sup> Turner (n 1124) 1.

<sup>1126</sup> Ibid.

<sup>1127</sup> Ibid 9.

<sup>1128</sup> Ibid 10.

<sup>1129</sup> Ibid 23.

<sup>1130</sup> Ibid.

<sup>1131</sup> ACT Law Reform Advisory Council (LRAC), *A Report on Suspended Sentences in the ACT* (Report 1, October 2010) 39–40 [132]–[138]. The ACT LRAC noted that this small analysis only reported a sample of cases where a breach was prosecuted and so only provided a partial picture of suspended sentence breaches practices and could not say what proportion the sample was of all suspended sentences imposed. The LRAC was unable to conduct a breach analysis due to insufficient data: *ibid* 1, 39 [132].

<sup>1132</sup> Lorana Bartels, 'Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania' (2009) 21(2) *Current Issues in Criminal Justice* 219, 228.

A later Tasmanian study<sup>1133</sup> found a breach rate for wholly suspended sentences of 34 per cent, with 75 per cent of those breaching likely to breach it multiple times (25% committing 11 or more offences) and 41 per cent breaching by committing serious offences. Just over half of those who breached the order (52%) breached within 150 days. Of the 44 offenders who breached, 24 had breach proceedings initiated (of which 10 (42%) were activated in full and three (13%) were partly activated or had lesser terms of imprisonment substituted.

## England and Wales

Quarterly statistics produced by the UK Ministry for Justice show that 74 per cent of the supervision periods of suspended sentences (the period during which offenders are subject to additional conditions) were successfully completed.<sup>1134</sup> Other data published by the UK Ministry of Justice for the second quarter of 2017 (the last period for which these recidivism statistics have been published) suggest that people on community orders or suspended sentence orders are less likely to reoffend than those who receive sentences of imprisonment of 12 months or less that are unsuspended (33.5% compared with 64.4%).<sup>1135</sup>

Earlier UK research, which matched offenders on offender and offence-based characteristics (such as age, gender, ethnicity, number of prior criminal convictions and offence type), found that offenders sentenced to less than 12 months in custody had a higher one-year reoffending rate than similar, matched offenders receiving a suspended sentence order (62.5% for those receiving immediate custody versus 53.9% for those sentenced to a suspended sentence, for 2010).<sup>1136</sup> Offenders sentenced to a suspended sentence order who reoffended had a lower number of proven offences (an average of 2.2 per offender for suspended sentence orders versus 3.4 for offenders sentenced to immediate custody of 12 months or less).<sup>1137</sup> Those on suspended sentences also performed better than matched offenders receiving a community order, reoffending at a slightly lower rate (33.6% for suspended sentences versus 36.8% for community orders), and committing fewer new offences (average of 1.1 offences per offender for suspended sentences versus 1.2 offences per offender for those on a community sentence).<sup>1138</sup> In both cases, those who reoffended on a suspended sentence were more likely to be given a custodial sentence than those reoffending subject to other orders (44.4% custody rate for those previously sentenced to immediate custody of 12 months or less, versus 55.5% for those subject to a suspended sentence; and 25.6% for those on a community order, versus 48.1% for those matched offenders on a suspended sentence).<sup>1139</sup> The higher reoffending custody rate for suspended sentences can be understood in light of the operation of the relevant breach provisions, which require a court to activate a suspended sentence on breach, 'unless of the opinion that it would be unjust to do so'.<sup>1140</sup>

As noted in section 8.8, important differences between England and Wales and Queensland at that time include that offenders in England and Wales sentenced to custodial sentences of less than 12 months when the study was undertaken were not subject to post-release supervision by the probation service on their release, and suspended sentence orders in England and Wales provide for a range of conditions (including supervision) to be attached to the order.

## 10.11 The role of suspended sentences

### 10.11.1 Approach in other jurisdictions and recent reviews

Two Australian jurisdictions (Victoria and NSW) have abolished suspended sentences as a sentencing option, with a third (Tasmania) proposing to phase these orders out, subject to the outcomes of a monitoring report considering the use of recent reforms introducing new forms of sentencing orders.

<sup>1133</sup> Sentencing Advisory Council (Tasmania), *Phasing Out of Suspended Sentences, Background Paper* (2015) 48–51.

<sup>1134</sup> United Kingdom, Ministry of Justice, *Offender Management Statistics Bulletin, England and Wales*, Quarterly data July to September 2018 (2019) 7.

<sup>1135</sup> United Kingdom, Ministry of Justice, *Proven Reoffending Statistics Quarterly Bulletin, April 2017 to June 2017* (2019).

<sup>1136</sup> United Kingdom, Ministry of Justice (n 667) 4, 16 (Table 1.2).

<sup>1137</sup> *Ibid* 16, Table 1.2.

<sup>1138</sup> *Ibid* 23, Table 1.6.

<sup>1139</sup> *Ibid* 16, Table 1.2 and 23, Table 1.6.

<sup>1140</sup> *Criminal Justice Act 2003* (UK) sch 12 paras 8(3)–(4).

In recommending the abolition of suspended sentences, the NSWLRC pointed to:

- its recommendation that the community detention order (CDO) combining home detention and ICOs be introduced as a new form of flexible custodial community-based order, which would be available to a wider cohort of offenders than home detention and ICOs, and would ‘occupy the same space as suspended sentences’;
- the flexible design of breach and revocation procedures for the CDO, which would allow, in cases of non-compliance, for the person to serve only the period of the order remaining in full-time custody, rather than the full term of the sentence under a suspended sentence, and which would also allow the person to apply to have the community-based order reinstated;
- the ability of the new order to provide a framework for intensive rehabilitative support, which the NSWLRC considered would be better able to cater for offenders likely to breach the conditions of their suspended sentence;
- evidence that suspended sentences in NSW had caused net widening from other forms of orders, which has failed to serve the interests of offenders with complex needs who have difficulty complying with sentencing orders.<sup>1141</sup>

The reforms recommended by the NSWLRC have now come into effect, with some modifications. For a summary of the NSW reforms and changes introduced in Victoria and Tasmania, see Chapter 8 on CCOs.

In the Second Reading Speech for the Bill removing suspended sentences as a sentencing option, the NSW Attorney-General referred to the concerns that:

They do not hold offenders accountable, 44 per cent of them are not supervised and [based on research by the NSW Bureau of Crime Statistics and Research] they have been found to increase the New South Wales prison population.<sup>1142</sup>

In Victoria, following its review of suspended sentences, VSAC raised concerns about suspended sentences including:

- problems of net widening (offenders being sentenced to imprisonment who would have otherwise received a non-custodial sentence) and sentence inflation (longer prison sentences being imposed than if the sentence had been ordered to be served immediately);
- the substitutional nature of the sanction and its impact on community understanding and confidence in sentencing: ‘In the public mind, a prison sentence (or a custodial sentence) is a sentence that offenders serve in prison—not something which is imposed, but not activated’.<sup>1143</sup>

Suspended sentences have been retained by the majority of Australian jurisdictions and are viewed by many as serving an important purpose. As summarised by TSAC, identified benefits include that they:

- provide a useful sentencing option and have an important place in the sentencing hierarchy;
- ‘allow for the seriousness of the offence and/or the offender’s conduct to be appropriately acknowledged by imposing a sentence of imprisonment, while at the same time allowing for mercy’;
- enable offenders to avoid short prison sentences, which is ‘expected to have a protective effect against reoffending’;
- are an effective specific deterrent;
- may reduce the prison population; and
- may provide an incentive for offenders to plead guilty.<sup>1144</sup>

<sup>1141</sup> NSW Law Reform Commission (n 76) 229–230 [10.34]–[10.39].

<sup>1142</sup> NSW, *Parliamentary Debates*, Legislative Assembly, ‘Second Reading — Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017’, 11 October 2017, 1–2 (Mark Speakman, Attorney-General).

<sup>1143</sup> Sentencing Advisory Council (Victoria) (n 80) 22–3 [2.35]–[2.36], [2.43].

<sup>1144</sup> Sentencing Advisory Council (Tasmania) (n 80) 13 [3.2.1] (references omitted).

Discussions with interstate stakeholders in NSW and Victoria suggest that many legal stakeholders would prefer to have the option of a suspended sentence still available in their jurisdictions and are concerned about the impact of the removal of suspended sentences on prisoner numbers.<sup>1145</sup>

The Australian Law Reform Commission (ALRC), which most recently reported on the use of suspended sentence orders in the context of its inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples, also commented on the ‘problematic’ nature of suspended sentences:

In particular, research has demonstrated that they have resulted in net widening while being perceived as too lenient by the public. While offering some offenders a last chance, suspended sentences can and do ‘set people up to fail’, particularly people with complex needs.<sup>1146</sup>

While noting the problems with this order, the ALRC recommended the retention of suspended sentences in the absence of the availability of appropriate community-based sentencing options.<sup>1147</sup> In doing so, it referred to the following risks and benefits of retaining suspended sentences:

- Aboriginal and Torres Strait Islander offenders may be disproportionate recipients of suspended sentences compared to non-Indigenous offenders (referencing both NSW and Queensland national data showing that a higher proportion of Aboriginal and Torres Strait Islander defendants in those jurisdictions found guilty of an offence received a wholly suspended sentence compared to their non-Indigenous counterparts).<sup>1148</sup>
- The removal of suspended sentences without improving access to community-based sentences is likely to lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to prison.<sup>1149</sup>
- Stakeholder views about the need to ensure that intermediate sentencing options are uniformly available before suspended sentences are phased out — particularly with reference to the potential negative impacts for Aboriginal and Torres Strait Islander offenders living in regional and remote communities<sup>1150</sup> — and that they are a useful ‘last chance’ option for offenders to avoid full-time custody.<sup>1151</sup>
- Highlighted benefits for Aboriginal and Torres Strait Islander women of suspended sentence orders because they are able to be structured in a way that requires few reporting obligations, making them more suitable for offenders with kinship and cultural obligations than other forms of community-based orders.<sup>1152</sup>

### 10.11.2 Stakeholder views

The views of legal stakeholders consulted by the Council over the period of the review about the utility of suspended sentences generally reflect those commonly advanced in support of suspended sentences as outlined above.

Legal stakeholders noted suspended sentences ‘can operate as an effective alternative to actual imprisonment for certain offenders’,<sup>1153</sup> and have ‘particular utility in sentencing [people] with a low risk of reoffending, elderly offenders and for offences that have low rates of recidivism’.<sup>1154</sup>

<sup>1145</sup> See Appendix 2 for a list of agencies and individuals consulted.

<sup>1146</sup> Australian Law Reform Commission (n 21) 267 [7.149].

<sup>1147</sup> Ibid 264, Recommendation 7–4.

<sup>1148</sup> Ibid 264 [7.136]. Cf. the Council’s analysis, which found that of those offenders receiving imprisonment for 5 years or less, Aboriginal and Torres Strait Islander offenders are more likely to receive an imprisonment sentence than their non-Indigenous counterparts. This does not, however, take into account the use of non-custodial penalties as an alternative to imprisonment.

<sup>1149</sup> Ibid 267–8 [7.150].

<sup>1150</sup> Ibid 265 [7.139].

<sup>1151</sup> Ibid 266 [7.144].

<sup>1152</sup> Ibid 266 [7.145].

<sup>1153</sup> Submission 6 (Legal Aid Queensland) 9.

<sup>1154</sup> Submission 15 (Queensland Law Society) 9.

The Queensland Law Society (QLS), among those who saw an important role for suspended sentences, suggested:

A suspended sentence has the dual advantage of allowing the Court to mark the seriousness of the offence, and deter an offender from re-offending, whilst, at the same [time], avoid the possible negative effects of imprisonment and facilitate an offender's rehabilitation.

...

[Suspended sentences] may provide a platform for adequate denunciation and deterrence whilst having proper regard to an offender's subjective circumstances. They contribute towards reducing the prison population. They allow offenders to avoid a first experience in custody by taking personal responsibility for their own rehabilitation ... They avoid short prison sentences, which can be refractory to ongoing rehabilitation. They may provide an incentive for offenders to plead guilty.<sup>1155</sup>

In its Options Paper, the Council asked whether suspended sentences are operating as an effective alternative to actual imprisonment in Queensland, and whether there were any current barriers to their use.

Some stakeholders were concerned that they are currently 'under-utilised' as a sentencing option,<sup>1156</sup> while others were concerned about the risk of courts imposing such orders as an alternative to a non-custodial sentence rather than imprisonment. The QLS, for example, cautioned:

It is critical however that the proper two-step process for imposing a suspended sentence is not elided. Legitimate concerns exist regarding the identified tendency of sentencing Courts to erroneously employ suspended sentences against offenders who previously would have been sentenced to a less severe sentence than imprisonment, or to order a longer sentence of imprisonment than otherwise would have been imposed had the sentence of imprisonment not been suspended. Courts must be vigilant to avoid the use of suspended sentences as an alternative to a non-custodial sentence.<sup>1157</sup>

Legal Aid Queensland (LAQ) noted this risk applied particularly 'in regional and remote areas with limited services where offenders who would ordinarily attract a community-based order may receive a suspended sentence'.<sup>1158</sup> Similar concerns were identified by the QLS, which noted the impact particularly for Aboriginal and Torres Strait Islander offenders.<sup>1159</sup>

Possible barriers to their use identified by stakeholders included:

- the inability of courts to set conditions as part of a suspended term of imprisonment;<sup>1160</sup>
- the 'poor regard in which suspended sentences are held by the public', which might factor into judicial considerations of suspended sentences as a sentencing option;<sup>1161</sup>
- the use of court ordered parole, which involves some form of supervision (which is not currently available to a court under a suspended sentence when sentencing for a single offence);<sup>1162</sup>
- for wholly suspended sentences, the lack of legislative recognition for extended periods of successful compliance with bail (in contrast to recognition that can be given to pre-sentence custody).<sup>1163</sup>

Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis of The University of Queensland School of Law suggested:

---

<sup>1155</sup> Ibid.

<sup>1156</sup> Submission 7 (Sisters Inside) 7.

<sup>1157</sup> Submission 15 (Queensland Law Society) 9.

<sup>1158</sup> Submission 6 (Legal Aid Queensland) 9.

<sup>1159</sup> Submission 15 (Queensland Law Society) 11.

<sup>1160</sup> Ibid 9–10.

<sup>1161</sup> Ibid 10.

<sup>1162</sup> Submission 6 (Legal Aid Queensland) 9; Submission 15 (Queensland Law Society) 10.

<sup>1163</sup> Submission 7 (Sisters Inside) 7.

There may be cognitive biases at play (relating to race, class and previous offending history) that may create barriers to the use of suspended sentences. The offence and current circumstances of the offender should be taken into account in making a determination.<sup>1164</sup>

To encourage use of this order, they suggested that judicial education may be important and that ‘better social supports to identified offenders may also assist’.<sup>1165</sup>

The QLS also noted such an order may act to disadvantage offenders who do not have access to familial and social support, and who are economically disadvantaged.<sup>1166</sup> They noted: ‘These offenders are often located in regional remote areas of the State, where access to social services is limited’.<sup>1167</sup> In this context, there may be ‘a concern that suspended sentences are less apt to serve the interests of offenders with complex needs who have difficulty complying with sentencing orders’.<sup>1168</sup>

The Queensland Council for Civil Liberties (QCCL) suggested that the introduction of CCOs may reduce the need for suspended sentences.<sup>1169</sup>

Consistent with its position on the use of community-based orders, Fighters Against Child Abuse Australia (FACAA) did not support the use of suspended sentences for crimes involving violence or of a sexual nature — with specific reference to the use of these orders not being used for people convicted of child sexual offences.<sup>1170</sup> FACAA recommended a list/schedule be developed of offences for which these orders were not available.<sup>1171</sup>

### 10.11.3 The Council’s view

Suspended sentences play an important role in the broader sentencing framework in Queensland. As courts have recognised, a suspended sentence is a significant punishment<sup>1172</sup> and not merely an exercise in leniency.<sup>1173</sup> ‘[I]t is an order made in the community’s interest and generally designed to prevent re-offending’.<sup>1174</sup>

While suspended sentences have now been abolished in NSW and Victoria, and also in NZ, those jurisdictions that have retained suspended sentences provide a power to courts to set conditions (either by making the order subject to conditions or by making the suspension conditional on the person entering into a good behaviour bond). This power does not exist in Queensland.

It has been recognised that there is a potential disconnect between the way suspended sentences are viewed at law and by members of the community, perhaps particularly so in their current unconditional form. As Justice Kirby commented in the High Court decision of *Dinsdale v The Queen*:<sup>1175</sup>

The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without re-offending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty known to law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims

<sup>1164</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 4.

<sup>1165</sup> Ibid.

<sup>1166</sup> Submission 15 (Queensland Law Society) 10.

<sup>1167</sup> Ibid.

<sup>1168</sup> Ibid 11.

<sup>1169</sup> Submission 8 (Queensland Council for Civil Liberties) 3.

<sup>1170</sup> Submission 4 (Fighters Against Child Abuse Australia) 6–8.

<sup>1171</sup> Ibid 6.

<sup>1172</sup> *Elliott v Harris (No. 2)* (1976) 13 SASR 516; *DPP (Cth) v Carter* [1998] 1 VR 601; *Sweeney v Corporate Security Group* (2003) 86 SASR 425.

<sup>1173</sup> *Reilly v The Queen* [2010] VSCA 278, [36]; *DPP (Cth) v Carter* [1998] 1 VR 601, 607–8; *DPP v Buhagiar and Heathcote* [1998] 4 VR 540, 547.

<sup>1174</sup> *DPP v Buhagiar and Heathcote* [1998] 4 VR 540, 547 (Batt and Buchanan JJA) (citations omitted).

<sup>1175</sup> (2000) 202 CLR 321.

of criminal wrong-doing or even by offenders themselves. This disparity of attitudes illustrates the tension that exists between the component parts of this sentencing option: the decision to imprison and the decision to suspend.<sup>1176</sup>

Enabling a court to set conditions in conjunction with a suspended sentence may allow for the order to operate more flexibly, better respond to the purposes of sentencing (including just punishment and rehabilitation) and promote greater judicial and community confidence in the use of this order.<sup>1177</sup>

The introduction of a combined form of suspended sentence and community-based order is discussed below.

#### **RECOMMENDATION: SUSPENDED SENTENCES**

35. The power to suspend a prison sentence in Queensland should be retained with no changes made either to the maximum term that can be suspended or to the maximum operational period.

#### **Evidence of effectiveness and potential net-widening effects**

While the Council strongly supports suspended sentences being retained as a sentencing option in Queensland, it has not been possible for the Council to evaluate whether the net-widening effects of suspended sentences identified in some other jurisdictions are also a problem in Queensland. To undertake such an analysis, the Council would need to understand:

- sentencing patterns before and after the introduction of the current form of suspended sentences in Queensland (a decreasing use of fines and community-based sentencing orders, alongside a growth in the use of suspended sentences — with or without a decrease in the use of immediate imprisonment — suggests the introduction of these orders has had a net-widening effect);
- what proportion of suspended sentences are breached by further offending; and
- of those offenders proceeded against for breach, what action is taken on breach (including whether the suspended term of imprisonment is activated in whole or in part).

The data required to analyse these matters were not available to the Council, although data on reoffending during the operational period of the order suggest that in at least half of cases, a suspended sentence is effective in diverting offenders from actual custody or, in the case of partially suspended sentences, reducing the period that would otherwise have been served in custody prior to release on parole. The data also show that offenders on suspended sentences are less likely to reoffend than those sentenced to short terms of imprisonment (although this may also be because those at lower risk of reoffending are more likely to have their sentence suspended). The analysis of reoffending is made more difficult in that the available data do not distinguish between offences punishable by imprisonment (therefore constituting a breach of the suspended sentence) and those that were not.

The Council recommends that the administrative data captured by Court Services Queensland for orders made under Part 8 of the PSA should be reviewed to ensure:

- information is available about the number of suspended sentences breached by the commission of a new offence punishable by imprisonment;
- orders made on breach are accurately captured; and
- data can be extracted in a format that can be analysed without resort to extensive manual coding.

Without these data it will continue to prove very difficult to evaluate the effectiveness of suspended sentences in Queensland, to understand the degree to which the use of these orders is diverting offenders from prison, and to identify which offender groups are most likely to succeed on these orders.

<sup>1176</sup> Ibid 346–7 [80] (Kirby J).

<sup>1177</sup> On this last point, see Keir Irwin-Rogers and Julian V Roberts, 'Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017' (2019) 82 *Law and Contemporary Problems* 137, 137–8.

## RECOMMENDATION: DATA ON BREACH OF SUSPENDED SENTENCES

36. Court Services Queensland should review administrative data captured for orders made under Part 8 of the *Penalties and Sentences Act 1992* (Qld) to ensure that:
- (a) information about the number of suspended sentences breached through reoffending by commission of a new offence punishable by imprisonment is available;
  - (b) orders made on breach are accurately captured; and
  - (c) breach data can be extracted in a format that can be analysed without resort to extensive manual coding.

## 10.12 A conditional form of suspended sentence

### 10.12.1 Current limitations in Queensland

As discussed earlier in this report, courts are restricted in their ability to sentence a person to supervision at the same time as making a suspended sentence order, unless sentencing that person for two or more offences.

Based on the Council's data, in about 20 per cent of cases where a suspended sentence is imposed as MSO for a Queensland offence (23.5% for wholly suspended sentences, and 21.1% for partially suspended sentences), the court is only sentencing the person for a single offence. In these cases, a court has no option to make another form of community-based sentencing order — for example, requiring the offender to be under supervision or to perform community work.

Where courts have the ability to impose multiple orders — for example, when sentencing a person for two or more offences of differing levels of seriousness at the same court event — courts frequently make use of combination orders, combining a wholly or partially suspended sentence with other order types. The Council's research shows that of the cases where more than one penalty was applied with a Queensland offence as the MSO, over one in five wholly suspended sentences imposed in the higher courts (22.5%) for the MSO sentenced at that court event, and one in 10 wholly suspended sentences in the Magistrates Courts (11.4%) was made alongside a probation order imposed for a separate offence (see above, Table 10-6). Probation is also commonly combined with a partially suspended sentence — 20.3 per cent of partially suspended sentences imposed for the MSO sentenced in the higher courts was combined with probation, and 9.8 per cent in the Magistrates Court (see above, Table 10-7). The use of community service orders in combination with suspended sentence orders is, however, far less common.

### 10.12.2 The approach in other jurisdictions

In all other Australian jurisdictions that have retained suspended sentences as a sentencing option, offenders are allowed (or, in some cases, required) to be subject to conditions during the operational period of the order.

- In the ACT<sup>1178</sup> and SA,<sup>1179</sup> the making of an order suspending imprisonment is conditional on the offender entering into a good behaviour bond, which is similar to the Commonwealth form of order — a recognizance release order under section 20(1)(b) of the *Crimes Act 1914* (Cth).
- In the NT,<sup>1180</sup> Tasmania<sup>1181</sup> and WA,<sup>1182</sup> the court is provided with the option of making the order unconditional or subject to conditions, with guidance about the making of conditions ranging from the very broad ('order may be subject to such conditions as the court sees fit' in the NT), to the setting out of specific mandatory conditions in legislation and requiring courts to order at least one

<sup>1178</sup> *Crimes (Sentencing) Act 2005* (ACT) ss 12, 13.

<sup>1179</sup> *Sentencing Act 2017* (SA) s 96. See also, for example, *R v Ireland* (2012) 114 SASR 438.

<sup>1180</sup> *Sentencing Act 1995* (NT) s 40(2).

<sup>1181</sup> *Sentencing Act 1997* (Tas) s 24.

<sup>1182</sup> *Sentencing Act 1995* (WA) ss 76, 81.

additional condition (in WA, a program requirement, supervision or curfew condition, which is imposed as part of a separate order called ‘conditional suspended imprisonment’).

The experience of WA is instructive as the Australian jurisdiction that has most recently introduced a conditional suspended sentence (in 2006) in the form of a Conditional Suspended Imprisonment (CSI) order.<sup>1183</sup> Until September 2017, this order could only be imposed by the Supreme Court, District Court, Children’s Court and Perth Drug Court. It has now been extended for use in the Magistrates Court.

In the sentencing options set out under the *Sentencing Act 1995* (WA), the CSI order has been positioned above a suspended sentence of imprisonment, and below a term of imprisonment,<sup>1184</sup> suggesting it is to be treated by courts in sentencing as a more severe form of penalty than an unconditional form of suspended sentence.<sup>1185</sup> In contrast to Queensland and many other Australian jurisdictions, there is no power under WA legislation to partially suspend a prison sentence.

The court can suspend a sentence of up to 5 years’ imprisonment similar to Queensland, but the suspension period must be not more than 24 months.<sup>1186</sup>

Offenders in WA must comply with standard obligations set out in the legislation, and one or more primary requirements as decided by the court.<sup>1187</sup> Standard obligations include reporting to a community corrections centre following sentence, notifying of any change of address or employment, not leaving the State without permission, and complying with other requirements set out under the *Sentence Administration Act 2003* (WA), such as complying with lawful orders or directions about undertaking community corrections activities and other obligations.<sup>1188</sup>

Three primary requirements are permitted to be attached to the order: a program requirement; a supervision requirement; and a curfew requirement.<sup>1189</sup> More information about these conditions is contained in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council’s website.

In a statutory review of the *Sentencing Act 1995* (WA) undertaken by the Western Australian Attorney-General’s Department in 2013, concerns were noted about the inflexibility of the CSI order, specifically in relation to the ability to amend or cancel the order.<sup>1190</sup> The Chief Justice submitted improvements could be made by allowing for more ‘generalised and flexible conditions’ and also suggested that community work be considered as a possible condition and, in the case of offenders in remote communities, scope for conditions that ‘regulate or restrain their conduct generally’.<sup>1191</sup> The conclusion reached by the review was the *Sentencing Act 1995* (WA) ‘should provide as much flexibility as possible in both range of conditions and flexibility of their use, so that judicial officers are able to exercise as much discretion as they can in response to individual offender situations’.<sup>1192</sup>

The current conditions that can be attached to a CSI order are unchanged from those that existed at the time the statutory review was undertaken. The rationale for not acting on the statutory review’s conclusion supporting flexibility in the range of conditions and their use is unclear.

A conditional form of order also exists in England and Wales. The legislation sets out a list of 14 requirements that can be attached to a suspended sentence order.<sup>1193</sup> These include:

- community service (not <40 hours or >300 hours completed within 12 months, unless extended);

<sup>1183</sup> *Sentencing Act 1995* (WA) pt 12 inserted by *Sentencing Legislation Amendment Act 2004* (WA) s 5, which came into effect on 31 May 2006.

<sup>1184</sup> *Sentencing Act 1995* (WA) s 39(2).

<sup>1185</sup> Ian Weldon, LexisNexis Butterworths, *Criminal Law Western Australia* (online at June 2017) [SA s 81.5].

<sup>1186</sup> *Sentencing Act 1995* (WA) s 81(1).

<sup>1187</sup> *Ibid.*

<sup>1188</sup> *Ibid* s 83.

<sup>1189</sup> *Ibid* s 84.

<sup>1190</sup> Western Australia, Department of the Attorney-General, *Statutory Review of the Sentencing Act 1995* (WA) (2013) 52.

<sup>1191</sup> *Ibid.*

<sup>1192</sup> *Ibid*, Conclusion 41.

<sup>1193</sup> *Criminal Justice Act 2003* (UK) s 190. The other requirement is an attendance centre requirement for offenders aged under 25 years.

- a rehabilitation activity requirement (to attend appointments and participate in activities, including restorative justice processes);
- a program requirement (e.g. to participate in a domestic and family violence, anger management, drug and alcohol, or sex offender program);
- a prohibited activity requirement;
- a curfew requirement (not <2 hours or >16 hours/day for up to 12 months);
- an exclusion requirement;
- a residence requirement — to live at a specified place (including a hostel or other institution);
- a foreign travel prohibition;
- a mental health treatment requirement;
- a drug rehabilitation requirement;
- an alcohol treatment requirement;
- an alcohol abstinence and monitoring requirement; and
- an electronic monitoring requirement (which is mandatory for a curfew or exclusion requirement, except if certain criteria are met).

The current form of conditional suspended sentence was introduced in England and Wales as part of a sentencing reform package that followed the release of the Halliday Report in 2001<sup>1194</sup> and the UK Government's White Paper in 2002 (*Justice for All*).<sup>1195</sup> The reforms made suspended sentences available in a broader range of cases (they were previously limited to 'exceptional circumstances'<sup>1196</sup>).

A 2009 report following the reforms in the UK found that about 60 per cent of suspended sentence orders had two or three requirements (with a further approximately 37% having only one).<sup>1197</sup> The most commonly used conditions at that time were: supervision (now part of a rehabilitation activity requirement), unpaid work, and participation in an accredited program.<sup>1198</sup>

In contrast to Queensland, none of these jurisdictions have an equivalent order to court ordered parole. A parole eligibility date is either set by the court (with a parole board determining the date and conditions of release), or the person is subject to a statutory release date. This is discussed further in Chapter 11 of this report.

The only other Australian jurisdiction with a similar recent experience in having these two orders operate together is NSW, which, until recently, had both court-based parole and suspended sentences. Suspended sentences have now been abolished, and the former court-based parole replaced with statutory parole orders for sentences of 3 years or less.<sup>1199</sup> Even when these orders existed alongside each other, courts in NSW only had the power to suspend a term of imprisonment imposed in full, not part.

<sup>1194</sup> Halliday, French and Goodwin (n 559).

<sup>1195</sup> Great Britain Home Office (n 558).

<sup>1196</sup> *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 118(4) (repealed).

<sup>1197</sup> Mair and Mills (n 728) 10–11, Tables 4–5.

<sup>1198</sup> *Ibid.*

<sup>1199</sup> See *Crimes (Administration of Sentences) Act 1999* (NSW) s 158 inserted by *Parole Legislation Amendment Act 2017* (NSW) sch 1 [13]. Under this scheme, an offender subject to a sentence of 3 years or less, being a sentence for which a non-parole period has been set, must be released on parole at the end of the non-parole period, unless ineligible for release under section 126 of the Act. A person is only eligible for release if subject to at least one sentence for which a non-parole period has been set and has served the non-parole period of each such sentence and is not subject to any other sentence. Other exceptions listed in section 126 are offenders required to be kept in custody in relation to an offence against a Commonwealth law, or for state offences, if the offender is a Commonwealth post-sentence terrorism inmate or a NSW post-sentence inmate. In setting a non-parole period, the court must also comply with requirements under ss 44(1)–(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) — for example, to ensure in setting the non-parole period, the balance of the sentence does not exceed one-third of the non-parole period for the sentence, unless the court decides there are special circumstances.

### 10.12.3 Options for reform

The Council considered three options for reform, which it put forward in its Options Paper for the purposes of consultation:

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

While Option 1 represents the model with the lowest cost implications, it does not respond to the court's inability to impose conditions on suspended sentence orders.

Option 1 would potentially leave a gap in the range of available orders if court ordered parole is not extended beyond 3 years, and if sexual offences are not included in the court ordered parole scheme. This is because courts will have to continue to rely on suspended sentences to achieve a certain release date, but without the ability to ensure, by imposing appropriate conditions, the offender is subject to some form of supervision on their release.

While the same outcome (a certain release date following the person being made subject to conditions for a single offence) could arguably also be achieved by use of a combined imprisonment plus probation order under section 92(1)(b) of the PSA, in reality, this option is limited in that:

- the court must order the person to serve a term of imprisonment prior to being released on probation (in comparison to, for example, a form of conditional wholly suspended sentence, which would not require the person to serve any period involving actual custody); and
- the period of imprisonment to be served under a section 92(1)(b) order is limited to one year.

Option 2 – the Council's preferred option as presented in its Options Paper – would introduce a discretionary power of courts to combine a suspended sentence with a community-based order when sentencing an offender for a single offence. This form of order (a suspended term of imprisonment, with the suspension made conditional upon the person agreeing to comply with the conditions of another order) is one of the most common types of conditional suspended sentence in Australia.

Option 3 is to introduce a single integrated form of conditional suspended sentence order, such as exists in WA and in England and Wales. The arguments against the adoption of this form of order, as noted in the Options Paper, are similar to the arguments against Option 2, but in this case there would be a greater risk of the diversionary power of suspended sentences being eroded. This is because a breach of the conditions placed on the order constitutes a breach of the suspended sentence order, and unless the provisions provide for separate consequences on breach of conditions other than by reoffending, the person subject to the order risks having part or the whole sentence activated if they fail to comply with the conditions.

There is also, arguably, greater risk of sentence escalation if courts set longer operational periods than would otherwise have been appropriate for supervisory purposes to enable offenders to address the factors associated with their risk of reoffending.

The adoption of Option 3 may also lead to confusion about how the different forms of conditional orders should be used, considering two different variations would potentially be available, namely:

- a conditional suspended sentence when sentencing an offender for a single offence;
- a partially or wholly suspended sentence combined with a community-based order when sentencing for two or more offences.

### 10.12.4 Stakeholder views

Legal stakeholders were supportive of the option preferred by the Council (Option 2) – to allow a court to order both a suspended sentence and community-based sentencing order when sentencing for a single offence.<sup>1200</sup>

LAQ submitted such an approach:

would allow for a punitive response and addressing of rehabilitative issues. Keeping the orders with different purposes separate has the benefit of avoiding incarcerating people for minor breaches of program participation as is the risk with a conditional suspended sentence. This is particularly important given the length of suspended sentences.<sup>1201</sup>

The ability to decouple the consequence of breaching the community-based order from a suspended sentence was also viewed positively by the QLS, which submitted:

a breach of the community based part of the order should not be a breach of the suspended sentence. It is a useful distinction to maintain, between what might be minor non-compliance, and a return to offending in a way that could incur imprisonment.

Maintaining this distinction will relieve the courts, and especially the District and Supreme Courts, of unnecessary work hearing allegations of minor non-compliance.<sup>1202</sup>

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel who attended a special meeting of the panel on the Council's Options Paper also supported Option 2 as their preferred option.<sup>1203</sup>

Stakeholders did not see any need to limit the maximum period a person is subject to conditions by reference to the operational period of the suspended sentence, viewing this as a matter to be left to the courts in the proper exercise of their sentencing discretion.<sup>1204</sup>

There was support for such conditions (or conditional orders) being imposed 'only ... when appropriate to do so, having regard to the kind of offence and seriousness'.<sup>1205</sup>

However, Queensland Corrective Services (QCS) cautioned: 'There would be significant resource implications for QCS if additional requirements/special conditions, requiring monitoring by QCS, were to become a feature of this penalty', and recommended that QCS should not be responsible for monitoring compliance with suspended sentences.<sup>1206</sup> They further recommended that 'there would need to be clarity around the response to breaches of such conditions between the different bodies that may be involved at the administrative level'.<sup>1207</sup>

### 10.12.5 The Council's view

The Council continues to support Option 2 as its preferred option for reform.

Until such time as the CCO is fully operational, the Council recommends courts should be provided with a power under the PSA to sentence an offender to a wholly suspended sentence or a partially suspended sentence in combination with a probation order or community service order when sentencing an offender for a single offence. An equivalent power should be introduced to allow a court to combine a suspended

<sup>1200</sup> See, for example Submission 6 (Legal Aid Queensland); Submission 7 (Sisters Inside) 7; Submission 10 (Queensland Police Union of Employees) 8–9; Submission 15 (Queensland Law Society) 16. The Queensland Council for Civil Liberties was supportive of a conditional suspended sentence: Submission 8 (Queensland Council for Civil Liberties) 2.

<sup>1201</sup> Submission 6 (Legal Aid Queensland) 4.

<sup>1202</sup> Submission 15 (Queensland Law Society) 17. They further suggested: 'That saving of work could be enhanced by an amendment to s. 124(4) to say more explicitly that the Magistrates Court has a discretion not to commit a person to the higher court. In the case of major non-compliance with a community-based order, the court can always re-sentence the offender, and one option available is to rescind the suspended sentence and impose a term of immediate imprisonment (s. 125(4)(a) and s. 126(4))'.

<sup>1203</sup> 'Talking points for Advisory Panel Members: Council meeting 18 June', 2, summarising views of panel members who attended an extraordinary meeting of the Panel on 17 May 2019.

<sup>1204</sup> See, for example, Submission 15 (Queensland Law Society) 17.

<sup>1205</sup> Submission 8 (Queensland Council for Civil Liberties) 3.

<sup>1206</sup> Submission 11 (Queensland Corrective Services) 24.

<sup>1207</sup> Ibid.

sentence with a community correction order when sentencing for a single offence at such time as this new order is introduced.

The Council recommends that the maximum term of imprisonment to be served in custody prior to the remainder of the sentence being suspended under a partially suspended sentence when combined with probation, community service or a community correction order should be 12 months, consistent with the current approach to imprisonment and probation orders under section 92(1)(b) of the PSA, but excluding any time declared as time served. The exclusion of time served from the determination of eligibility for a combined partially suspended sentence/community-based order is intended to ensure courts have the ability to make this form of combined order sentence in circumstances where the person has spent significant time on remand – and would otherwise be ineligible for this form of sentence due to the period ordered by the court to be served prior to suspension exceeding 12 months.

As highlighted in the Council's Options Paper, this reform proposal has potential benefits including:

- increasing community confidence in suspended sentences, given the person who is subject to such an order may be required to comply with supervision, treatment and program conditions, and to undertake community service in appropriate cases;
- aligning the courts' powers with those that already exist when a court is sentencing an offender for more than one offence – the introduction of this new power would therefore correct a legislative anomaly that currently exists;
- enabling an offender to be supervised, where this is warranted, potentially assisting in reducing the likelihood of breach by reoffending.

Moreover:

- while court ordered parole is a potential alternative to a conditional form of suspended sentence order, the maximum duration of this order (3 years) is more limited than a suspended sentence (5 years), and court ordered parole is not currently available to courts in sentencing for sexual offences, or if the person has had their parole order cancelled;
- community service is not a standard condition of parole, so court ordered parole may not provide a real substitute for a suspended sentence with the power to combine with community service;
- uncoupling the consequences of breaching the conditions of a community-based order from that of breaching the suspended sentence (through the imposition of two separate orders) may protect against the risks of the suspended sentence being activated on breach on the basis of the person's failure to comply with the conditions of the order other than by reoffending.

Also, while some might suggest that a change to the current position is unnecessary because a term of imprisonment with court ordered parole can effectively perform the same function as a conditional suspended sentence, there are good reasons why a court may prefer the making of a suspended sentence with a community-based order (in the form of Recommendation 37 below) over imposing a term of imprisonment with a parole release or eligibility date. For example, in the case of a suspended sentence, if the conditions of the order are breached (including a technical breach by a breach of conditions, other than by reoffending), the offender is required to be returned to court to be dealt with, thereby providing court oversight of actions taken on breach and how the order originally made by that court is being administered. Where a conditional order is achieved by imposing a combined suspended sentence and community-based sentencing order for a single offence, the possibility of the person being returned to custody for a technical breach of conditions can also arguably be reduced under a suspended sentence.<sup>1208</sup> Also, in contrast to a term of imprisonment for which a parole eligibility date is set, the court when imposing a suspended sentence has the ability to decide when the person is released in the community and to decide the conditions of that release, taking into account factors such as the availability of family supports and services in the community.

This option attracted support from those legal stakeholders who supported the Council-preferred option.

<sup>1208</sup> On this issue, see Queensland Parole System Review (n 10) which saw this as a potential advantage of alternative sentencing options, such as this, as it could 'avoid issues with offenders' parole orders being suspended, and the person serving more time in custody than they otherwise should': at 97–8 [476]–[477].

At the same time, the Council acknowledges there are potential risks with this approach and that support for this proposed reform was not universal. The potential risks are:

- Allowing courts to make combination orders for a single offence will increase the attractiveness of suspended sentences, thereby potentially contributing to any net-widening effects of suspended sentences (i.e. courts being more likely to impose a community-based order with a suspended sentence, than a community-based sentencing order on its own). The Council notes that some jurisdictions reviewed (NSW, NZ, and Victoria) have abolished or indicated their intention to abolish (Tasmania) suspended sentences on the basis of net-widening concerns and the impact of this order on prison populations.
- Increased resourcing will be required to supervise offenders who would otherwise not have been subject to QCS involvement. Given the numbers of suspended sentences currently made without any other form of supervised orders, the impacts of this change could be significant.

Should the proposed new form of combined orders be introduced, the Council suggests it should be recorded or 'flagged' in a way that allows the use of this combination of sentences imposed for a single offence to be monitored over time. This collection of data will be important for any future assessment of whether the new power has resulted in net widening, for what types of offences such orders are commonly being made, and whether those subject to such orders are more or less likely to complete these orders successfully without reoffending, than people sentenced to imprisonment with parole, or who receive a suspended sentence not involving some form of supervision.

#### **RECOMMENDATIONS: COMBINED SUSPENDED SENTENCE AND COMMUNITY-BASED ORDER FOR A SINGLE OFFENCE**

37. Until such time as the community correction order (CCO) is fully operational, courts should be provided with a power under the *Penalties and Sentences Act 1992* (Qld) to sentence an offender to a wholly suspended sentence or a partially suspended sentence in combination with a probation order or community service order when sentencing an offender for a single offence. An equivalent power should be introduced to allow a court to combine a suspended sentence with a CCO when sentencing for a single offence at such time as this new order is introduced.
38. The maximum term of imprisonment to be served in custody prior to the remainder of the sentence being suspended under a partially suspended sentence when combined with probation, community service or a CCO should be 12 months, consistent with the current approach of combined prison and probation orders under section 92(1)(b) of the *Penalties and Sentences Act 1992* (Qld), but excluding any time declared as time served (see Recommendation 17).
39. In preparation for the introduction of the proposed reforms, Court Services Queensland should consider how the new form of order or orders might be recorded or 'flagged' in a way that allows the use of this combination of sentences to be monitored over time.

## **10.13 Relationship between the operational period and sentence length**

### **10.13.1 Current guidance**

As discussed earlier in this chapter, the making of a suspended sentence involves two distinct steps:

1. The imposition of a term of imprisonment of 5 years or less; and
2. A determination by the court that it is appropriate in the circumstances to order that term of imprisonment to be suspended in whole or in part.

In *Dinsdale v The Queen*,<sup>1209</sup> Kirby J commented on the two-stage process of suspended sentences in the context of the Western Australian provisions, which are worded similarly to those in Queensland, identifying that the same considerations relevant for the first step are also to be applied in the second:

the scheme of the legislation, and the two steps which s 76(1) and (2) of the Act requires, suggest, as a matter of construction, that the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term. This means that it is

<sup>1209</sup> (2000) 202 CLR 321.

necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender. It would be surprising if the legislation were to warrant, at the second step, concentration of attention only on matters relevant to the offender, such as issues of the offender's rehabilitation and the court's mercy. On the contrary, the structure and language of s 76(2) of the Act support the view that what is required by a proposal that a term of imprisonment should be suspended is reconsideration of 'all the circumstances'. This necessitates the attribution of 'double weight' to all of the factors relevant both to the offence and to the offender – whether aggravating or mitigating – which may influence the decision whether to suspend the term of imprisonment.<sup>1210</sup>

In determining that it is appropriate to suspend the whole or part of the sentence: 'The court must state an operational period during which time an offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with... for the of the suspended sentence.'<sup>1211</sup>

In Queensland, section 144(6) of the PSA states that the operational period starts on the day the order is made and must be: '(a) not less than the term of imprisonment imposed; and (b) not more than 5 years.'<sup>1212</sup> Beyond this general legislative guidance, there is no further direction provided at law about how this period is to be set.

The principle of proportionality (discussed in sections 4.11 and 5.2 of this report), however, acts as a general limiting principle in sentencing, including for the purposes of setting an appropriate operational period.

The legislative approach to the setting of the operational period varies by jurisdiction. For example:

- In WA a court that sentences a person to imprisonment of 5 years or less may order that the term be suspended for a period of not more than 2 years,<sup>1213</sup> which means that a sentence of imprisonment of over 2 years that is suspended carries an operational period shorter than the head sentence.
- In Tasmania there is no maximum operational period stated in the legislation and no legislative guide as to the relationship between the imprisonment and period of suspension.<sup>1214</sup>
- In NT a court, when imposing a suspended sentence, must specify that the sentence is suspended for a period of not more than 5 years,<sup>1215</sup> and may make the order 'subject to such conditions as the court thinks fit'.<sup>1216</sup> In contrast to Queensland, there is no legislative direction that the operational period must not be less than the term of imprisonment imposed. However, there is Court of Appeal authority that supports the view that a shorter operational period should be set only in exceptional circumstances.<sup>1217</sup>

<sup>1210</sup> Ibid 348 [85] (Kirby J) (citations omitted).

<sup>1211</sup> *Penalties and Sentences Act 1992* (Qld) s 144(5).

<sup>1212</sup> Ibid s 144(6).

<sup>1213</sup> *Sentencing Act 1995* (WA) ss 76(1), 81(1).

<sup>1214</sup> *Sentencing Act 1997* (Tas) s 7(b), pt 3 div 4.

<sup>1215</sup> *Sentencing Act 1995* (NT) s 40(6).

<sup>1216</sup> Ibid s 40(2).

<sup>1217</sup> See, for example, *R v Lane* (2005) 149 NTR 16, 25–6 [41]–[42] (Riley J, Mildren and Southwood JJ agreeing). Although comments made under a different sentencing regime, Riley J cited with approval comments made in *R v Ireland* (1987) 49 NTR 10 to the effect that where a sentence is partially suspended, the period of a good behaviour bond ought not ordinarily be less than the period of the balance of the head sentence, which followed the earlier decision of *R v Brusch* (1986) 11 FCR 582. See also *R v Minor* (1992) 2 NTLR 183, 186, 189, 199 (Asche CJ, Mildren and Martin JJ); and *R v Wurramara* [1999] NTCCA 45 [64]–[65] (Mildren, Thomas and Riley JJ).

### 10.13.2 Operational periods of suspended sentences

Over the relevant reference period, the majority of suspended sentences had an operational period of less than 2 years (83%, 58,215 cases) – see Figure 10-17.

**Figure 10-17: Operational periods and head sentences of suspended sentences (MSO), 2005–06 to 2017–18**

| Operational period length | Number of cases (MSO) |
|---------------------------|-----------------------|
| <b>1 year or less</b>     | 27,926 (40%)          |
| <b>1 to 2 years</b>       | 30,289 (43%)          |
| <b>2 to 3 years</b>       | 7,410 (11%)           |
| <b>3 to 4 years</b>       | 2,222 (3%)            |
| <b>4 to 5 years</b>       | 2,013 (3%)            |

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods from QWIC, extracted February 2019.

Table 10-10 shows the relationship between head sentences and operational periods. There were 27,926 cases with a head sentence and operational period of one year or less (40% of cases). An additional 27,125 cases had a head sentence one year or less but had a longer operational period of between 1 and 2 years (39% of cases). Over two-thirds of offenders (69%, 48,235 cases) had a short head sentence (less than 6 months) with a short to moderate operational period (2 years or less).

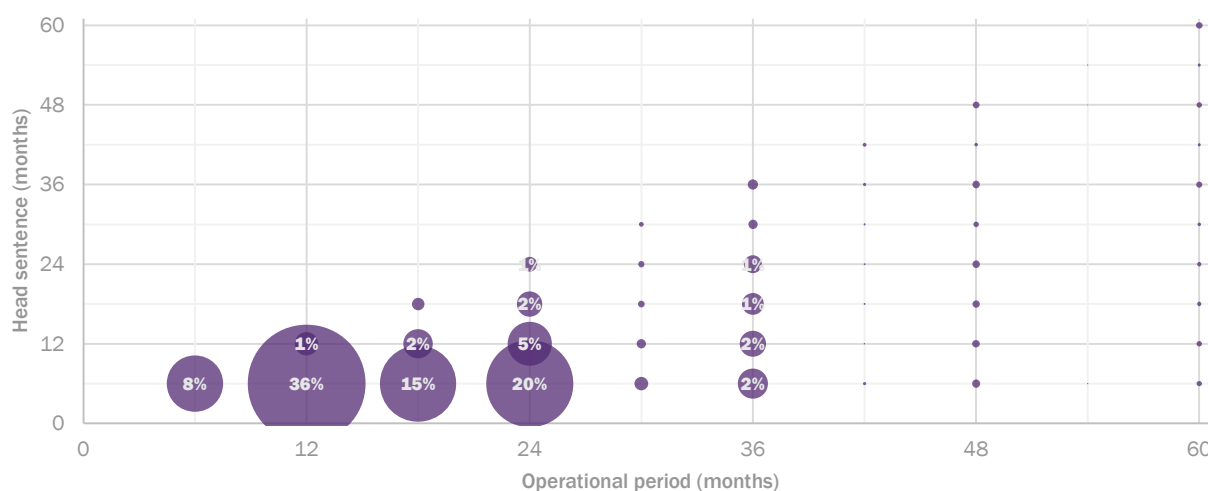
**Table 10-10: Relationship between head sentences and operational periods (months) (MSO), 2005-06 to 2017-18**

|                             |       | Head sentence (months) |     |       |     |       |    |       |    |       |    |       |    |       |    |       |    |       |    |        |     |        |      |  |  |
|-----------------------------|-------|------------------------|-----|-------|-----|-------|----|-------|----|-------|----|-------|----|-------|----|-------|----|-------|----|--------|-----|--------|------|--|--|
|                             |       | 0-6                    |     | 7-12  |     | 13-18 |    | 19-24 |    | 25-30 |    | 31-36 |    | 37-42 |    | 43-48 |    | 49-54 |    | 55-60  |     | Total  |      |  |  |
|                             |       | n                      | %   | n     | %   | n     | %  | n     | %  | n     | %  | n     | %  | n     | %  | n     | %  | n     | %  | n      | %   | n      | %    |  |  |
| Operational period (months) | 0-6   | 4,927                  | 7%  |       |     |       |    |       |    |       |    |       |    |       |    |       |    |       |    | 4,927  | 7%  |        |      |  |  |
|                             | 7-12  | 21,825                 | 31% | 1,174 | 2%  |       |    |       |    |       |    |       |    |       |    |       |    |       |    | 22,999 | 33% |        |      |  |  |
|                             | 13-18 | 9,260                  | 13% | 1,747 | 3%  | 487   | 1% |       |    |       |    |       |    |       |    |       |    |       |    | 11,494 | 17% |        |      |  |  |
|                             | 19-24 | 12,223                 | 18% | 3,895 | 6%  | 1,817 | 3% | 860   | 1% |       |    |       |    |       |    |       |    |       |    | 18,795 | 27% |        |      |  |  |
|                             | 25-30 | 300                    | 0%  | 159   | 0%  | 125   | 0% | 144   | 0% | 212   | 0% |       |    |       |    |       |    |       |    | 940    | 1%  |        |      |  |  |
|                             | 31-36 | 1,512                  | 2%  | 1,329 | 2%  | 1,165 | 2% | 1,027 | 2% | 567   | 1% | 870   | 1% |       |    |       |    |       |    | 6,470  | 9%  |        |      |  |  |
|                             | 37-42 | 18                     | 0%  | 4     | 0%  | 10    | 0% | 13    | 0% | 14    | 0% | 63    | 0% | 149   | 0% |       |    |       |    | 271    | 0%  |        |      |  |  |
|                             | 43-48 | 108                    | 0%  | 114   | 0%  | 124   | 0% | 162   | 0% | 123   | 0% | 374   | 1% | 285   | 0% | 661   | 1% |       |    | 1,951  | 3%  |        |      |  |  |
|                             | 49-54 | 2                      | 0%  |       | 0%  | 1     | 0% |       | 0% |       | 0% | 2     | 0% |       | 0% | 30    | 0% | 97    | 0% |        | 132 | 0%     |      |  |  |
|                             | 55-60 | 46                     | 0%  | 59    | 0%  | 57    | 0% | 54    | 0% | 43    | 0% | 153   | 0% | 81    | 0% | 388   | 1% | 189   | 0% | 811    | 1%  | 1,881  | 3%   |  |  |
| Total                       |       | 50,221                 | 72% | 8,481 | 12% | 3,786 | 5% | 2,260 | 3% | 959   | 1% | 1,462 | 2% | 515   | 1% | 1,079 | 2% | 286   | 0% | 811    | 1%  | 69,860 | 100% |  |  |

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

The operational periods for wholly suspended sentences and partially suspended sentences follow decidedly different trends. Figure 10-18 below illustrates the relationship between operational periods and head sentences for wholly suspended sentences. The three largest bubbles show that the majority of wholly suspended sentences have a head sentence of 6 months or less, with an operational period between 12 and 24 months.

**Figure 10-18: Wholly suspended sentences (MSO), operational periods and head sentences, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

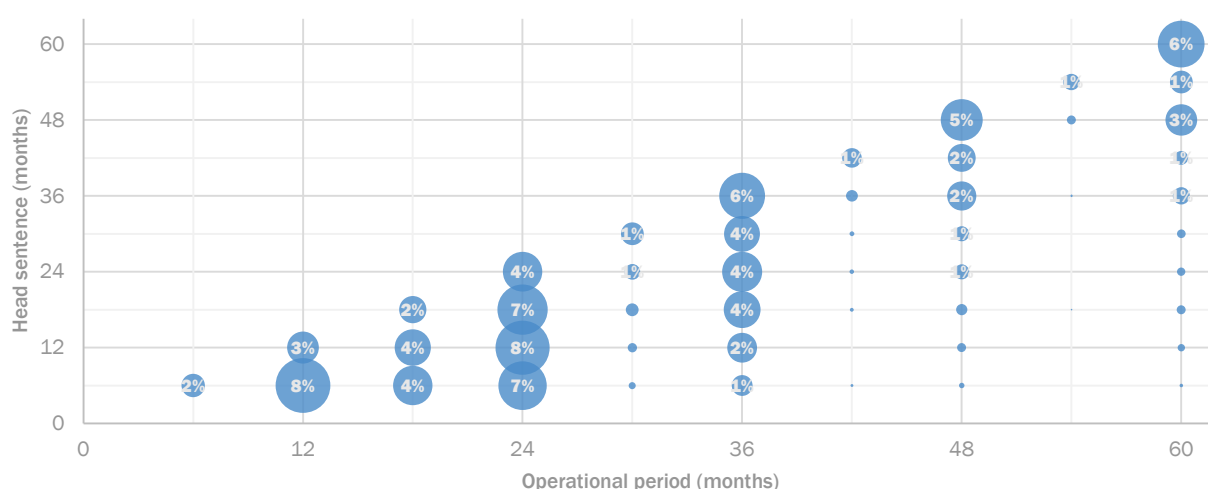
Notes:

- 1) Bubbles with no labels represent less than 1% of cases.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Figure 10-19 below illustrates the same information on the relationship between operational periods and head sentences for partially suspended sentences. Partially suspended sentences are more likely to have longer operational periods — almost one-third (31%) of all partially suspended sentences have the operational period set at the same length as the head sentence. In general, cases with a long head sentence were accompanied by a proportionately long operational period.

Unlike wholly suspended sentences, only a small proportion of offenders had a short head sentence (less than 6 months) with a moderate length operational period (12 to 24 months) (11%, 1,329 cases).

**Figure 10-19: Partially suspended sentences (MSO), operational periods and head sentences, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

Notes:

- 1) Bubbles with no labels represent less than 1% of cases.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Suspended sentences with a short head sentence are much more likely to have an operational period that is comparatively long compared to the head sentence – see Table 10-11. For example, offenders sentenced to a wholly suspended sentence of less than 6 months, on average, have an operational period 7.4 times longer than their head sentence. This ratio is slightly lower for partially suspended sentences where, on average, sentences with a head sentence of less than 6 months have an operational period 5.0 times longer than the head sentence.

**Table 10-11: Operational periods as a ratio to head sentence (MSO), 2005–06 to 2017–18**

| Operational period ratio | Head Sentence (months) |      |       |       |       |      |       |       |       |       |
|--------------------------|------------------------|------|-------|-------|-------|------|-------|-------|-------|-------|
|                          | 0–6                    | 6–12 | 12–18 | 18–24 | 24–30 | 30–6 | 36–42 | 42–48 | 48–54 | 54–60 |
| Suspended partially      | 5.0x                   | 2.2x | 1.6x  | 1.3x  | 1.2x  | 1.1x | 1.1x  | 1.1x  | 1.1x  | 1.0x  |
| Suspended wholly         | 7.4x                   | 2.3x | 1.7x  | 1.4x  | 1.3x  | 1.2x | 1.2x  | 1.1x  | 1.1x  | 1.0x  |

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018. Supplemented with data on operational periods, extracted from QWIC, February 2019.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 10.13.3 Issues

The uncertain relationship between head sentences and operational periods was an issue raised with the Council during consultation. A suggestion was made that this should be the subject of further guidance.

From the Council's analysis, it seems that comparatively long operational periods in proportion to sentences imposed are most common in the case of short sentences of less than 6 months. The Council has found that it is not unusual for short sentences of 6 months or less to carry operational periods of over 12 months. The ratio between suspended sentences and the operational period was highest in the case of these short sentences, ranging from 5.0 times the length of the sentence imposed for partially suspended sentences of 6 months or less, and 7.4 times for wholly suspended sentences of this length.

As discussed in sections 4.11 and 5.2 of this report, proportionality is a fundamental principle of sentencing. As also highlighted in section 5.6, sentencing is not a mathematical exercise; each case must be decided on its own facts in the exercise of judicial discretion.

While the exercise of judicial discretion in determining a sentence that is proportionate also applies to the setting of the operational period, the Council has not been able to identify any case law or other guidance that directly addresses the appropriate relationship between the head sentence imposed and its accompanying operational period.

The development of guidelines about the setting of the operational period to ensure it is proportionate to the offending and term of imprisonment imposed was suggested during early consultation as a means of addressing issues with overly long operational periods being set relative to the term of imprisonment imposed, as otherwise there is a risk that in sentencing, courts may be setting people up to fail. This was particularly a concern given it was noted that even relatively minor offences will breach a suspended sentence, being offences that are punishable by imprisonment.

In its Options Paper, the Council noted that a step beyond guidelines would be legislating a method or model for imposing operational periods of suspended sentences; for instance, a mandatory ratio or calculation (such as no more than twice the length of the sentence imposed) with a presumption that it be applied, unless exceptional circumstances warrant a departure. It was suggested this might enhance certainty and consistency for such sentences and avoid the imposition of unduly long operational periods. For instance, it might reflect the general proposition that, where a sentence of imprisonment does not involve immediate release, a suspension or parole release or eligibility date will often be set at the one-third mark of the head sentence for an offender who enters an early guilty plea accompanied by genuine remorse.<sup>1218</sup> However, this could inhibit judicial discretion and risk increasing complexity.

<sup>1218</sup> Where the sentence is not mandatory, it is common for an offender who enters an early guilty plea – accompanied by genuine remorse – to have a parole eligibility date or release date set, or suspension of their sentence after serving one-third of their head sentence in custody: See *R v Crouch* [2016] QCA 81, 9 [29] (McMurdo P, Gotterson JA and Burns J agreeing), *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22, 6–7 [42]–[44] (Boddice J, Philippides and McMurdo JA agreeing), *R v Rooney* [2016] QCA 48, 6 [16]–[17] (Fraser JA, Gotterson JA and McMeekin J agreeing) and *R v McDougall* [2007] 2 Qd R 87, 97 [20] (Jerrard, Keane and Holmes JJA).

### 10.13.4 Stakeholder views

While a number of legal stakeholders supported a need for greater guidance in the setting of the operational period, none supported legislating upper limits by reference to a specified proportion or 'mandatory ratio'.

There were different views about what form of guidance should be adopted. LAQ saw merit in legislative guidance, supported by professional development, in the form of a statement of the need for 'the operational period [to] be proportionate to the imprisonment imposed, the offence and personal attributes'.<sup>1219</sup> Sisters Inside similarly supported an amendment to section 144 of the PSA 'to require the operational period to be the shortest period possible and in proportion to any other sentence'.<sup>1220</sup> In the alternative, it supported this form of guidance be included in a benchbook.

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis, Sisters Inside, and the QCCL supported any guidance being provided in the form of a benchbook, rather than achieved by legislative means.<sup>1221</sup> The QCCL commented: 'Given that suspended sentencing orders currently involve an exercise of judicial discretion, guidance for operational periods that likewise preserves judicial discretion is to be preferred'.<sup>1222</sup>

Both the QLS and the Queensland Police Union of Employees (QPU) were of the view that further legislative guidance on operational periods was not required.<sup>1223</sup> The QPU in this context noted that the appeal process is sufficient to set down appropriate principles, and 'any alleged errors in sentence can be subject to appeal'.<sup>1224</sup>

FACAA supported a mandatory 5-year operational period attaching to all suspended sentences, in addition to excluding certain offences, particularly those involving violence and sexual offences, from the scope of the scheme.<sup>1225</sup>

### 10.13.5 The Council's view

The Council strongly supports the position, as recognised by the High Court of Australia,<sup>1226</sup> that sentencing is not (and nor should it be) a mathematical exercise. Each case must be decided on its own facts in the proper exercise of judicial discretion. There is, nevertheless, a concern that in Queensland, where operational periods can be any period up to 5 years, the result of the exercise of this discretion in some cases is very lengthy operational periods ordered for short sentences, which may not be proportionate to the offending.<sup>1227</sup>

After considering possible approaches, the Council's view is that rather than legislating to limit the length of the operational period relative to sentence length, this risk is better managed by ensuring that sentencing courts are made aware of the outcomes of relevant appeals against sentence. This will avoid the risk of confining the powers of a court in setting an appropriate operational period in circumstances where a longer than usual operational period may be justified.

As the majority of short suspended sentences are imposed at the Magistrates Court level, the importance of these appeal outcomes being shared applies particularly to appeal decisions being shared with the Magistrates Courts. Under an existing practice direction, the Registrar of the court in which the appeal is heard is required to forward to the Registrar, secretary or similar officer of the relevant court or entity from which the appeal is brought, a copy of the order and/or reasons for judgment in each appeal, together with any original court or entity record.<sup>1228</sup> The Chief Magistrate's Office also maintains a central register of all appeals received, when the magistrate who made the

<sup>1219</sup> Submission 6 (Legal Aid Queensland) 9.

<sup>1220</sup> Submission 7 (Sisters Inside) 7.

<sup>1221</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 5; Submission 7 (Sisters Inside) 7; Submission 8 (Queensland Council for Civil Liberties) 3.

<sup>1222</sup> Submission 8 (Queensland Council for Civil Liberties) 3.

<sup>1223</sup> Submission 15 (Queensland Law Society) 11; Submission 10 (Queensland Police Union of Employees) 8.

<sup>1224</sup> Submission 10 (Queensland Police Union of Employees) 8.

<sup>1225</sup> Submission 4 (Fighters Against Child Abuse Australia) 19.

<sup>1226</sup> See, for example *Wong v The Queen* (2001) 207 CLR 584, 611–12 [74]–[76] (Gaudron, Gummow and Hayne JJ); *Markarian v The Queen* (2005) 228 CLR 357, 373–5 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ) 378 [52] (McHugh J); *Muldock v The Queen* (2011) 244 CLR 120, 131–2 [26] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 452 [79] (Gageler and Gordon JJ).

<sup>1227</sup> For a view on why operational periods that extend beyond the length of the head sentence might be justified on the basis of increasing the 'penal weight' of suspended sentences to bring them 'more into line with ... immediate terms of imprisonment', see Irwin-Rogers and Roberts (n 1177) 156–8.

<sup>1228</sup> District Court of Queensland, *Practice Direction No. 5 of 2016 — Appeals*, 20 May 2016, para 8(b).

decision is notified, when the judgment is delivered and the outcome of the appeal.<sup>1229</sup> The Queensland Sentencing Information System (QIS) maintained by the Supreme Court Library includes 'Chief Magistrate (CM) Notes', which are circulated from the Chief Magistrate's Office to magistrates across the State.<sup>1230</sup> The CM Notes include information about relevant appeals under section 222 of the *Justices Act 1886* (Qld), including a number of single-judge decisions where the operational period of a suspended sentence imposed by a Magistrates Court has been set aside and substituted with a shorter period. The Council notes that QIS is accessible to all judicial officers across Queensland.

An additional issue is whether there should be some defined relationship between the operational period of the order and the length of any community-based sentencing order imposed at the same time as the suspended sentence under the Council's proposed new form of combination order. The approach to this issue varies by jurisdiction. For example:

- In the ACT, the court when making a suspended sentence order, 'must also make a good behaviour order for the period during which the sentence is suspended **or for any longer period** that the court considers appropriate'.<sup>1231</sup>
- In SA a court may 'suspend the sentence on condition that the defendant enter into a bond'.<sup>1232</sup> The maximum period of the bond is not specified by the legislation;<sup>1233</sup> however, if a person subject to the bond 'complies with the conditions of the bond, the sentence of imprisonment is, on the expiration of the bond, wholly extinguished'.<sup>1234</sup> The Supreme Court of SA has held that '[w]here a sentence of imprisonment has been suspended upon the appellant entering in[to] a bond, the period of the bond must not be disproportionate to the term of imprisonment imposed'.<sup>1235</sup>
- For Commonwealth offences, a recognizance release order can be imposed under section 20(1)(b) of the *Crimes Act 1914* (Cth), which is similar to a suspended sentence. Where a court imposes a term of imprisonment of 3 years or less it must order that a person be released forthwith or after a specified period upon giving security and to be of good behaviour for a period not exceeding 5 years.<sup>1236</sup> The court may also include a condition that the person will, during the period of the order, be subject to the supervision of a probation officer for no more than two years.<sup>1237</sup> Aside from supervision of a probation officer, a sentence combining a term of imprisonment and a community-based order for a single federal offence is not permitted under the Commonwealth sentencing regime.<sup>1238</sup>
- In England and Wales, a court, when passing a sentence of imprisonment for a period of at least 14 days, but not more than two years, may order it be suspended for 'a period specified in the order' ('the operational period').<sup>1239</sup> If conditions are attached, the court must specify a period during which the person must comply with these conditions, referred to as 'the supervision period'.<sup>1240</sup> The legislation provides that: 'The supervision period (if any) and the operational period must each be a period of not less than six months and not more than two years from the date of the order,<sup>1241</sup> and 'the supervision period must not end later than the operational period'.<sup>1242</sup>

<sup>1229</sup> Email from the Office of the Chief Magistrate to Manager, Policy, Queensland Sentencing Advisory Council, 31 May 2019. Appeals included in this spreadsheet are those notified to the Office by individual registries.

<sup>1230</sup> Supreme Court Library of Queensland, *Queensland Sentencing Information System: User Guide* (no date) Chapter 9 — Chief Magistrate Notes, 64.

<sup>1231</sup> *Crimes (Sentencing) Act 2005* (ACT) s 12(3) (emphasis added).

<sup>1232</sup> *Sentencing Act 2017* (SA) s 96(1).

<sup>1233</sup> *Ibid* s 99.

<sup>1234</sup> *Ibid* s 96(8).

<sup>1235</sup> *Griffin v Police* [2005] SASC 337 5 [22] (White J) citing *Flett v SA Police* (SASC, King AJ, 5 August 1997). See also *Wilson v Police* [2013] SASC 48, 6 [26]–[27] (White J) where 21 days' imprisonment suspended upon entering into a bond for 2 years was reduced on appeal to 21 days' imprisonment suspended upon entering into a bond for 8 months. Cf *O'Neil v Police* [2018] SASC 137 (Parker J) where a sentence of 6 months' imprisonment suspended upon entering into a bond for 2 years was reduced on appeal to 2 months' imprisonment, but without any change being made to the 2-year period of the bond.

<sup>1236</sup> *Crimes Act 1914* (Cth) ss 19AC, 20(1)(a)(i) and (b). Note that where the sentence is 6 months or less, the court does not need to make a recognizance release order: *Crimes Act 1914* (Cth) s 19AC(3).

<sup>1237</sup> *Crimes Act 1914* (Cth) 20(1)(a)(iv).

<sup>1238</sup> *Atanackovic v The Queen* (2015) 45 VR 179, 205–6 [82]–[87] (Weinberg, Kyrou and Kaye JJA).

<sup>1239</sup> *Criminal Justice Act 2003* (UK) s 189(1).

<sup>1240</sup> *Ibid* s 189(1A).

<sup>1241</sup> *Ibid* s 189(3).

<sup>1242</sup> *Ibid* s 189(4).

A further complicating factor under the combined order model proposed for adoption in Queensland is that the maximum length of sentence that can be suspended and operational period is 5 years, in comparison to probation or the proposed new CCO, which is for a maximum term of 3 years.

The Council sees no need for the operational period of the suspended sentence and the length of the community-based sentencing order to perfectly align. In support of full sentencing discretion, the Council supports an approach that would allow:

- a community-based sentencing order of shorter duration to be ordered alongside a suspended sentence of longer duration;
- a community-based sentencing order to be ordered alongside a suspended sentence with the same operational period as the length of the community-based sentencing order;
- a community-based sentencing order to be ordered that extends beyond the operational period of the suspended sentence.

The Council's reasons for adopting this position include:

- The suspended sentence and community-based sentencing order will exist as separate orders and breach of the conditions of the community-based sentencing order (unless by commission of an offence punishable by imprisonment) will not constitute a breach of the suspended sentence. This is in contrast to orders that, for example, require compliance with the conditions of a bond as a condition of suspension, or conditions attached under some forms of orders to the suspended sentence itself.
- The maximum term of imprisonment that can be suspended and maximum operational period (5 years) means that inevitably in some cases, the operational period will exceed the length of the community-based sentencing order. Attempting to avoid this outcome would mean limiting the availability of the new proposed combined order to sentences of 3 years or less when, arguably, the attaching of conditions through the making of a community-based sentencing order is more important in the sentencing of offenders for more serious offences, which generally attract longer sentences.
- There may be rehabilitative benefits of a shorter community-based sentencing order being ordered alongside a longer suspended sentence as it would provide for conditions, such as supervision, to be tapered off over time. Under this form of an order, a person would be subject to an initial compliance period during which they must comply both with the conditions of the community-based sentencing order (probation, community service or other conditions under the proposed new CCO) and suspended sentence (not to commit another offence punishable by imprisonment), followed by a longer period during which the only condition would be not to commit another offence once the community-based sentencing order has expired.
- In cases where a court might not otherwise have considered suspending a shorter sentence of imprisonment but for the making of the community-based sentencing order, it may be appropriate for the court to order a community-based sentencing order that extends beyond the term of the suspended sentence. To require the operational period of the suspended sentence to be at least the same length as the community-based sentencing order in these cases risks exacerbating the problems outlined above of long operational periods being set for relatively short sentences of imprisonment — an outcome, in the Council's view, that should be avoided.

## RECOMMENDATIONS: SUSPENDED SENTENCES — OPERATIONAL PERIODS

40. No additional guidance should be included in section 144(6) of the *Penalties and Sentences Act 1992* (Qld) regarding the setting of the operational period for a suspended sentence.
41. Courts should ensure that relevant sentencing appeal decisions continue to be made available to judicial officers to guide the proper exercise of their sentencing discretion in fixing appropriate operational periods.
42. When making a combined suspended sentence and community-based sentencing order for a single offence, courts should have full discretion to set what they consider is an appropriate operational period, within the confines of section 144(6) of the *Penalties and Sentences Act 1992* (Qld). This would allow:
  - (i) a community-based sentencing order of shorter duration to be ordered alongside a suspended sentence with a longer operational period;
  - (ii) a community-based sentencing order to be ordered alongside a suspended sentence with the same operational period as the length of the community-based sentencing order;
  - (iii) a community-based sentencing order to be ordered that extends beyond the operational period of the suspended sentence imposed.

## 10.14 Breach powers

### 10.14.1 Issues

The final issues explored in the Council's Options Paper concerned the legislative powers and guidelines that apply under the PSA in circumstances where a suspended sentence has been breached by commission of an offence during the operational period that is punishable by imprisonment.

During the review, some stakeholders expressed concerns about what they considered to be the restrictive nature of the terminology of section 147(3)(a), which sets out seven factors that a court must consider in deciding whether it would be unjust to order that the offender serve the whole of the suspended imprisonment. In particular, there is concern that the use of the word 'trivial' in subsection (3)(a) is an anachronism and unintentionally undermines the extent of the court's discretion when dealing with a breach.

Section 147, as originally drafted in the PSA, did not contain current subsection (3) and did not use the word 'trivial' (it was added in 1997, see below). Instead, original subsection (2) required the court to order the offender to serve the suspended part of a partly suspended sentence, or the whole of a wholly suspended sentence, 'unless it is of the opinion that it would be unjust to do so in view of all the circumstances that have arisen since the suspended imprisonment was imposed'.<sup>1243</sup>

The word 'trivial' had been used in Queensland criminal legislation prior to 1997, but this was not mentioned in the context of the bill introducing section 147(3).

Section 657A of the *Criminal Code* (Qld) ('Power to permit release of certain persons charged') allowed a court to absolutely discharge an offender or discharge conditionally upon a recognisance (a good behaviour bond). One of the relevant factors was 'the trivial nature of the offence'.<sup>1244</sup> That section was inserted into the *Criminal Code* (Qld) in 1975<sup>1245</sup> and omitted from it by the original PSA in 1992.<sup>1246</sup> In its place, PSA sections 18 and 19 (release absolutely and recognisance) were enacted (at the same time as the original PSA s 147). Sections 18 and 19 were expressly stated to have derived from part of section 657A of the *Criminal Code* (Qld).<sup>1247</sup> However, they did not (and do not) refer to the offence as 'trivial'.

The Court of Appeal has noted this and stated that, because section 18 'now simply refers to the nature of the offence rather than to the "trivial nature of the offence" as previously applied, [it] indicates that the court is now given a broader discretion to act pursuant to s. 19'.<sup>1248</sup> Another judgment also recognised the widening of the discretion which the PSA brought, regarding the recording of convictions generally:

<sup>1243</sup> The words from 'in view of all the circumstances ...' were criticised as 'the source of the confusion, owing to their ambiguity' — Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997', 19 March 1997, 601 (Denver Beanland, Attorney-General and Minister for Justice).

<sup>1244</sup> Section 657A(b) *Criminal Code* (Qld).

<sup>1245</sup> *The Criminal Code and the Justices Act Amendment Act 1975* (Qld) s 29, commenced on 1 July 1975.

<sup>1246</sup> *Penalties and Sentences Act 1992* (Qld) (as introduced) s 207, sch 'Criminal Code' s 13.

<sup>1247</sup> Explanatory Notes, *Penalties and Sentences Bill 1992* (Qld) 3.

<sup>1248</sup> *R v Fullalove* (1993) 68 A Crim R 486, 493 (Lee J).

The *Penalties and Sentences Act 1992* has brought some significant changes in sentencing practice and as part of those changes has expressly conferred discretions in areas where they did not previously exist. In my opinion the deliberate legislative policy discernible behind this should not be impeded by over-rigid rules or by restrictive approaches drawn from the experience of an era when the discretions did not exist.

The broad situation used to be that a finding of guilt and the decision to convict involved the recording of the conviction as a consequence. Then, limited exceptions were created, e.g. under the Code by s. 657A in the case of “trivial offences” and by the *Offenders Probation and Parole Act 1980*, ss 85A and 33 where orders for community service and probation resulting from conviction were deemed not to be convictions except for restricted, specified purposes. This narrower sentencing regime is now considerably broadened by the specification of a wide range of circumstances in which a conviction may not be recorded [the various parts of the PSA which allowed this were discussed].<sup>1249</sup>

Section 147(3)(a) uses ‘trivial’ as the value against which its seven factors are contextualised, and against which they are evaluated. The first of the seven — section 147(3)(a)(i) — is ‘the nature of the offence and the circumstances in which it was committed’.

Subsection 147(3) was inserted by section 7 of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld). It has not been amended since.<sup>1250</sup> The Explanatory Notes spoke of creating ‘provisions setting out guidelines for courts faced with deciding whether to order that a person serve the whole of a suspended term of imprisonment’ — but are not otherwise instructive.<sup>1251</sup>

In the Second Reading Speech leading to the amending Act in 1997, the Attorney-General stated that the Government agreed with a South Australian judgment,<sup>1252</sup> relating to section 9(5) of the *Offenders Probation Act 1913* (SA) (now repealed).<sup>1253</sup> The portion of the judgment quoted in the speech included this: ‘the [SA] legislation contemplates that a breach may be excusable, if it is trivial or if there are otherwise proper reasons to excuse the breach; but whether trivial or not, those reasons must lie primarily in the nature of the breach itself’.<sup>1254</sup> Section 9(5) of the SA statute read:

- (5) Where a probationer is subject to a suspended sentence and the probative court is satisfied that the failure of the probationer to observe the conditions of his recognizance is trivial or that there are proper grounds upon which the failure should be excused, the court –
  - (a) may refrain from ordering that the sentence be carried into effect; and
  - (b) may extend the term of the recognizance by a period not exceeding one year.<sup>1255</sup>

The Explanatory Notes and Second Reading Speech did not mention section 657A of the *Criminal Code* (Qld), PSA sections 18 and 19 or the Court of Appeal’s consequent recognition of the widening of the discretion as regards recognizances because of the omission of the word ‘trivial’. The Attorney-General stated that:

This amendment will still ensure that the primary focus is to require the whole of a suspended sentence to be served if the person comes back before the court for an offence for which the person may be imprisoned, but that a lesser term may be ordered to be served if the subsequent offence is genuinely trivial or if other special or limited circumstances have arisen.<sup>1256</sup>

The Court of Appeal has since stated that the word ‘trivial’ in section 147(3) should not ‘be given a meaning other than its ordinary meaning by reference to the matters referred to in subpara (i) to subpara (vii) of subs 3(a)’.<sup>1257</sup>

<sup>1249</sup> *R v Brown, Ex parte A-G (Qld)* [1994] 2 Qd R 182, 184 (Macrossan CJ).

<sup>1250</sup> Section 147(3), including the word ‘trivial’, has been imported (although not verbatim) into Part 8A of the *Penalties and Sentences Act 1992* (Qld), Drug and alcohol treatment orders: s 151P(1)(b).

<sup>1251</sup> Explanatory Notes, *Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997* (Qld) 1.

<sup>1252</sup> *R v Buckman* (1988) 47 SASR 303, 308 (Jacobs J).

<sup>1253</sup> See s 114(3) of the *Sentencing Act 2017* (SA), however, which retains the use of the term ‘trivial’.

<sup>1254</sup> Queensland, *Parliamentary Debates*, ‘Second Reading — Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997’, 19 March 1997, 601 (Denver Beanland, Attorney-General and Minister for Justice), citing *R v Buckman* (1988) 47 SASR 303, 308 (Jacobs J).

<sup>1255</sup> *Offenders Probation Act 1913* (SA), as repealed by *Statutes Amendment and Repeal (Sentencing) Act 1988* (SA) s 78 (reproduced in *R v Buckman* (1988) 47 SASR 303, 306 (Jacobs J)).

<sup>1256</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, ‘Second Reading — Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997’, 19 March 1997, 601 (Denver Beanland, Attorney-General and Minister for Justice).

<sup>1257</sup> *R v Edward* [1997] QCA 425, 4 (Davies JA, de Jersey and Muir JJ agreeing).

Another judge wrote that ‘triviality in that section is a relative concept’.<sup>1258</sup> In a third case, another judge wrote that while breaching offences were not trivial ‘under the ordinary meaning of that word:

However, in s 147(3)(a) of the *Penalties and Sentences Act*, ‘trivial’ is used in a completely artificial sense. In my view, having particular regard to such factors as proportionality under s 3(a)(ii), the respondent’s genuine attempts at rehabilitation under s 3(a)(v) and to further factors that arise under subs 3(b) and subs 3(c), it would have been unjust to require this respondent to serve the full three years of the initial sentence.<sup>1259</sup>

### 10.14.2 Options

The Council invited views in its Options Paper about whether courts’ powers on breach, and the current form of guidance in section 147(3) of the PSA, were appropriate.

The Options Paper also invited feedback about whether the current restrictions on the legislative powers of courts to deal with breach of suspended sentence orders should remain. In particular, concerns were raised that the current provisions under section 146 of the PSA that prevent a lower court from dealing with a breach of an order imposed by a court of higher jurisdiction are inefficient and likely to result in delays for the offender in having all their court matters finalised.

The position of all jurisdictions reviewed, with the exception of Tasmania, is consistent with Queensland’s position – with courts of inferior jurisdiction unable to deal with breaches of orders imposed by courts of higher jurisdiction.

In Tasmania, if any court (including a Magistrates Court) finds an offender guilty of an offence punishable by imprisonment committed during the operational period of a suspended sentence order imposed by another court, an application can be made orally while the offender is before the court and the court may either deal with the application or adjourn the application to the court that imposed the suspended sentence.<sup>1260</sup>

Various models were proposed by stakeholders:

- Option 1: defence election
- Option 2: by referral to the DPP seeking consent to have the matter dealt with in this way
- Option 3: by the court (on its own motion), with an adaption of section 651 *Criminal Code* (Qld)-type considerations (this section allows a court to decide summary offences if a person is charged on indictment after the DPP consent to transmit). Under this model, a court would be provided with the ability to determine action to be taken when dealing with a person for an offence breaching a suspended sentence order imposed by a higher court, provided: (a) the court considers it appropriate to do so; and (b) the accused person is represented by a legal practitioner; and (c) the Crown and the accused consent to the court so doing; and (d) sufficient information about the original offence and circumstances in which it was imposed is before the court.

The Council indicated at this stage that its preferred option was Option 3, in the event that this reform option was supported.

It suggested some protections could be built in to ensure this power is only exercised where appropriate. For example, a lower court dealing with a breach of an order imposed by a higher court might be provided with more limited powers on breach, such as only to extend the operational period or to take no further action. Alternatively, additional guidance could be provided to assist in determining when it may be inappropriate to deal with such a breach.

### 10.14.3 The approach in other jurisdictions

As in Queensland, most jurisdictions (NT, SA, Tasmania, WA, England and Wales) have a presumption in favour of the activation of the term of imprisonment held in suspense on breach by reoffending – with the most usual form of words requiring the term suspended be activated ‘unless of the opinion it would be unjust to do so’, or a variation of this (NT, Tasmania, WA, England and Wales).<sup>1261</sup>

<sup>1258</sup> *Gordon & Camp v Whybrow* [1998] QCA 52, 13–14 (Fryberg J, dissenting as to the result).

<sup>1259</sup> *Villiers v A-G (Qld)* [1999] QCA 244, 10–11 (Thomas JA, McPherson JA agreeing).

<sup>1260</sup> *Sentencing Act 1997* (Tas) ss 27(4)–(4A).

<sup>1261</sup> *Criminal Justice Act 2003* (UK) sch 12 para 8(3) (The presumption under the legislation in England and Wales is either that the court activate the sentence with its original term unaltered or activate it but substitute a lesser term: para 8(2)); *Sentencing Act 1995* (NT)

The legislative criteria that must be applied by the court in determining if it would be 'unjust' to activate the sentence vary by jurisdiction. For example, in WA, a court must consider whether it is 'unjust to do so in view of all the circumstances that have arisen, or have become known, since the suspended sentence was imposed'.<sup>1262</sup> The NT legislative formulation is similar to WA, but makes specific reference to the need for the court to take into account the 'facts of any subsequent offence'.<sup>1263</sup>

Some jurisdictions have broader options to respond to a breach than exist in Queensland where the court determines it is not appropriate to activate the period of imprisonment held in suspense. For example, in the NT<sup>1264</sup> and Tasmania,<sup>1265</sup> the court is permitted to make no order in the event of breach. This power also exists in the case of breach of Commonwealth forms of orders.<sup>1266</sup> A power to impose a fine also exists in WA<sup>1267</sup> and in England and Wales.<sup>1268</sup>

Generally, the powers a court can exercise on breach are the same regardless of whether the offender has breached the order by committing a new offence or by failing to comply with other conditions of the order. However, in Tasmania, the presumption in favour of the whole of the sentence held in suspense being activated on breach does not apply where the breach is constituted by a failure to comply with the conditions of the order rather than reoffending only (in this case, the court has the power to either activate all or part of the sentence that is held in suspense, order a substituted sentence take effect, vary the conditions of the order (including extending the operational period), or to make no order).<sup>1269</sup>

The Tasmanian legislation is also unique in allowing the Magistrates Court to deal with a breach of an order made by a superior court (in its case, the Supreme Court of Tasmania) when sentencing a person for a new offence committed during the operational period of the order.<sup>1270</sup> In all other Australian jurisdictions, a lower court, on becoming aware an offender has committed a further offence punishable by imprisonment during the operational period of an order made by a higher court, must commit the offender to the higher court to be dealt with by that court for the breach.

In England and Wales, Magistrates Courts are provided with a discretion when convicting an offender of a new offence in breach of an order imposed by a higher court, to either commit the person to that court to be dealt with for the breach, or to simply provide notice to the court of the new conviction.<sup>1271</sup> This approach appears to give some discretion to the courts as to whether formal breach action is initiated, with the higher court determining whether the person should be dealt with for the breach.<sup>1272</sup>

In WA, similar to Tasmania, there is no presumption that the term of imprisonment be activated where the offender has failed to comply with the order but has not committed a new offence punishable by imprisonment.<sup>1273</sup> There are also some minor differences in the courts' powers on breach taking into account that a failure to comply with conditions constitutes a separate offence.<sup>1274</sup> As this breach offence is punishable by a fine of up to \$1,000, there is no need, as in the case of breach by reoffending, for the legislation to provide separately for the imposition of a

---

s 43(7); *Penalties and Sentences Act 1992* (Qld) s 147(2); *Sentencing Act 1997* (Tas) ss 27(4B)–(4C); *Sentencing Act 1995* (WA) ss 80(3), 84F(3).

<sup>1262</sup> *Sentencing Act 1995* (WA) s 80(3), 84F(3).

<sup>1263</sup> *Sentencing Act 1995* (NT) s 43(7).

<sup>1264</sup> *Ibid* s 43(5)(f).

<sup>1265</sup> *Sentencing Act 1997* (Tas) s 27(4C)(d) (breach by offending) and 27(4E)(d) (failure to comply with condition, other than by committing a new offence).

<sup>1266</sup> *Crimes Act 1914* (Cth) s 20A(5)(c)(ii).

<sup>1267</sup> *Sentencing Act 1992* (WA) s 80(1)(d), 84F(1)(d) (breach by commission of a new offence). A power to fine also effectively exists for a breach of conditions of a conditional suspended imprisonment order as breach of these conditions is an offence punishable by a fine: ss 84J–84K.

<sup>1268</sup> *Crimes Act 2003* (UK) sch 12 para 8(2)(ba).

<sup>1269</sup> *Sentencing Act 1997* (Tas) s 27(4E).

<sup>1270</sup> *Ibid* ss 27(4)–(4A).

<sup>1271</sup> *Criminal Justice Act 2003* (UK) sch 12 para 11(2).

<sup>1272</sup> *Ibid* sch 12, para 12(1). This paragraph provides: '(1) If it appears to the Crown Court, where that court has jurisdiction in accordance with sub-paragraph (2), or to a justice of the peace having jurisdiction in accordance with that sub-paragraph (a) that an offender has been convicted in the United Kingdom of an offence committed during the operational period of a suspended sentence, and (b) that he has not been dealt with in respect of the suspended sentence, that court or justice may ... issue a summons requiring the offender to appear at the place and time specified in it, or a warrant for his arrest' (emphasis added). There is no requirement that such action be taken.

<sup>1273</sup> *Sentencing Act 1995* (WA) s 84L.

<sup>1274</sup> *Ibid* ss 84J–84K.

fine. The maximum fine that can be imposed when dealing with an offender who has committed a new offence is also higher (\$6,000).<sup>1275</sup>

For Commonwealth offenders, under section 20A(5)(c) of the *Crimes Act 1914* (Cth), if a person subject to a recognizance release order (analogous to a suspended sentence) has breached the order, the court may impose a pecuniary penalty, extend the good behaviour period, revoke the order and impose a community-based order, revoke the order and order imprisonment, or take no action.

#### 10.14.4 Submissions and consultation

##### Powers on breach and legislative guidance

Stakeholders expressed mixed views about whether the current breach powers under section 147 of the PSA are appropriate or should be amended.

The QPU supported the current legislative powers on breach,<sup>1276</sup> but did not specifically comment on why they considered these to be appropriate. It further suggested that there be a presumption that any term activated be served by way of home detention.<sup>1277</sup>

The QLS also supported the current presumption in favour of activation, noting: ‘This comprises a significant aspect of the punitive nature of the suspended sentence as a sentencing option’, with the courts having ‘broad discretion in determining whether or not the circumstances of the defendant and/or the case dictate that the activation of the sentence would be unjust’.<sup>1278</sup> However, they expressed support for broadening the discretion of the courts with respect to factors they must have regard to when considering whether or not it was ‘unjust’ to activate a suspended sentence.<sup>1279</sup> They supported a formulation reflecting the wording of section 147 prior to its amendment in 1997, that the court be required to order the offender to serve the suspended term of imprisonment, ‘unless it is of the opinion that it would be unjust to do so in view of all the circumstances that have arisen since the suspended imprisonment was imposed’.<sup>1280</sup>

LAQ’s position was aligned with that of the QLS, with it supporting a ‘significant test’ to be met to avoid activation of the sentence, given the order had been breached, but the removal of references in section 147(3)(a) to whether the breach offence was ‘trivial’.<sup>1281</sup> Sisters Inside also supported amending the wording of sections 147(2) and 147(3) of the Act ‘to promote greater judicial discretion in sentencing for breaches’.<sup>1282</sup>

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis supported the removal of the current requirement that the court activate the whole of the sentence held in suspense, unless of the opinion it is ‘unjust to do so’, ‘in order to promote greater judicial discretion in the sentencing process’.<sup>1283</sup> They also supported amendments being made to section 147(3)(a) to widen judicial discretion when dealing with a breach of a suspended sentence – including ‘to remove the reference to whether the subsequent offence committed during the operational period of the order is ‘trivial’’, and providing an additional power to impose a fine, and to make no other order in circumstances where the order has been breached’.<sup>1284</sup>

To provide courts with flexibility in responding to breaches, Sisters Inside, LAQ and the QLS supported including additional powers to impose a fine, or to make no order (or, alternatively, as suggested by LAQ, ‘legislative recognition ... acknowledging the breach is proven but no action is taken’).<sup>1285</sup>

<sup>1275</sup> Ibid ss 84F(1)(d), 80(1)(d).

<sup>1276</sup> Submission 10 (Queensland Police Union of Employees) 9.

<sup>1277</sup> Ibid.

<sup>1278</sup> Submission 15 (Queensland Law Society) 12.

<sup>1279</sup> Ibid 12–13.

<sup>1280</sup> Ibid 13.

<sup>1281</sup> Submission 6 (Legal Aid Queensland) 10.

<sup>1282</sup> Submission 7 (Sisters Inside) 7.

<sup>1283</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 5.

<sup>1284</sup> Ibid.

<sup>1285</sup> Submission 6 (Legal Aid Queensland) 10; Submission 7 (Sisters Inside) 7; Submission 15 (Queensland Law Society) 13.

LAQ also indicated its support for a discretion being available to a court when dealing with an offender in circumstances where the court is satisfied the person has been convicted of an offence for which imprisonment can be imposed, in breach of their suspended sentence.<sup>1286</sup>

FACAA did not support courts having a discretion on breach, and considered that when breached, the suspended sentence should be activated in full. They commented:

option[s] like in the Northern Territory and Tasmania that says ‘make no order’ then what was the point of the initial suspended sentence? Any and all powers to do nothing when a criminal is breaching their suspended sentence conditions must be removed and replaced with mandatory prison time being either the entire or part of the custodial sentence being activated.<sup>1287</sup>

### **Power of lower court to deal with breach of higher-court order**

As discussed earlier in this chapter, the Council in its Options Paper asked whether a court should have a discretionary power to deal with a breach of a suspended sentence imposed by a higher court, if that court is dealing with an offence that breaches the higher court’s order.

A number of legal and criminal justice stakeholders supported courts having a discretionary power to deal with a breach of a suspended sentence imposed by a higher court in circumstances where that court was dealing with an offence giving rise to a breach of the higher court’s order.

There were a range of views about how this might operate. The QPU, which saw benefits such as greater court efficiencies, suggested this power should be ‘subject to the accused having a right to review any activation to the Court which originally imposed the suspended sentence’.<sup>1288</sup>

LAQ suggested such a power enabling a lower court to deal with a breach of a higher court’s order should be at the defendant’s election.<sup>1289</sup>

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis supported any guidance being modelled on section 552D of the *Criminal Code* (Qld) commenting:

In a similar way, a lower court should have the power to deal with a breach of a suspended sentence imposed by a higher court if the lower court is satisfied that because of the seriousness of the offence or any other relevant consideration, it should deal with the matter.<sup>1290</sup>

Sisters Inside supported the Council’s initial proposal that under such a model, a court could deal with a breach on its own motion, provided: ‘(a) the court considers it appropriate; (b) the defendant is legally represented; (c) the Crown and the defendant consent; and (d) sufficient information about the original offence and circumstances in which it was imposed is before the court.’<sup>1291</sup>

The QLS, however, identified a number of potential problems with introducing this form of power:

In order to properly come to its decision, a Court dealing with a breach of suspended sentence is often provided with the transcript of the original sentence in order to be availed of all of the factors placed before the original sentencing Court which led to the imposition of the suspended sentence. It is most uncommon for this material to be available at the time of the sentencing for the breaching offence. It would be dangerous to allow a lower Court to deal with a suspended sentence ordered by a higher Court without this material being available and may lead that Court into an appealable error.

Further, the Courts each have jurisdictional limits on what kinds of offences they can deal with. If a lower Court were allowed to deal with the breach of a suspended sentence ordered by a higher Court they would then be required to assess the seriousness of the original offence in circumstances where they are not ordinarily required to sentence that particular offence. Again, this may lead the lower Court into an appealable error.<sup>1292</sup>

The exception to this, they submitted, would be ‘In circumstances where the breaching offence is so objectively trivial that it is accepted the higher court would extend the operational period by a nominal amount’.<sup>1293</sup> The

<sup>1286</sup> Ibid.

<sup>1287</sup> Submission 4 (Fighters Against Child Abuse Australia) 21–2.

<sup>1288</sup> Submission 10 (Queensland Police Union of Employees) 9.

<sup>1289</sup> Submission 6 (Legal Aid Queensland) 10.

<sup>1290</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 6.

<sup>1291</sup> Submission 7 (Sisters Inside) 7.

<sup>1292</sup> Submission 15 (Queensland Law Society) 15.

<sup>1293</sup> Ibid.

example provided was where an evade fare charge under section 143AC of the *Transport Operations (Passenger Transport) Act 1994* (Qld) is dealt with in a Magistrates Court, which breaches a District Court sentence for armed robbery. The QLS suggested: 'Providing the transcript of the proceedings in the higher court is available, and the defendant consents, it would be cost and time effective to have the matter dealt with in the lower court'.<sup>1294</sup> They suggested criteria could be developed limited to these sorts of situations, and in circumstances where 'a Magistrate or Judge in the lower Court forms the view that the likely penalty for the breach of suspended sentence will not be the extension of the operational period the matter is committed to the higher Court'.<sup>1295</sup>

#### 10.14.5 The Council's view

To maximise the diversionary impact of suspended sentences, the Council considers it important that courts have discretion to respond to breaches as they consider appropriate, taking into account the nature and seriousness of any new offence committed during the operational period relative to the seriousness of the offence for which the original sentence was imposed.

In the Magistrates Courts, those offences most likely to attract a suspended sentence (but excluding offences with a comparatively small number of state-based offences sentenced at that court level) are:

- unlawful entry (10.6%);
- acts intended to cause injury (10.6%);
- fraud (7.9%).

For the higher courts, suspended sentences are most often imposed for:

- sexual assault offences (49.3%);
- fraud (43.7%);
- acts endangering persons (37.2%).

All offences for which suspended sentences are imposed across all court levels are serious offences that, particularly in the case of offences dealt with in the higher courts, more often than not attract a custodial sentence of some type.

In contrast, the Council's analysis shows that the most common offence types committed during the operational period of a suspended sentence constituting a potential breach of a suspended sentence (where punishable by imprisonment) are traffic and vehicle offences. About one-quarter of offences committed during the operational period of Magistrates Court-imposed sentences are traffic and vehicle offences, which also constitute about one-third of offences committed during the operational period of higher-court sentences. The next highest category of breaching offence is public order offences, representing 18 per cent of offences committed during the operational period of Magistrates Court-imposed sentences, and 15 per cent of offences committed during the operational period of sentences imposed by the higher courts.

For sentences imposed in the higher courts, the majority of new offences committed during the operational period (over 80%) are less serious than the offence for which the original sentence was imposed. This is also the case for 42 per cent of offences committed during the operational period of sentences imposed by the Magistrates Courts.

England and Wales appears to have responded to the challenge of dealing with lower-level offences committed during the operational period of suspended sentence orders imposed by a higher court (in this case, the Crown Court) by providing a legislative power for the Magistrates Court in dealing with the new offence to either:

- (a) if it thinks fit, remand the offender in custody or release the offender on bail to be brought back before the original sentencing court to be dealt with (as is the current approach in Queensland); or
- (b) to give written notice of the conviction to the higher court.<sup>1296</sup>

The Crown Court may then decide whether to issue a summons/notice to appear or warrant for the person's arrest to be dealt with for the breach of the suspended sentence order.<sup>1297</sup>

The Council supports an equivalent discretion to that which exists in England and Wales being provided to Magistrates Courts in Queensland when dealing with an offence that breaches a suspended sentence imposed by

<sup>1294</sup> Ibid.

<sup>1295</sup> Ibid 15–16.

<sup>1296</sup> *Criminal Justice Act 2003* (UK) sch 12 para 11(2).

<sup>1297</sup> Ibid sch 12 para 12(1).

either the District or Supreme Court. The Council suggests that further consultation should occur with the Heads of Jurisdiction to determine the most effective means for Magistrates Courts to transmit information about convictions for new offences committed in breach of a suspended sentence to the higher courts and to the Director of Public Prosecutions for appropriate consideration.

While the Council had originally considered whether the Magistrates Courts might be provided with limited powers to deal with the breach, our concern is that a court may not have all the information before it to determine the intention of the sentencing court at the time the original sentence was imposed, which is likely to be important in determining how to respond to the breach. Further, while the court in such a situation is not, at law, imposing a sentence, this approach may give rise to legitimate concerns that a lower court is interfering with a sentence imposed by a superior court.

The Council's view is that it is preferable to allow Magistrates Courts to assist in filtering out offences at the lower end of offence seriousness where an offence dealt with by that court was committed during the operational period of a sentence imposed by a higher court. This will avoid the issues outlined above, with the safeguard of requiring notice to be given to the original sentencing court and prosecuting authority.

### **Legislative powers and guidance under section 147 of the PSA**

The Council further recommends reforms be made to section 147 of the Act, which requires the suspended term of imprisonment to be activated in full on breach by reoffending, 'unless the court is of the opinion that it would be unjust to do so' and sets out the matters to which the court must have regard in making this determination.

The factors listed under section 147(3) in the Council's view should be replaced with simplified criteria. In particular, the criteria should not require a court to expressly consider whether a subsequent offence committed is 'trivial'. The effect of this provision, as currently drafted, is to confine the court's consideration of the circumstances of the new offence and its relevance to deciding if the original sentence should be activated, in a way that is unnecessary and unhelpful. Through the many factors listed, it also adds an additional level of complexity to the exercise of judicial discretion, which the Council considers unnecessary.

Assuming that some form of legislative guidance is required, the Council prefers the adoption of wording that would align with section 80(3) of the *Western Australian Sentencing Act 1995*, which provides:

A court must make an order under subsection (1)(a) unless it decides that it would be unjust to do so **in view of all the circumstances that have arisen, or have become known, since the suspended imprisonment was imposed.**  
[emphasis added]

In the Council's view, this formulation provides sufficient guidance to the court in determining whether it is appropriate for a sentence that has been suspended to be ordered to be served on breach, while avoiding the need for more detailed criteria.

In addition, while the Council supports retention of the presumption in favour of the offender being ordered to serve the suspended imprisonment on breach, we recommend changes be made to section 147 to improve the operation and flexibility of the current breach provisions.

First, the Council recommends the current direction under section 147(2), which is that the court order the offender to serve the whole of the term of imprisonment suspended unless 'unjust to do so', should be expanded to allow the court, in the alternative, to order the offender to serve part only. This would require a simple amendment to subsection (2) to include reference to subsection (1)(c).

In the Council's view, providing courts with a broader discretion under section 147(2) is important, given that a suspended sentence under the proposed reforms will be able to be combined with a community-based order. This means the offender may have spent some months complying with supervision, reporting and community service requirements of the community-based order prior to being dealt with for the breach. While this scenario is likely to reasonably fall within the discretion of the court to take other action on the basis it is unjust to activate the whole of the suspended sentence, the Council considers it preferable to provide the alternative option of activating part of the sentence, which allows the intended deterrent effect of the sentence at law to remain intact while providing for some measure of flexibility.

The change proposed is consistent with the approach in England and Wales, which requires the court to either activate the whole of the sentence, or to substitute a lesser term in circumstances where an offence has been committed during the operational period of the order, unless of the opinion it is unjust to do so.

Secondly, the Council supports the court having broader powers where it finds it unjust to activate the whole or part of the sentence held in suspense – including for the reasons outlined above that there may have been substantial

compliance with a community-based order made alongside the suspended sentence. In particular, the Council recommends courts be provided with a power to:

- impose a fine of not more than 10 penalty units, consistent with the current maximum penalty that applies to contravention of a requirement of a community-based order;<sup>1298</sup>
- make no order with respect to the breach of the suspended sentence.

As discussed earlier in this chapter, the Council's view that breach of the conditions of probation, a community service order or a community correction order made alongside a suspended sentence other than involving commission of a new offence punishable by imprisonment should be dealt with under equivalent provisions to those provided for under Part 7 of the PSA. In particular, technical violations of conditions should not give rise to a breach of the suspended sentence. (See further Recommendation 43.)

As specialist packages of treatment and rehabilitation conditions are developed under the new CCO, the Council also suggests there may be benefit in considering providing courts with additional powers on breach of a CCO where combined with a suspended sentence. As an example, courts might be provided with a power to activate a limited number or days of imprisonment for repeat or serious non-compliance with conditions in circumstances where the suspended sentence is still in force, similar to those powers that exist under section 151W of the PSA in support of the management of offenders subject to a drug and alcohol treatment order imposed by the Drug and Alcohol Court (court may order an offender who has failed to comply with the rehabilitation part of their drug and alcohol treatment order to serve up to 7 consecutive days of the sentence of imprisonment suspended). Drawing on the best practice principles that support the operation of drug courts, these types of sanctions, where applied to individuals with substance misuse issues linked to their offending, can be effective where managed within a therapeutic jurisprudence or solution-focused court framework, which includes opportunities for regular court reviews and other strategies to achieve behavioural change, supported by the delivery of integrated or coordinated treatment and support services.<sup>1299</sup> Specialist approaches supported by the use of appropriately tailored sanctions might also be considered for other offender cohorts – such as domestic and family violence offenders.<sup>1300</sup>

<sup>1298</sup> *Penalties and Sentences Act 1992* (Qld) s 123.

<sup>1299</sup> See, for example, National Association of Drug Court Professionals, *Principles of Evidence-Based Sentencing and Other Court Dispositions for Substance Abusing Individuals* (no date).

<sup>1300</sup> A suggestion for a specialist sentencing approach was made as part of 2017 evaluation of the Specialist Domestic and Family Violence Court Trial in Southport. While noting the evidence on the impact of domestic violence sentencing courts on offender recidivism was 'mixed', the authors suggested, 'as the model of high risk teams in the integrated response trial develops, it might be worth considering the trial of a sentencing court (with judicial monitoring) for high risk offenders in a court site in the high risk team locations': Christine Bond et al, *Evaluation of the Specialist Domestic and Family Violence Court Trial in Southport* (2017) 44, n 33. The use of particular sanction types was not considered. In a 2017 report, the Victorian Sentencing Advisory Council rejected the adoption of 'swift, certain and fair' sentencing responses to family violence offenders, including the use of short custodial sanctions, on the basis there is insufficient evidence this approach would be effective or appropriate in Victoria (Recommendation 1). Instead, it preferred the adoption of a fast-tracking listing process for contravention of a CCO for family violence offenders (Recommendation 2) and strategies to promote the greater use of judicial monitoring as a condition of a CCO (Recommendations 3–5): Sentencing Advisory Council (Victoria), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Report* (2017). Issues identified with the use of short terms of imprisonment for domestic violence offenders included: the lack of opportunity to meaningfully engage with offenders during custodial sentences of two to three days' imprisonment; potential increased risks for offenders serving short terms of imprisonment in police custody; and practical issues concerning the lack of facilities in Victoria to accommodate sentenced offenders for short terms of imprisonment: Ibid 29–31 [3.84]–[3.100].

## RECOMMENDATIONS: SUSPENDED SENTENCES – BREACH PROVISIONS

43. Breach of the conditions of probation, a community service order or a CCO made alongside a suspended sentence, other than involving commission of a new offence punishable by imprisonment, should be dealt with under equivalent provisions to those provided for under Part 7 of the *Penalties and Sentences Act 1992* (Qld). In particular, technical violations of conditions should not give rise to a breach of the suspended sentence. (See further Recommendation 31.)
44. As specialist packages of treatment and rehabilitation conditions are developed under the new CCO, the Department of Justice and Attorney-General, in partnership with stakeholder agencies, should investigate whether there may be benefit in providing courts with additional powers on breach of a CCO where combined with a suspended sentence, such as a power to activate a limited number of days of imprisonment due to non-compliance – similar to the power that exists under section 151W of the *Penalties and Sentences Act 1992* (Qld), i.e. the court may order an offender who has failed to comply with the rehabilitation part of their drug and alcohol treatment order to serve up to 7 consecutive days of the sentence of imprisonment suspended.
45. Magistrates Courts should be provided with a legislative discretion when sentencing for an offence committed during the operational period of a suspended sentence imposed by a higher court to either:
  - (a) commit the offender to custody to be brought, or grant bail to the offender conditioned to appear, before the original sentencing court to be dealt with, which is the existing approach under section 146 of the *Penalties and Sentences Act 1992* (Qld); or
  - (b) ensure written notice of the sentence order is given to the higher court and the Director of Public Prosecutions in order to consider whether breach action should be initiated.
46. The courts' powers on breach of a suspended sentence by commission of an offence punishable by imprisonment under section 147 of the *Penalties and Sentences Act 1992* (Qld) should be amended to:
  - (a) provide under section 147(2) that a court must either make an order under subsection (1)(b) (existing requirement) or subsection (1)(c) (new option to order the offender to serve part of the suspended sentence only), unless of the opinion it would be unjust to do so;
  - (b) omit subsection (3), which sets out what matters a court must have regard to in making a determination under subsection (2) as to whether it would be unjust to order the person to serve the whole (or part, under the Council's recommended reforms) of the suspended imprisonment on breach, and require instead that the court consider 'all the circumstances that have arisen, or have become known, since the suspended imprisonment was imposed';
  - (c) provide the court with additional powers on breach to:
    - (i) impose a fine of 10 penalty units;
    - (ii) make no order with respect to the breach of the suspended sentence.

## Chapter 11 Court ordered parole

This chapter considers the legal framework that supports the use of parole in Queensland and potential reforms, as recommended by the Council, to court ordered parole. It also considers the possible removal of parole for short sentences of imprisonment of 6 months or less and discusses judicial power to order parole conditions for court ordered parole orders.

### 11.1 Historical context

Court ordered parole involves a sentencing court setting a definite date for an offender's release on a parole order, without any application to a parole board. It was introduced in Queensland in the *Corrective Services Act 2006* (Qld) (CSA) in 2006. Before this, a parole board made all orders for release on parole.<sup>1301</sup> Furthermore:

Prior to 2006, a short-sentence prisoner (serving two years or less of imprisonment) who was granted early release could not be supervised by corrective services in the community for the remainder of their sentence. Early remission allowed the chief executive to administratively reduce the length of a prisoner's sentence by authorising the release of the prisoner from custody for good behaviour while in custody. These decisions however, could not be based on considerations of community safety. The prisoner could not be monitored nor could their risks upon release be addressed and supported through case management.<sup>1302</sup>

The CSA established parole as the only form of early release from custody. It abolished remissions, phased out conditional release along with two forms of community-based release (release to work and home detention), and introduced court ordered parole.

Court ordered parole only applies to sentences of 3 years or less and cannot be imposed for declared serious violent offences or sexual offences.<sup>1303</sup>

In her Second Reading Speech, the then Minister for Police and Corrective Services explained the rationale for introducing court ordered parole as being part of 'truth in sentencing' because 'a prisoner's release date is a decision that should only ever be made by a court or by a parole board':

Short-sentenced prisoners, who are not sex offenders or serious violent offenders, will have their parole date set by the sentencing court. A court might decide that a prisoner should serve every day of their sentence in prison. If that is the case, it will happen. Alternatively, a court might decide that a prisoner needs to spend time in custody and time under supervision before the end of their sentence. Prisoners released to parole on the date set by a court will have to comply with their parole order or they can be returned to custody. There will be no second chances for prisoners whose behaviour leads to the cancellation of their court ordered parole order.<sup>1304</sup> They will be off to jail. If that happens, they will have to ask a parole board for further release to parole, or else serve their full sentence behind bars.<sup>1305</sup>

By introducing court ordered parole, the Government established a mixed parole system whereby prisoners on short sentences could receive automatic parole and prisoners on longer sentences were subject to discretionary parole.<sup>1306</sup> Court ordered parole was aimed at addressing the overrepresentation of low-risk prisoners subject to short sentences. These prisoners were responsible for a high degree of turnover in the prison population, and this scheme was intended to enable them to be diverted away from custody, while providing post-release support and supervision.<sup>1307</sup>

### 11.2 Purpose and benefits of parole

The sole purpose of parole 'is to reintegrate a prisoner into the community before the end of a prison sentence to decrease the chance that the prisoner will ever reoffend. Its only rationale is to keep the community safe from crime'.<sup>1308</sup> The *Ministerial Guidelines* that set out the criteria for the Parole Board Queensland (the Parole Board)

<sup>1301</sup> Queensland Parole System Review (n 10) 78 [362].

<sup>1302</sup> Queensland Corrective Services, *Court Ordered Parole in Queensland* (Research Paper No. 4, June 2013) 2.

<sup>1303</sup> *Penalties and Sentences Act 1992* (Qld) s 160B.

<sup>1304</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Corrective Services Bill 2006', 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).

<sup>1305</sup> *Ibid.*

<sup>1306</sup> Queensland Parole System Review (n 10) 56 [256].

<sup>1307</sup> Queensland Corrective Services (n 1302) 3.

<sup>1308</sup> Queensland Parole System Review (n 10) 1 [3] (emphasis in original).

to use when considering applications provide that the overriding consideration for the Parole Board's decision-making process is community safety.<sup>1309</sup>

The Parole System Review Report, which recognised parole as being primarily a 'method that has been developed in an attempt to prevent reoffending',<sup>1310</sup> found evidence suggesting that parole 'has a beneficial impact on recidivism, at least in the short term' and perhaps modestly.<sup>1311</sup> Paroled prisoners are less likely to reoffend than prisoners released without parole.<sup>1312</sup> It also found 'it is more risky to have a short period of parole' than a longer one.<sup>1313</sup>

The Court of Appeal has noted that parole places support, supervision and control over sentenced offenders.<sup>1314</sup> The community benefits from having an offender rehabilitated rather than remaining for extended periods in prison.<sup>1315</sup>

A key task for the review has been to consider the effectiveness of court ordered parole versus Board ordered parole. A review of the evidence undertaken by QUT for this review found:

There is sufficient robust evidence to conclude that parole is more effective at reducing recidivism than unsupervised release. This is particularly so for rehabilitation-focused supervision, rather than compliance-focused supervision. However, evidence on the effectiveness of parole for vulnerable cohorts is sparse. Parole may be less effective for Aboriginal and Torres Strait Islander offenders, male offenders and offenders with a mental illness, but a lack of robust research precludes any definitive conclusion.

While there is consistent evidence that parole failure is more likely among parolees who are young, male, Indigenous and have a criminal history, there is no consensus on the relative effectiveness of court-ordered versus board-ordered parole.<sup>1316</sup>

The absence of robust evidence on the impacts of court ordered versus Board ordered parole has limited the extent to which the Council has been able to present recommendations based on what is likely to be most effective in reducing reoffending risks. However, consistent with the fundamental principles of the review, the Council's position is that a sentence that enables an offender to be supervised in the community where it can meet the purposes of sentencing, and it is safe to do so, is preferable to one that involves imprisonment. To the extent that court ordered parole is one of a number of available orders that encourage this to occur, its use is supported.

At the same time, the Council is conscious of the potential net-widening effects of the Queensland form of order, which allows a court to set a parole release date as the date of sentence. This may make imprisonment a more attractive sentencing option to sentencing courts when considering whether to impose a custodial or non-custodial order, as imposing imprisonment has the advantage of enabling time served in custody to be recognised, while still enabling the person to be released into the community under supervision. The difficulty is that the use of court ordered parole in place of non-custodial orders can have serious repercussions for those who fail to comply with the conditions of parole — including exposing these offenders to the risk the parole order will be suspended and/or cancelled and they will be ordered to serve the entirety of the sentence in custody, which is a decision made by the Parole Board rather than by a court. It also means the person will have a term of imprisonment recorded on their criminal history — which may suggest to those reviewing the person's criminal history in future that the offence was more serious than if a non-custodial sentence had been imposed, and it may also increase the likelihood of the person being sentenced to imprisonment for future offences.

In this chapter, the Council considers whether parole should be available for short sentences of imprisonment, taking into account these potential net-widening effects of court ordered parole.

<sup>1309</sup> Mark Ryan, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland*, 3 July 2017, 2 [1.2]–[1.3].

<sup>1310</sup> Queensland Parole System Review (n 10) 2 [8].

<sup>1311</sup> Ibid 38 [140] and see 2 [11] and 38 [139].

<sup>1312</sup> Ibid 1 [7] citing Wan Wai-Yin et al, 'Parole Supervision and Reoffending' (Trends and Issues in Crime and Criminal Justice No. 485, Australian Institute of Criminology, 2014).

<sup>1313</sup> 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.

<sup>1314</sup> *R v Clark* [2016] QCA 173, 3 [5] (McMurdo P). See also *R v Bliss* [2015] QCA 53, 3 [5] (McMurdo P), 3[6] Holmes JA.

<sup>1315</sup> Ibid 13 [52] (Morrison JA). See also *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285, 12 [48] (Keane JA, McMurdo P and Holmes JA agreeing).

<sup>1316</sup> Gelb, Stobbs and Hogg (n 28) 109–10 [3.3.5].

The impact of court ordered parole on sentencing practices and its relative effectiveness when compared with other forms of orders, including community-based alternatives, is an important area for future research.

## 11.3 The current legal framework

### 11.3.1 Making a court ordered parole order

Court ordered parole involves a parole release date fixed by the court (meaning the offender is automatically released on that date, subject to certain powers of intervention held by the Parole Board. Judicial power to order parole release (and eligibility)<sup>1317</sup> dates is governed by Part 9, Division 3 of the *Penalties and Sentences Act 1992* (Qld) (PSA). A court required to fix a parole release date may fix any day of the offender's sentence as that parole release date.<sup>1318</sup>

Court ordered parole orders flow from a court sentencing an offender to a sentence of 3 years or less, provided the offence for which the sentence is imposed is not a declared serious violent offence or a sexual offence. The court must fix a date the offender is to be released on parole, unless the offender has had a court ordered parole order cancelled under section 205 or 209 of the CSA during the offender's period of imprisonment (in which case the court must fix a parole eligibility date<sup>1319</sup>).

All other forms of sentencing under Part 9, Division 3 result in the court setting a parole eligibility date (by legislative requirement or at the court's discretion) or in the court setting no parole eligibility date, in which case the deeming provision in section 184(2) of the CSA applies. It sets parole eligibility where a parole eligibility date has not been set after half of a sentence is served.<sup>1320</sup> Then, the offender must apply for parole to the Parole Board for Board ordered parole.

As Table 11-1 shows, court ordered parole orders form the overwhelming majority of parole orders in Queensland.

**Table 11-1: Number of offenders supervised on parole any time during 2017–18**

| Penalty type             | Offenders     |              | Orders        |              |
|--------------------------|---------------|--------------|---------------|--------------|
|                          | N             | %            | N             | %            |
| Court ordered parole     | 12,937        | 81.8         | 13,592        | 79.5         |
| Board ordered parole*    | 3,359         | 21.2         | 3,515         | 20.5         |
| <b>All parole orders</b> | <b>15,817</b> | <b>100.0</b> | <b>17,107</b> | <b>100.0</b> |

Source: QCS unpublished data supplied 29 March 2019.

Notes: Some offenders had more than one parole order during 2017–18.

\* Board ordered parole includes: Qld Parole, Interstate Parole, Commonwealth License, Parole pursuant to *Youth Justice Act 1992* (Qld).

### 11.3.2 The approach in other jurisdictions

Queensland's parole system is not directly analogous to other Australian models (nor England and Wales, Canada or NZ). General details regarding other parole regimes are outlined in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-Jurisdictional Analysis*, which can be found on the Council's website.

The Queensland Parole System Review noted that Queensland appeared to be the only Australian state that allowed offenders to serve a period of imprisonment completely on parole [and, it follows, to have immediate release on parole].<sup>1321</sup> It further noted:

Queensland is the only state in Australia to have a system where parole must apply to all sentences of a term of imprisonment. In Victoria, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory, parole is not available for sentences of imprisonment for periods of less than 12 months. In New South Wales, parole is not available for sentences of imprisonment for periods of less than six months. In all Australian

<sup>1317</sup> Parole eligibility dates are discussed here only for the purpose of completeness. The different circumstances and provisions which engage their operation are not discussed here.

<sup>1318</sup> See *Penalties and Sentences Act 1992* (Qld) s 160G(1).

<sup>1319</sup> Ibid s 160B.

<sup>1320</sup> This is the general position, which does not apply to various mandatory sentencing schemes such as the serious violent offence scheme and head sentences of life imprisonment.

<sup>1321</sup> Queensland Parole System Review (n 10) 93 [452].

states, except for Queensland, the sentencing Court may choose not to fix a non-parole period, meaning the offender will not be eligible for parole and will be required to serve the full term.<sup>1322</sup>

Western Australia,<sup>1323</sup> Victoria,<sup>1324</sup> Tasmania,<sup>1325</sup> the ACT<sup>1326</sup> and the NT<sup>1327</sup> do not have court ordered parole or something similar. These jurisdictions have systems entirely of discretionary parole.<sup>1328</sup>

New South Wales,<sup>1329</sup> SA, England and Wales and NZ have systems that involve an offender's early release from custody without consideration by the Parole Board.

In NSW, a court cannot set a non-parole period for imprisonment of 6 months or less.<sup>1330</sup> For sentences of over 6 months, a court must set a non-parole period when sentencing a person to imprisonment. The balance of the term 'must not exceed one-third of the non-parole period ... unless the court decides that there are special circumstances for it being more'.<sup>1331</sup> A court can decline to set a non-parole period if it is appropriate to do so.<sup>1332</sup> NSW has standard non-parole periods for set offences listed in a table, which must be taken into account by sentencing courts.<sup>1333</sup> In NSW 'an offender who is subject to a sentence of 3 years or less, being a sentence for which a non-parole period has been set, is taken to be subject to a parole order (a **statutory parole order**) directing release on parole at the end of the non-parole period'.<sup>1334</sup>

In SA, a court must fix a non-parole period when sentencing a person to imprisonment, but may decline to do so if it would be inappropriate and may not do so if the sentence of imprisonment is for less than 12 months.<sup>1335</sup> Legislation then dictates that the Parole Board must order that a prisoner who is liable to serve a total period of imprisonment of less than five years and for whom a non-parole period has been fixed be released from prison on parole 'not later than 30 days after the day on which the non-parole period expires'.<sup>1336</sup> The prisoner must agree in writing to the parole conditions prior to release.<sup>1337</sup>

<sup>1322</sup> Ibid 72 [325]. In Queensland, a court may generally choose not to order a parole eligibility date if it is not required to order a parole release date — but s 184 of the CSA will then automatically apply.

<sup>1323</sup> Part 3, *Sentence Administration Act 2003* (WA) and Part 13 *Sentencing Act 1995* (WA). Terms of imprisonment of 6 months or less generally cannot be imposed: s 86 *Sentencing Act 1995* (WA). A court may make a parole eligibility order (s 89), but this simply means the Board can consider an application once the proportion of the sentence determined by statute is reached (s 93) — half of a term of 4 years or less; two years before expiry of the full term of over 4 years' duration.

<sup>1324</sup> *Sentencing Act 1991* (Vic) — For a term of 2 years or more, the court must fix a period during which the offender is not eligible for release on parole, unless inappropriate. May do so when head sentence is less than 2 years but not less than 1 year. Non-parole period must be at least 6 months less than the head sentence (s 11). Set percentages for non-parole periods regarding 'standard sentence' offences (where Act specifies standard sentence) — ss 3, 11A.

<sup>1325</sup> *Sentencing Act 1997* (Tas) ss 17(2), (3)–(5). In Tasmania, courts have the discretion to order that an offender is not eligible for parole in respect of a sentence for a term of imprisonment, or that the offender is not eligible for parole before a date specified, which cannot be less than one-half of the sentence period. If no such order is made, the offender is not eligible for parole.

<sup>1326</sup> *Crimes (Sentencing) Act 2005* (ACT) — Court must set a non-parole period for terms of imprisonment of 1 year or longer but may decline to do so if inappropriate (s 65).

<sup>1327</sup> *Sentencing Act 1995* (NT) — Generally, a court imposing imprisonment of 12 months or more must set a non-parole period, unless this is inappropriate; and may not fix one for imprisonment of less than 12 months (s 53). The non-parole period for sentences of 12 months or more (unless 'inappropriate') must be not less than 50 per cent and the period cannot be less than 8 months (s 54). There are minimum non-parole periods set for sexual and drug offences (s 55) and offences against children under 16 (s 55A).

<sup>1328</sup> NSW Law Reform Commission, *Parole Question Paper 1: The Design and Objectives of the Parole System* (2013) 15 [1.53].

<sup>1329</sup> NSW previously had court based parole; however, the Government accepted and implemented a NSW Law Reform Commission recommendation to abolish that approach (see now repealed section 50 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) and be replaced with statutory-based parole (NSW Law Reform Commission, *Parole* (Report No. 142, 2015) Recommendation 3.1(4)). Under this approach for sentences of 3 years or less the court is required to set a non-parole period and offenders must be released at the end of the non-parole period, unless the State Parole Authority revokes parole in advance. The court is no longer required to make parole orders or have a role in setting parole conditions. It is required to set a non-parole period (s 44) but may decline to do so (s 45).

<sup>1330</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

<sup>1331</sup> Ibid s 44(2).

<sup>1332</sup> Ibid s 45.

<sup>1333</sup> Ibid pt 4 div 1A.

<sup>1334</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 158(1) (emphasis in original).

<sup>1335</sup> *Sentencing Act 2017* (SA) s 47. This is the general proposition, from which there are numerous deviations.

<sup>1336</sup> *Correctional Services Act 1982* (SA) s 66(1)(b).

<sup>1337</sup> Ibid s 68(4).

## 11.4 Queensland Parole System Review recommendations

The Terms of Reference requested the Council to:

- consider Recommendation 3 of the Parole System Review Report and advise whether a court should have discretion to set a parole release date or parole eligibility date for sentences of greater than 3 years where the offender has served a period on remand and the court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence; and
- consider and advise on Recommendation 5 of the Parole System Review Report that court ordered parole should apply to a sentence imposed for a sexual offence.

The Council has also considered a number of alternative options for the extension of court ordered parole, including extending the cap for court ordered parole to 5 years, and providing courts with a dual discretion to set either a parole release date or a parole eligibility date for all sentences under 3 years.

### 11.4.1 Queensland Parole System Review: Recommendation 3

Time on remand can run to such a length that it represents a large proportion of the ultimate head sentence. If that head sentence is over 3 years, there can be no fixed parole release date. The result may be a prisoner serving most of the head sentence in custody, with little or no rehabilitation to benefit either the prisoner or the community. The unfairness of this is exacerbated if the prisoner pleaded guilty.

A court may struggle within such confines to create a sentence that is just, reflects a guilty plea, allows for supervision, and reflects the time served on remand. For example, a stakeholder noted that a judge may order a fixed parole release date, but not declare the time served and instead take it into account, reducing the head sentence to 3 years, to allow for immediate release on parole. The negative consequences of such a course are:

- It gives a false picture when reviewing sentencing statistics.
- It means that the actual/effective sentence is not reflected in the person's criminal history.
- It can unfairly give the impression that the sentence does not reflect the seriousness of the offence.

After discussing the difficulties with a proposal, discussed below, to extend court ordered parole as a matter of discretion to sentences of more than 3 years, the Queensland Parole System Review went on to make Recommendation 3 in the alternative:

A Court should have the discretion to set a parole release date or a parole eligibility date for sentences of greater than three years where the offender has served a period of time on remand and the Court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence.

The power to make a parole eligibility date in such circumstances merely represents the status quo.<sup>1338</sup> It appears to be included in the recommendation to make it clear that in this context, courts would have a dual discretion<sup>1339</sup> in order to fix the following 'anomaly':<sup>1340</sup>

However, there is a limited set of circumstances in which the Court faces a real difficulty when sentencing an offender who has served a long period on remand. If the Court considers that the best interests of the community would be served if only a further short period of time in custody is served before release under supervision but that appropriate head sentence is greater than three years the Court cannot give effect to that conclusion. The Court is deprived of the flexibility in those circumstances to fix a parole release date. The Court's options, in those circumstances, are limited to either:

- (a) imposing a suspended sentence, which would ensure the date of release but not provide for supervision and rehabilitation in the community through Probation and Parole; or
- (b) imposing a sentence with a parole eligibility date which may have the consequence that the prisoner would serve a longer period in custody than intended by the Court while awaiting the outcome of her or his application

<sup>1338</sup> 'The option should still be available to the Court to set a parole eligibility date if they deem it appropriate that the offender should undergo the parole application process': Queensland Parole System Review (n 10) 96 [467].

<sup>1339</sup> See Queensland Parole System Review (n 10) 6 [45] and 95 [463] where the recommendation text is cast without reference to a parole eligibility date.

<sup>1340</sup> Ibid 6 [43].

to the Parole Board and without any rehabilitative programs being offered during that further custodial period.<sup>1341</sup>

The Parole System Review submitted this recommendation would ensure an offender sentenced in such circumstances would be ‘placed upon the most appropriate order’.<sup>1342</sup> The Review noted the following factors in support of this approach:

- Defendants may be held on remand because they were refused bail, did not apply for it, or for reasons beyond the person’s control (for instance, referral to the Mental Health Court or delays in the disclosure of prosecution material).<sup>1343</sup>
- Seventy per cent of the 5,193 remand prisoners in 2015–16 were ultimately sentenced to imprisonment.<sup>1344</sup>
- About 48 per cent of prisoners spent less than 2 months on remand.<sup>1345</sup>
- When offenders spend long periods on remand prior to sentence, a court is limited by the sentencing options available when taking into account the time served on remand by the offender.<sup>1346</sup>
- The court should be able to assess the offender’s risk to the community and whether release on parole is appropriate, because the date of release from custody is soon after the time of sentence.<sup>1347</sup>

There would still be gaps. Sexual offences and head sentences of 4 to 5 years would not be affected.

#### 11.4.2 Data analysis — the current situation

The Council analysed data regarding court ordered parole.<sup>1348</sup> From the 2015–16 to 2016–17 financial years, there were a total of 22,366 adult offenders who were sentenced to imprisonment of any length or a partially suspended sentence of imprisonment for their MSO. Of these, 20,462 offenders (91.5%) were potentially eligible for court ordered parole. The remaining 1,904 offenders (8.5%) could receive a parole eligibility date at the discretion of the sentencing judge — see Figure 11-1.

Offenders were not eligible for court ordered parole for one of three reasons:

- In 77 cases (0.3%), a serious violent offence declaration was made.
- 696 sentences (3.1%) were imposed for sexual offences.<sup>1349</sup>
- 1,130 sentences (5.1%) had a head sentence duration exceeding 3 years.

<sup>1341</sup> Ibid 95 [462].

<sup>1342</sup> Ibid 96 [468].

<sup>1343</sup> Ibid 96 [464].

<sup>1344</sup> Ibid 96 [465].

<sup>1345</sup> Ibid 96 [466].

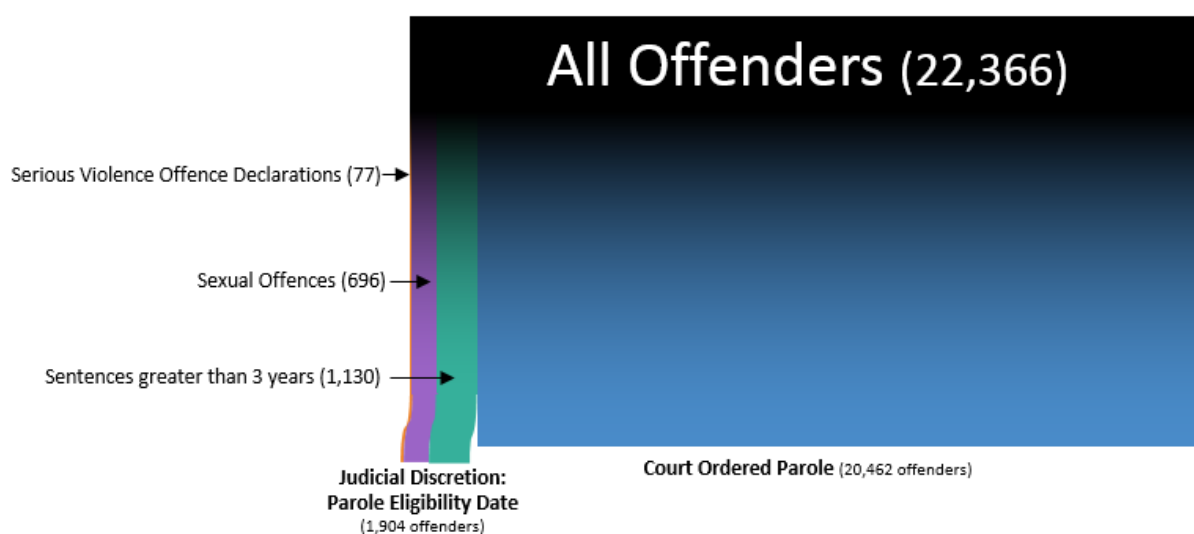
<sup>1346</sup> Ibid.

<sup>1347</sup> Ibid 96 [467].

<sup>1348</sup> Data in this report include offenders who were sentenced to either a single and current sentence of imprisonment, or a partially suspended sentence of imprisonment. Sentences imposed in the 2015–16 to 2016–17 financial years were analysed. For offenders who were subject to multiple sentencing orders in a single court event, only the most serious offence (MSO) has been included in the analysis. All data were extracted from the QGSO Courts Database in September 2018.

<sup>1349</sup> Of the 696 offenders sentenced for a sexual offence, 255 had sentences of greater than 3 years and would not be eligible for court ordered parole. The remaining 441 offenders with sentences of 3 years or less may have been eligible for court ordered parole if Recommendation 5 of the Parole Review Final Report was accepted.

**Figure 11-1: Offenders sentenced to an actual term of imprisonment (any length) (or a partially suspended sentence) who were potentially eligible for court ordered parole, 2015–16 to 2016–17**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

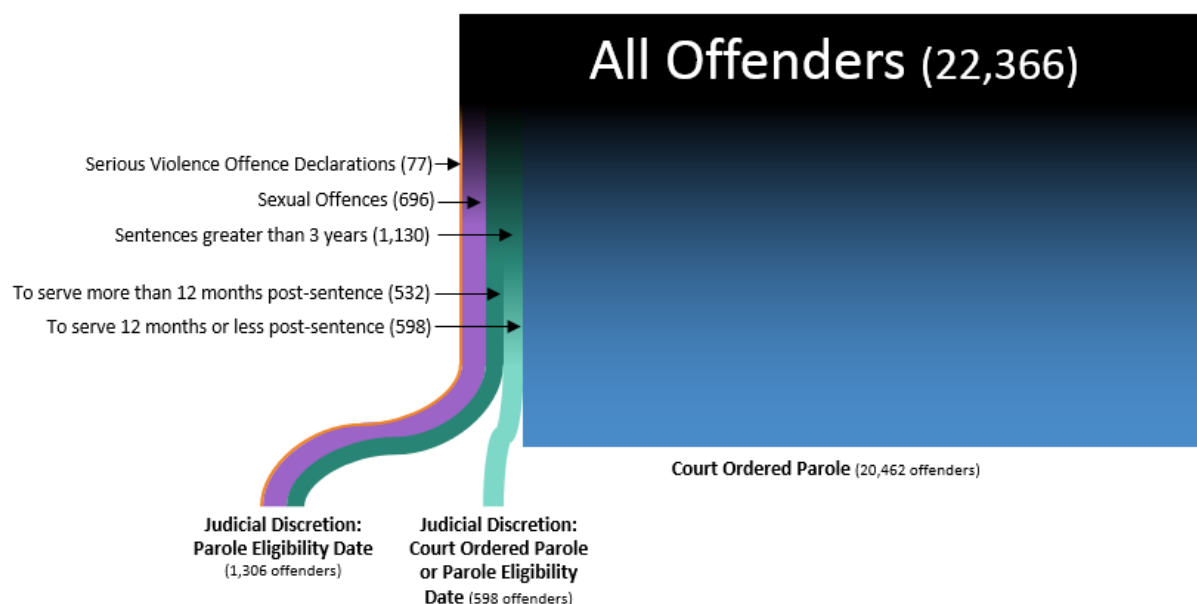
Notes:

- 1) This analysis includes cases finalised between 2015–16 and 2016–17 that involve adult offenders.
- 2) Only cases where the most serious offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases).
- 3) Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
- 4) It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

#### 11.4.3 What cohort of offenders would be affected if Recommendation 3 were adopted?

The Council used data to consider how many offenders may have potentially been affected if Recommendation 3 had been implemented two years ago. Figure 11-2 shows that, of the 1,130 offenders with sentences of more than 3 years' imprisonment, approximately half of these offenders were sentenced to less than 12 months in actual custody post-sentence (either by way of a partially suspended sentence, or by way of a parole eligibility date). A total of 598 offenders may have been affected if Recommendation 3 had been adopted and would have been eligible for court ordered parole at the court's discretion. The remaining 532 offenders were to serve more than 12 months in post-sentence custody and would not have been affected over this period by this recommendation.

**Figure 11-2: Offenders who would have been eligible for court ordered parole if Recommendation 3 had been adopted, 2015–16 to 2016–17**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

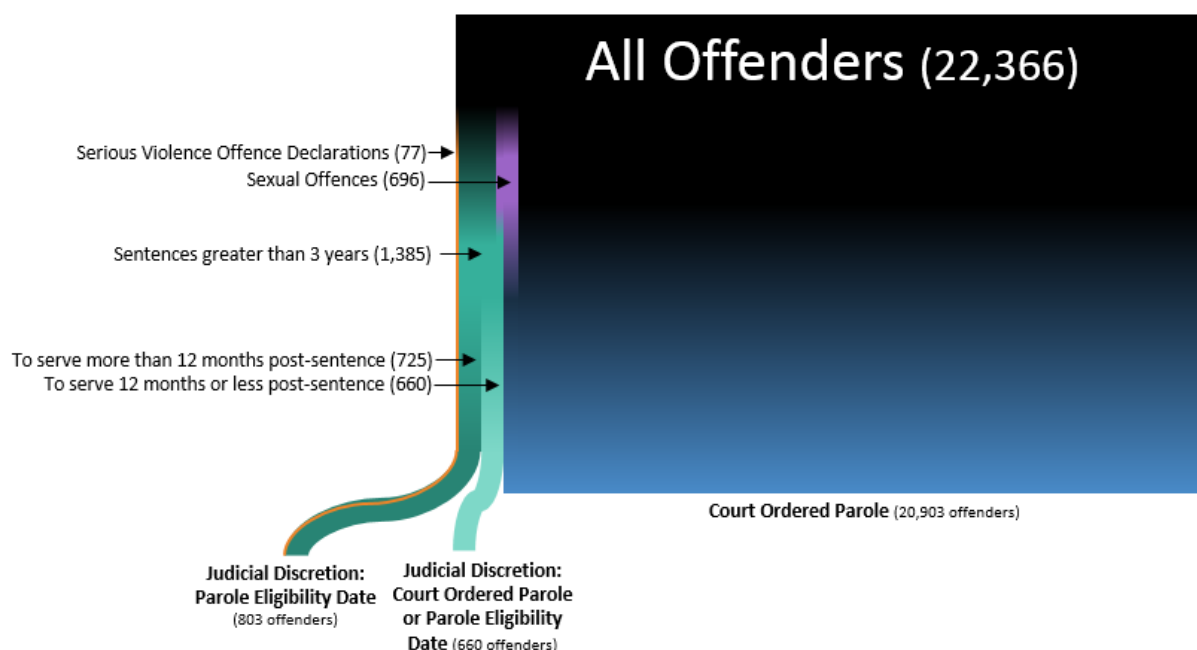
Notes:

- 1) This analysis includes cases finalised between 2015–16 and 2016–17 that involve adult offenders.
- 2) Only cases where the most serious offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases).
- 3) Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
- 4) It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

#### 11.4.4 Adding sexual offences to Recommendation 3

Recommendation 5 of the Queensland Parole System Review (that court ordered parole should apply to a sentence imposed for a sexual offence) is discussed in Chapter 12 of this report. However, for the purpose of fully exploring Recommendation 3, the Council also analysed sentencing outcomes of sexual offences in a limited Recommendation 3 context: offenders sentenced to more than 3 years' imprisonment, where time has been spent on remand, and the appropriate remaining time in custody is less than 12 months — see Figure 11-3. A total of 62 extra offenders (additional to the 598 identified above) would have been affected and would have been eligible for court ordered parole at the court's discretion over the two-year period.

**Figure 11-3: Offenders who would have been eligible for court ordered parole if Recommendation 3 had been adopted, adding relevant sexual offence sentences 2015–16 to 2016–17**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Notes:

- 1) This analysis includes cases finalised between 2015–16 and 2016–17 that involve adult offenders.
- 2) Only cases where the most serious offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases).
- 3) Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
- 4) It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

### Stakeholder views

Some stakeholders cautioned that a broader, more general approach regarding how such a discretion is exercised should be considered. Overly structured, inflexible amendments could lead to unintended consequences when applied in practice and unnecessarily fetter the discretion of the individual judge.

The issue of balancing flexibility versus sentencing complexity was also raised, including how sentence calculation of such provisions would be effectively implemented.

Initial views expressed led the Council to explore alternative approaches from those ultimately recommended by the Parole System Review. These are discussed in the following sections.

## 11.5 Extending court ordered parole from a cap of 3-year sentences, to 5-year sentences

The Queensland Parole System Review acknowledged a suggestion that:

on sentences involving a head sentence of more than three years, but less than five, the court should have the discretion to order a parole release date or a parole eligibility date. This change would in effect extend court ordered parole as a matter of discretion to sentences of more than three years.<sup>1350</sup>

For consistency with existing provisions, this proposal might involve extending court ordered parole to head sentences of more than 3 years and up to 5 years or less, at the court's discretion.<sup>1351</sup>

<sup>1350</sup> Queensland Parole System Review (n 10) 94–5 [458].

<sup>1351</sup> Reflecting the wording of '3 years or less' in s 160B and '5 years or less' in s 144(1) of the *Penalties and Sentences Act 1992* (Qld).

If this were the only change made, it would effectively create a third, middle rung between what would be amended PSA sections 160B (0–3 years release only) and 160C (more than 5 years but eligibility only). However, this change might arguably create more complexity. There are multiple possible variations, below, which could increase court discretion while simplifying processes.

The deeming provision in section 184(2) of the CSA regarding eligibility after half of a sentence is served (which applies if the court does not exercise its discretion regarding an eligibility date under PSA sections 160C or 160D) would continue to operate with any necessary amendments.

### 11.5.1 Aligning parole eligibility dates and Board ordered parole?

The interrelationship with Board ordered parole was another issue considered, with options being:

1. Board ordered parole stays applicable, as is, to head sentences of over 3 years; or
2. the 3-year starting point for Board ordered parole is removed so that courts also have a simultaneous discretion to set an eligibility date for all sentences of actual imprisonment. This would in turn necessitate removing the requirement in section 160B(2) of the PSA that court ordered parole must be ordered in certain circumstances.

This co-existence of eligibility and release date powers would create a ‘dual discretion’. In order for a ‘dual discretion’ to exist, neither parole type would be mandatory. It would rely on a common-sense judicial approach in refusing to apply Board ordered parole to short sentences. Such sentences would be constructive sentences of full-time custody with no parole release, given the time required for an application to the Parole Board. Legislative guidance could be provided in this regard.

Setting a 5-year cap for all offence types could arguably avoid unintended effects of a 3-year cap – in particular, the likely continued use by courts of partially suspended sentences (ordered alone or in combination with a community-based order) to achieve the same outcome as court ordered parole (certainty about the release date of an offender from custody). This is discussed further below.

### 11.5.2 Section 209 CSA and automatic cancellation

If a court ordered parole order was cancelled by the Parole Board after its consideration of the relevant circumstances under section 205 of the CSA, court ordered parole would remain unavailable. However, if a court ordered parole order, on the current provisions, were to be cancelled automatically by a new sentence of imprisonment in accordance with section 209 of the CSA, courts could be given a discretion to decide if court ordered parole is still appropriate.

### 11.5.3 Including sexual offences in any changes?

Chapter 12 address Recommendation 5 of the Queensland Parole System Review, which is that court ordered parole should apply to a sentence imposed for a sexual offence. If Recommendation 5 were adopted, any variation above could be made to apply equally to sexual offences.

The PSA regime would be further simplified if a dual discretion for terms of imprisonment of up to 5 years were extended to include sexual offences. Sexual offences receiving a term of actual imprisonment currently cannot attract a parole release date at all; the sentencing court may fix the date the offender is eligible for parole, unless the offender has a current parole eligibility or release date, in which case the court must fix an eligibility date.<sup>1352</sup>

Some concerns were expressed in consultation regarding the use of suspended sentences for sexual offences for the purposes of punishment, proportionality and certainty, but to the exclusion of supervision. A recent example is *R v Wano; Ex parte Attorney-General (Qld)*:<sup>1353</sup>

A curious feature of the sentence proceeding is that no-one identified any basis at all as to why a partly suspended sentence was preferable to one which would involve at least some ongoing supervision on the respondent's release, as for example occurs when a prisoner is released on parole. The respondent was a long remanded teenager, without tangible rehabilitative progress or family support, whose continued burglary offending had disturbingly escalated to accompanying sex offending. The need for him to be under supervision when released back into the community was compelling.

<sup>1352</sup> *Penalties and Sentences Act 1992 (Qld)* s 160D.

<sup>1353</sup> [2018] QCA 117, 8 [44]–[45] (Henry J, Fraser JA and North J agreeing).

It follows that, further to the above identified specific error, the imposition of a sentence involving no element of supervision on his release was so inadequate to the circumstances of this case as to manifest error.

#### 11.5.4 Why the Queensland Parole System Review did not support expanding the court ordered parole cap, except in limited circumstances

The Queensland Parole System Review instead made Recommendation 3, discussed above. Relevantly to this issue, though, the report noted the court's function 'to determine the appropriate time an offender deserves to spend in custody for the offence committed', but identified 'some difficulties' with this proposal:<sup>1354</sup>

- The Parole Board should 'play a crucial role in determining whether an offender is an unacceptable risk to be released into the community'.<sup>1355</sup>
- '[T]he process a prisoner must undertake when applying for parole has tangible benefits for offenders in requiring them to undertake programs in custody, prepare and make plans for their release, obtain suitable accommodation and be assessed by a psychiatrist or a psychologist as required'.<sup>1356</sup>
- While 'a sentencing Court is best placed to assess the suitability of an offender for release on parole on a particular date if the date of parole is close to the date of sentence. Without being able to revisit the matter, the Court is not in the best position to determine whether an offender should be released on parole months or even years in advance'.<sup>1357</sup> This point in particular was also made by some stakeholders. It was pointed out, for instance, that housing is one of the highest risk factors for recidivism on release and an important factor in terms of community reintegration. Obviously, the further away a release date is, the less likely any meaningful analysis of this can occur.

#### 11.5.5 Potential benefits of such a change

A 5-year ceiling for the availability of court ordered parole would align with the suspended sentence regime in Part 8 of the PSA (ss 143–151A), which allows wholly and partially suspended sentences to be imposed for any offence punishable by imprisonment provided the head sentence does not exceed 5 years.<sup>1358</sup>

Such amendments arguably should not compromise community safety, as the Parole Board can set the same conditions on a court ordered parole order as for a Board ordered parole order (the greatest distinction between the two orders is that court ordered parole offers certainty for an offender about their release date, whereas Board ordered parole does not).

Even when combined with a community-based order, such as probation, this approach has limitations. While applications to amend or revoke a community-based order need to be made to a court, the Parole Board has the power to amend, suspend or revoke parole orders relatively quickly, meaning these orders may allow Queensland Corrective Services (QCS) to better respond to issues of escalating risk. This has been the subject of competing views among different stakeholders as to whether it is a positive or a negative.

The maximum duration of a probation order is also shorter than suspended sentences (3 years versus 5 years), meaning offenders may be left unsupervised for the final portion of effectively parallel community-based and suspended sentence orders.

Arguably, for higher risk offenders, allowing for the use of court ordered parole, therefore, is preferable to the possibility of courts ordering a wholly or partially suspended sentence in combination with a community-based order. Based on current experience with sexual offenders, there is a real possibility that courts may prefer a partially suspended sentence over a term of imprisonment if they only have the power to set a parole eligibility date rather than a release date. This may result in offenders being left unsupervised.

#### 11.5.6 Potential negatives of such a change

There would potentially be a significant workload impact for the Parole Board if the change were made and resulted in a shift from court ordered parole orders to parole eligibility dates and Board ordered parole orders. However, if the amendment discussed above regarding automatic cancellation and section 209 of the CSA were made, and

<sup>1354</sup> Queensland Parole System Review (n 10) 95 [459]. Recommendation 3 of the report was then made following these considerations.

<sup>1355</sup> Ibid 95 [460].

<sup>1356</sup> Ibid.

<sup>1357</sup> Ibid 95 [461].

<sup>1358</sup> *Penalties and Sentences Act 1992* (Qld) s 144.

courts responded by ordering release dates on subsequent sentences of 'breaching' offences instead of the current mandated eligibility date, this might ameliorate such effects.

As highlighted in the Parole System Review, using court ordered parole instead of Board ordered parole for offenders sentenced to actual custody for longer periods may result in reduced offender motivation to be proactive in rehabilitation efforts and planning for release, given the certainty of the release date.

Making court ordered parole more readily available might also see higher-risk offenders being placed on court ordered parole (noting that assessment of risk would ride on the quality of pre-sentence assessment, with corresponding resource and delay issues).

As noted in the Parole System Review, concerns were raised by multiple stakeholders about a court's ability to assess future risk. It was suggested that the need for supervision for the purposes of rehabilitation cannot (or perhaps should not) be made at sentence; the better approach being to set a parole eligibility date.

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

The proposed change may further be unlikely to reduce prisoner numbers, including because, following this change, courts may be more likely to order imprisonment with parole than make use of alternative forms of orders — in particular, partially suspended sentences (see further, Chapter 12 on how this applies to the sentencing of sexual offences). However, there may be a slight positive effect on prisoner numbers because fewer people who otherwise would have a parole eligibility date would be required to apply for parole to the Parole Board due to the broader availability of court ordered parole.

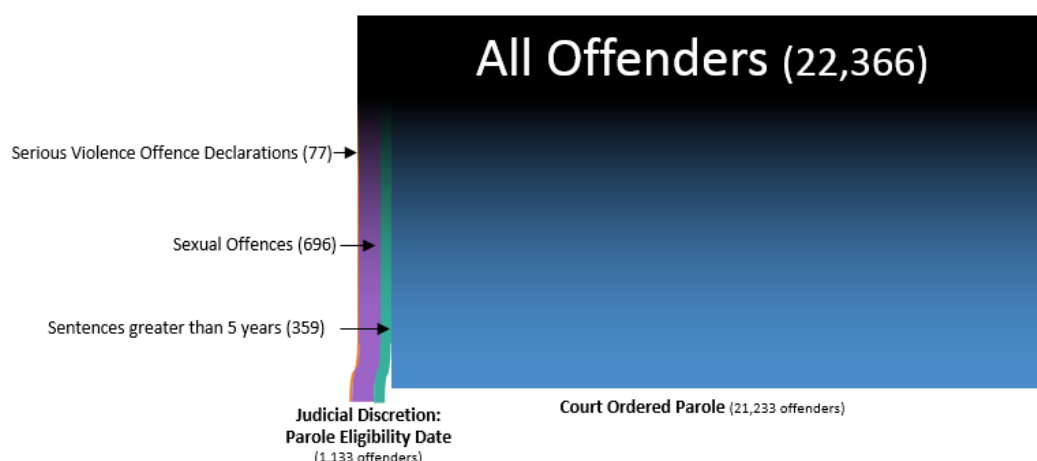
### 11.5.7 Data regarding extending court ordered parole from a cap of 3-year to 5-year sentences

The same approach to modelling the potential impact of the option based on Recommendation 3 of the Parole System Review (see Figure 11-2 above) was applied to extending court ordered parole from a cap of 3-year sentences, to 5-year sentences.

### 11.5.8 Extending court ordered parole to sentences less than 5 years

If court ordered parole were made available to offenders sentenced to a period of 5 years or less, an additional 771 offenders (3.4%) would have become eligible for court ordered parole in the past two years (2015–16 to 2016–17). In this scenario, 94.9 per cent of offenders sentenced to a period of imprisonment would have been eligible for court ordered parole, compared to 91.5 per cent currently — see Figure 11-4.

**Figure 11-4: Offenders who would have been eligible for court ordered parole if discretion was extended to head sentence of 5 years or less, still excluding sexual offences, 2015–16 to 2016–17**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

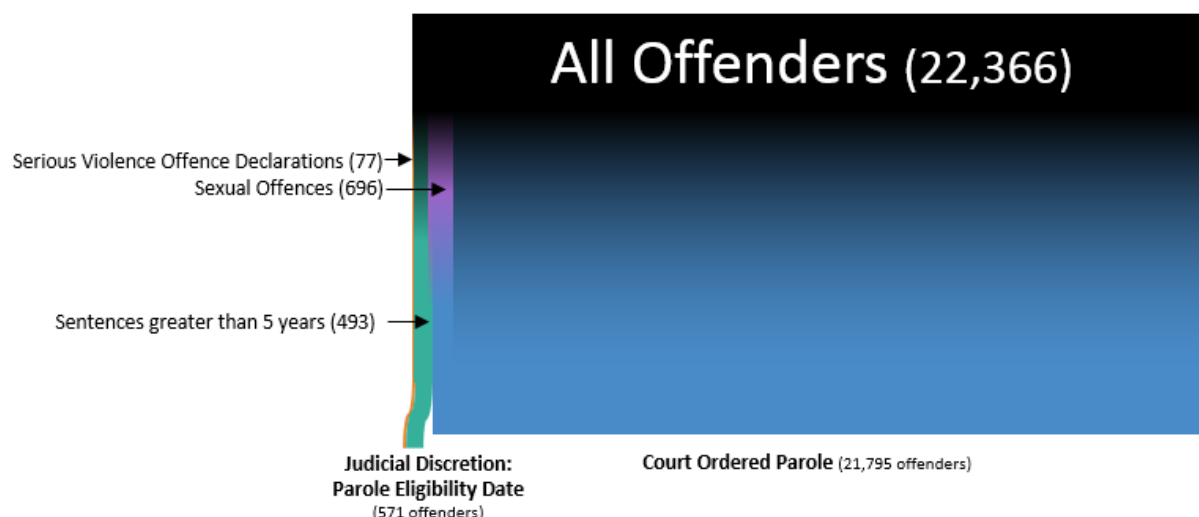
Notes:

- 1) This analysis includes cases finalised between 2015–16 and 2016–17 that involve adult offenders.
- 2) Only cases where the most serious offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases).
- 3) Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
- 4) It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

### 11.5.9 Extending court ordered parole to sentences less than 5 years and sexual offences

If court ordered parole were to be made available to offenders sentenced to a period of 5 years or less, and also to offenders who committed a sexual offence, an additional 1,333 offenders (5.9%) would have become eligible for court ordered parole compared to the current situation. In this scenario, 97.4 per cent of offenders sentenced to a period of imprisonment would have been eligible for court ordered parole, compared to 91.5 per cent currently – see Figure 11-5.

**Figure 11-5: Offenders who would have been eligible for court ordered parole if discretion was extended to head sentences of 5 years or less, including sexual offences, 2015–16 to 2016–17**



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

Notes:

- 1) This analysis includes cases finalised between 2015–16 and 2016–17 that involve adult offenders.
- 2) Only cases where the most serious offence (MSO) resulted in a term of immediate imprisonment were analysed (22,366 cases).
- 3) Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
- 4) It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.

## 11.6 Parole reform options

### 11.6.1 Consultation options

Drawing on the options identified by the Parole System Review, and the alternative to Recommendation 3 of extending the availability of court ordered parole to sentences of up to 5 years, the Council identified a practical total of four options (some with sub-options) for the purposes of consultation:

- **Option 1: Maintaining the status quo**

Retain court ordered parole in its current form, with no changes to eligibility criteria or the circumstances in which a parole release date can be set.

- **Option 2: Expanding parole use, in one of three ways**

(All three separate options under option 2 were expressed so as to apply to sexual offences as well. The different considerations that can apply to sexual offences are explored in Chapter 12.)

- **Option 2a:** Apply court ordered parole for sentences over 3 years, if the appropriate release date is no more than 12 months from the sentence date (Parole Review Report Recommendation 3). This would be swallowed up by either of options 2(b), 2(c) or 3.

- **Option 2b:** Apply court ordered parole for sentences over 3 years and up to 5 years, to create a dual discretion for a court to fix either a parole release or eligibility date for head sentences of between 3 and 5 years. Parole eligibility criteria and Board ordered parole would remain unchanged.
- **Option 2c:** Apply court ordered parole for all sentences up to 5 years (aligning with the suspended sentence regime) and removing the parole eligibility date bottom of 3 years and 1 day. This would create a dual discretion, giving courts the choice between court ordered parole and parole eligibility dates for all sentence from 1 day's<sup>1359</sup> to 5 years' imprisonment.

- **Option 3: Expand parole use with the widest discretion possible**

Option 3 would extend option 2(c) to sentences above 5 years as well. By removing the cap for court ordered parole altogether, it would give courts full discretion to set either a parole release or a parole eligibility date for any sentence of one day or more.<sup>1360</sup>

This discretion would extend to all offences, other than serious violent offences, offences for which a life sentence is imposed, or other offences or circumstances that are expressly excluded (such as through the operation of mandatory sentencing provisions). Option 3 can be expressed alternatively as: No limits — a dual discretion to choose between the two forms of parole release for any non-mandatory sentence from one day to life.

- **Option 4: Reform for sentences 3 years or less only (the Council's recommendation)**

This was not a formal Council option but was discussed at page 238 (last paragraph) of the Council's Options Paper and during a stakeholder roundtable meeting. It was expressed in the Options Paper as:

Providing courts with a discretion to order either: a parole release date or eligibility date, when sentencing for current offences to which the court ordered parole scheme applies, but without extending the availability of court ordered parole beyond this period or to other offences until such time as the effectiveness of the scheme has been further evaluated.

It can be expressed in another way, as two distinct propositions:

1. Whether a dual discretion should be introduced under section 160B of the PSA that would allow courts to set either a parole release or parole eligibility date for sentences of 3 years or less, but retaining other criteria, including offences to which court ordered parole does not apply;
2. Whether instead of, or in addition to the above, a dual discretion should be introduced that allows a court to set either a parole release date or parole eligibility date when sentencing a person for a sexual offence in circumstances where the sentence of imprisonment imposed is 3 years or less.

### 11.6.2 Submissions and consultation

The Parole Board did not support the reforms proposed in options 2 or 3:

It is the Board's view that any increase in the ability of a sentencing court to sentence an offender to court ordered parole: by increasing the current three year cap, or by removing the cap for the setting of a parole release date altogether, or by extending court ordered parole as a sentencing option for other offences or circumstances which are currently expressly excluded, will lead to an exponential increase in the number of parole orders being suspended, with the inevitable result of further overburdening an already overburdened prison system.<sup>1361</sup>

The Parole Board reiterated concerns with current data regarding success on parole (discussed below) and stated: 'it is difficult to justify an increased workload in the absence of evidence indicating that the extension of court ordered parole is likely to be successful'.<sup>1362</sup>

They did support the first limb of option 4 — a dual discretion for parole release or eligibility for sentences of 3 years or less, maintaining existing criteria.<sup>1363</sup>

<sup>1359</sup> References to sentences of 'one day' would instead read as '6 months and one day' if the Council's recommendation regarding removing parole from sentences of 6 months or less is adopted.

<sup>1360</sup> Ibid.

<sup>1361</sup> Submission 12 (Parole Board Queensland) 8–9 (emphasis in original).

<sup>1362</sup> Submission 12 — supplementary submission (Parole Board Queensland) 3.

<sup>1363</sup> Ibid 5.

They did not support the second limb of option 4 regarding an expansion to sexual offences (the Council's recommendation),<sup>1364</sup> expressing concern that while suspended sentences would remain a sentencing option, there was nonetheless the possibility 'that the entire class of persons may potentially be sentenced such that they fall within the jurisdiction of the Parole Board'.<sup>1365</sup> The Parole Board's view was that extending the dual discretion to sexual offences would likely expand the use of court ordered parole, and consequently, significantly increase the Parole Board's workload.<sup>1366</sup>

QCS responded to the several options. As to sexual offences, QCS noted that retaining court ordered parole in its current form would not resolve existing limitations on effectively managing sexual offenders on community-based orders, or its 'limited ability to take swift action in response to emerging risks'. Excluding 'sexual offences from the court ordered parole regime reduces the likelihood of post-release supervision', which 'decreases the risk of reoffending for sexual offenders'.<sup>1367</sup> In its submission, QCS noted:

QCS data suggests some sexual offenders sentenced to over three years imprisonment have a similar, and in some cases lower, risk profile to sexual offenders sentenced to a community based order. This suggests that the sentences and consequences of breaching those sentences are not always commensurate to risk.<sup>1368</sup>

QCS stated that 'approximately 45 per cent of sexual offenders currently do not have the opportunity to complete a sexual offending program prior to release to [Board ordered parole] or full-time discharge, and this number may decrease if [court ordered parole] dates are set for certain offenders'.<sup>1369</sup> It acknowledged that if court ordered parole were to be 'extended to sexual offences, the program delivery model would need to be changed':<sup>1370</sup>

Sexual offending programs are currently primarily available in correctional centres. If extending [court ordered parole] resulted in short custodial stays but longer parole periods, then a larger scale sexual offending program delivery model in the community would need to be established. In contrast, if extending [court ordered parole] resulted in longer custodial stays, then the custodial sexual offending program delivery model would also need to be expanded.<sup>1371</sup>

QCS addressed extending court ordered parole to head sentences of up to 5 years (options 2b and 2c). It cautioned that there may be net widening in terms of longer head sentences (with combinations of shorter periods of custody and longer periods on parole, and longer periods in custody with either shorter or longer periods on parole).<sup>1372</sup>

An extension to 5 years 'could increase the sentence length for short sentence prisoners',<sup>1373</sup> because there is no indication that court ordered parole reduces sentence length for those outside the threshold timeframe. This is based on the finding that 'there was no reduction in the number of people sentenced to more than 3 years and up to 5 years when [court ordered parole] was introduced'.<sup>1374</sup>

Previous modelling indicated that extensions of court ordered parole up to 5 years could decrease the proportion of time offenders spent in custody, which would mean more time spent in the community under supervision. Modelling did not examine 'potential impact on suspension rates for this cohort',<sup>1375</sup> and in a 2008 evaluation, stakeholders had raised concerns about increased suspensions and cancellations if QCS could not meet the more complex needs of these offenders in the community.<sup>1376</sup> Findings of the 2008 evaluation included these impacts:

- More offenders with a parole release date.
- Decreased prisoner numbers (and significantly more offenders eligible for QCS programs being supervised in the community).
- Reduced successful court ordered parole completion and compliance rates.

---

<sup>1364</sup> Ibid.

<sup>1365</sup> Ibid 2.

<sup>1366</sup> Ibid 3.

<sup>1367</sup> Submission 11 (Queensland Corrective Services) 12.

<sup>1368</sup> Ibid 13.

<sup>1369</sup> Ibid 18.

<sup>1370</sup> Ibid 13.

<sup>1371</sup> Ibid.

<sup>1372</sup> Ibid 14.

<sup>1373</sup> Ibid.

<sup>1374</sup> Ibid.

<sup>1375</sup> Ibid 16.

<sup>1376</sup> Ibid.

- Change in offender risk profile for those under supervision in the community (more offenders with a higher likelihood of recidivism and complex criminogenic needs on parole).
- Increase to the workload of corrective services officers, sentence management and reception officers within Custodial Operations and the Parole Board.
- Possible increase in the number of prisoners not willing to participate in employment and programs in custody.
- Fewer suspended sentences.<sup>1377</sup>

QCS ultimately proposed that ‘to promote community safety’, if court ordered parole is extended to 5 years, any dual discretion to order parole release or eligibility dates should be restricted to sexual offenders and sentences of between 3 and 5 years.<sup>1378</sup>

QCS addressed option 3. It had concerns with this option:

- ‘Significant’ net widening: prisoners who would otherwise have received an eligibility date might receive longer head sentences with longer non-parole periods beyond 5 years, further increasing Queensland’s incarceration rate.<sup>1379</sup>
- It contrasted the Parole Board’s critical role in determining offender risk regarding release with a court’s ability to assess risk more than 5 years in advance.
- The ‘tangible benefit’ for prisoners required to undertake programs in custody and plan and prepare for release [which an eligibility date encourages], and behavioural concerns regarding refusal to engage in custody [which a release date may risk].
- ‘The certainty of a release date that does not take into account rehabilitative efforts since sentencing may not meet victim or community expectations’.<sup>1380</sup>

QCS addressed option 4. It warned that a discretion to prescribe a parole release date for sentences of imprisonment of less than 3 years ‘would likely result in longer periods spent in custody and increase prisoner numbers due to the increased workload on QCS and the Board’.<sup>1381</sup> Average duration of stay in custody past parole eligibility dates for prisoners released in 2018 was 6.6 months. Median duration of stay was 3.9 months.<sup>1382</sup>

There would be a risk that courts would impose parole eligibility dates in the place of court ordered parole dates, and if the same dates were selected, this ‘will increase length of stay because some prisoners will not be released’, on their parole eligibility date or potentially, at all prior to full-time discharged, because it is a matter of the Parole Board’s discretion.<sup>1383</sup> Increasing the Parole Board’s workload could mean longer periods spent in custody waiting for the Parole Board’s decision.<sup>1384</sup>

Another disadvantage could be more prisoners refusing to participate in rehabilitation programs in custody, ‘as it can be challenging to motivate offenders when their release is not dependent on the Board’s decisions’.<sup>1385</sup>

QCS also examined sentences of 3 years or less. As shown in Figure 11-6 below, QCS data show that after the parole scheme’s introduction in 2006 ‘there was an initial significant drop in short sentence prisoners sentenced to less

---

<sup>1377</sup> Ibid.

<sup>1378</sup> Ibid 19.

<sup>1379</sup> Ibid 20.

<sup>1380</sup> Ibid.

<sup>1381</sup> Ibid 19.

<sup>1382</sup> Ibid.

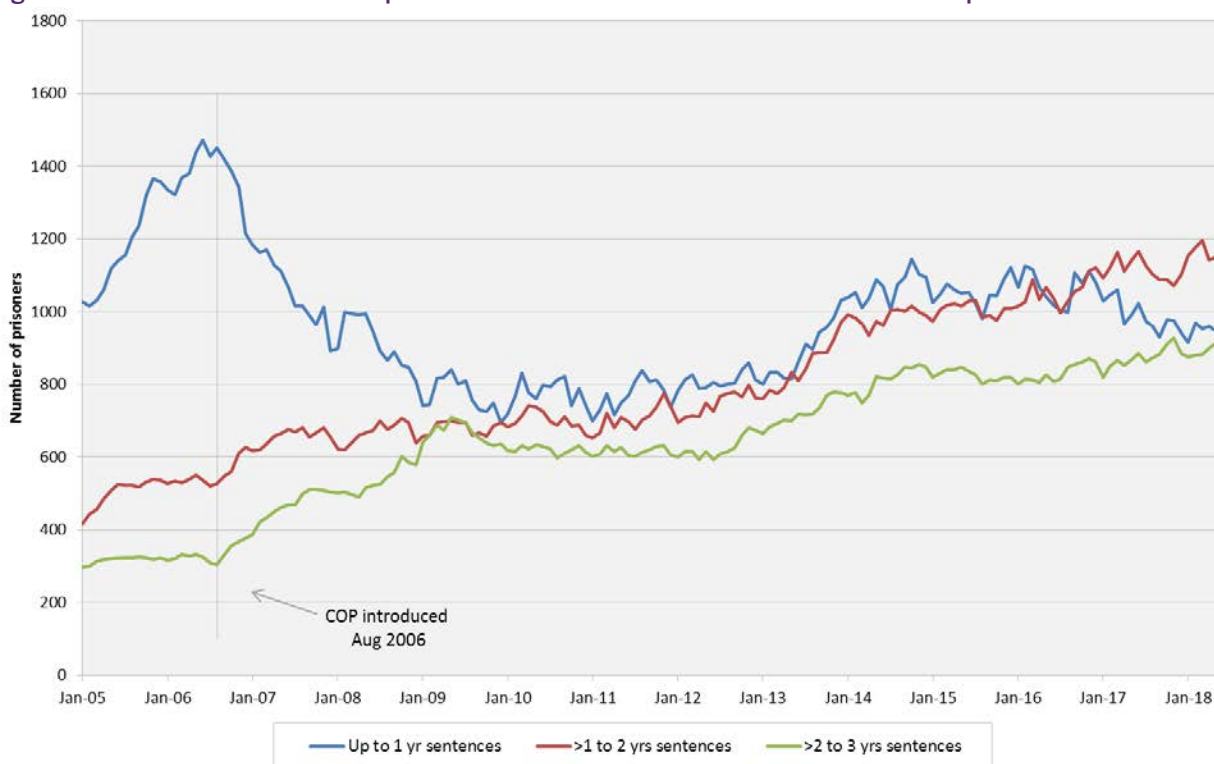
<sup>1383</sup> Ibid 18. Note, however, *Corrective Services Act 2006* (Qld) s 192, which states that, ‘when deciding whether to grant a parole order, a parole board is not bound by the recommendation of the sentencing court or the parole eligibility date fixed by the court ... *if* the board receives information about the prisoner that was not before the court at the time of sentencing; *and* after considering the information, considers that the prisoner is not suitable for parole at the time recommended or fixed by the court’ (emphasis added). See *Sweeney v Queensland Parole Board* [2011] QSC 223, 14–15 [20]–[23] (Fryberg J). At [23] His Honour wrote: ‘Section 192 clearly implies that a parole board is bound to make a parole order if there is no relevant information before it which was not before the sentencing judge’. See also *Williams v Queensland Community Corrections Board* [2001] 1 Qd R 557, 567 [25] and *R v Maxfield* [2002] 1 Qd R 417, 424–5 [27]–[28] (Davies JA and Fryberg J).

<sup>1384</sup> Submission 11 (Queensland Corrective Services) 18.

<sup>1385</sup> Ibid 19.

than 12 months' while numbers of prisoners in the 1–2 and 2–3 year brackets increased. Numbers of prisoners sentenced to 1–3 years have continued to increase since then.<sup>1386</sup>

**Figure 11-6: Short sentences of imprisonment since the introduction of court ordered parole**



Source: Submission 11 (Queensland Corrective Services) 15.

There was an increase in prisoners sentenced to less than 12 months since 2014 (although this dipped while 1–2 and 2–3 year sentences continued rising). QCS suggested the rise in sentences of under 12 months was likely due in part to declines in use of prison/probation orders, ICOs and partially suspended sentences for non-sexual offenders with sentences up to 3 years. This trend meant that the number of offenders with longer sentences (in prison and in the community) increased, while the length of prison stay for those offenders decreased.<sup>1387</sup>

Legal Aid Queensland (LAQ) did not support a particular option, but stated support for:

- 'judicial officers having flexibility and discretion when sentencing a defendant';<sup>1388</sup>
- 'the availability of court ordered parole and eligibility for sex offenders'; and<sup>1389</sup> 'the availability of a court ordering a parole release date for a sentence up to 5 years'.<sup>1390</sup>

LAQ noted that extending parole options to sex offenders may require 'greater information at sentence as to availability of courses and exploration of criminogenic needs', which could be covered in a pre-sentence report.<sup>1391</sup> They suggested that parole eligibility could be ordered 'if the information is not available or not able to satisfy a court that a convicted sex offender should be released on a given date'.<sup>1392</sup>

Sisters Inside supported extending court ordered parole 'for all sentences of between 3 to 5 years, and for sexual offences'.<sup>1393</sup> Further, in respect of the option 4 application of a dual discretion for sentences of imprisonment of 3

<sup>1386</sup> Ibid 14.

<sup>1387</sup> Ibid 15.

<sup>1388</sup> Submission 6 (Legal Aid Queensland) 4.

<sup>1389</sup> Ibid.

<sup>1390</sup> Ibid.

<sup>1391</sup> Ibid.

<sup>1392</sup> Ibid.

<sup>1393</sup> Submission 7 (Sisters Inside) 9.

years or less, they supported this for sexual offences on the basis that this ‘would balance greater flexibility and current community expectations in respect of these offences’<sup>1394</sup> but not otherwise for all offences generally:

We are concerned that introducing a discretion to set a parole eligibility date would result in more people in prison ... this would disproportionately affect women, who are more likely to be sentenced to short periods of imprisonment.<sup>1395</sup>

Save for sexual offences, they submitted ‘the current requirement to set a parole release date under section 160B(3) must be maintained’:<sup>1396</sup>

certainty is an important value in sentencing, particularly to assist with referrals for support and to plan for release from imprisonment. Any change to this position may result in more women spending actual time in prison ... there are more funded services to support women sentenced to immediate release on court ordered parole ...<sup>1397</sup>

They responded to concerns about the courts’ ability to assess future risk at sentence by suggesting the Parole Board could suspend court ordered parole prior to release based on QCS notification of risks.<sup>1398</sup>

Members of the Council’s Aboriginal and Torres Strait Islander Advisory Panel who attended a special meeting of the panel on the Council’s Options Paper supported the greater use and availability of court ordered parole, suggesting that there is a tendency for Aboriginal and Torres Strait Islander people to elect to serve their full sentence in prison rather than apply to the Parole Board for release on parole.<sup>1399</sup> Panel members identified reasons for this as being the desire of Aboriginal and Torres Strait Islander offenders to be free of obligations, their fear of breaching conditions and being returned to custody, and the limited assistance available to them to help them prepare their parole applications. Panel members supported a court being able to set a parole release date for a sentence of any length, thereby creating greater certainty for Aboriginal and Torres Strait Islander offenders about their release date.<sup>1400</sup>

The Bar Association of Queensland supported removing the current 3-year cap on court ordered parole. The Bar Association also supported introducing a dual discretion allowing a court to set either a parole release date or an eligibility date when sentencing sexual offenders to imprisonment of 3 years or less:

This position reflects the Association’s general commitment to judicial discretion in sentencing, but also acknowledges the public interest in ensuring that individuals who are convicted of serious sexual offences are subjected to the scrutiny of the parole system prior to their release from custody.

The combination of reforms suggested would enable sentencing judges to impose appropriate and proportionate sentences while still having the power to order release at a certain point depending on the circumstances of the individual. This is particularly important in cases where long periods of presentence custody have been served prior to sentence.<sup>1401</sup>

In an earlier submission, the Bar Association noted the breadth of the definition of ‘sexual offence’ and the ‘significant spectrum of seriousness with sexual offending’, which meant that greater flexibility is needed in sentencing options for sexual offences:<sup>1402</sup>

In some cases, the inability of judges to imprison with a parole release date causes judges to look at partially or wholly suspending terms of imprisonment for relatively minor offending where individuals would otherwise be required to serve longer in actual custody than is warranted by their offending (and taking into account other mitigating features). It is in the community’s best interest that sex offenders are supervised, rather than being released on suspended sentences if there is any risk of reoffending.<sup>1403</sup>

<sup>1394</sup> Submission 7 — supplementary submission (Sisters Inside) 1.

<sup>1395</sup> Ibid.

<sup>1396</sup> Ibid.

<sup>1397</sup> Submission 7 (Sisters Inside) 9.

<sup>1398</sup> Ibid.

<sup>1399</sup> ‘Talking points for Advisory Panel Members: Council meeting 18 June’, 2, summarising views of panel members who attended an extraordinary meeting of the Panel on 17 May 2019.

<sup>1400</sup> Ibid.

<sup>1401</sup> Submission 16 (Bar Association of Queensland) 2.

<sup>1402</sup> Preliminary submission (Bar Association of Queensland) 13 July 2018, 3. ‘Sexual offence’ is defined in schedule 1 of the *Corrective Services Act 2006* (Qld). As listed in Appendix 7 of this report.

<sup>1403</sup> Ibid 3.

In respect of parole for offences generally, Bar Association members were ‘aware of offenders who remained in custody well beyond their parole eligibility date and even served the entirety of their sentence without parole in circumstances where the reason for ignoring the Court’s recommendation was neither obvious nor compelling’.<sup>1404</sup>

The Queensland Law Society (QLS) supported option 4, being a ‘dual discretion introduced under s 160B of the PSA that would allow courts to set either a parole release or parole eligibility date for sentences of 3 years or less, but retaining other criteria’.<sup>1405</sup> The QLS also recommended, in the context of commenting on mandatory sentences:

legislative change to enable judges to order parole for child sexual offences. More generally, we recommend that sections 160B & C of the *Penalties & Sentences Act 1992* (Qld) be amended to enable the Supreme and District Courts to order a parole eligibility or release regardless of the period of the head sentence.<sup>1406</sup>

### 11.6.3 The Council’s view

The Council notes that arguments for making no change (**option 1**) include:

- The majority of parole orders currently made do not exceed 3 years anyway.
- The automatic nature of release may limit prisoner incentive to complete programs or comply during longer periods of custody.
- The risk of reoffending may create parole-prisoner churn through, and entanglement in, the system and increase the Parole Board’s workload.
- Concerns about the limitations on judicial ability to assess risk and factors relevant to release compared to the Parole Board’s ability to do so at a later time (for instance, regarding accommodation and behaviour in custody).
- Concerns about the effectiveness of parole.

However, keeping the court ordered parole system in its current form would not address the issues identified in this chapter or the Parole System Review. Other sentencing reforms would need to be relied upon to effect any positive change.

Allowing courts greater flexibility in setting either a parole release or eligibility date (**option 2 variants**) has potential advantages, including reducing legislative complexity while still allowing courts to set an eligibility date where identified risks posed by an offender warrant this.

Expanding the use of court ordered parole could reduce prisoner length of stay, as courts could fix a parole release date in a broader range of circumstances. There would remain a safeguard that the Parole Board can set additional conditions where required for court ordered parole orders and, if the risk of reoffending is unacceptably high, can amend, suspend or cancel the parole order prior to the offender’s release.

Option 2a may assist courts in creating just sentences that give certainty to offenders who are close to completing the period of actual custody required, although there would still be gaps in that head sentences of 4 to 5 years would not be affected.

Offenders subject to a parole release date, who would be subject instead to an eligibility date if no change was made, may find the greater certainty assists with pre-release planning. However, these offenders might also have less incentive to complete programs while in custody.

It may arguably be simplistic to limit the availability of court ordered parole on the basis of head sentence length and/or offence seriousness. These factors are not always a good proxy for levels of risk and do not take into account the potential impact of any future offending (for example, if a person is at risk of committing violent offences, versus low-level property offending).

As to risk, the court ordered parole safeguard would remain an option for those orders made for head sentences exceeding 3 years: the Parole Board can set additional conditions where required for court ordered parole orders and, if risk is high, it can amend, suspend or cancel the parole order prior to release.

There could be resource implications — the Parole Board’s workload would likely increase.

<sup>1404</sup> Ibid 2.

<sup>1405</sup> Submission 15 (Queensland Law Society) 30.

<sup>1406</sup> Ibid 3.

Courts may not have sufficient information at the time of sentence to decide whether to fix a release date, or even an eligibility date in some cases (in which case, the statutory 50 per cent rule regarding eligibility would usually operate). There would likely also be a greater need for pre-sentence assessment to inform court decisions. There is an argument that because of problems assessing future risk, release of offenders sentenced to longer prison sentences should be a matter for the Parole Board to determine, not a court.

**Option 3**, which would involve the widest judicial discretion, would give the greatest amount of discretion to a court but would also permit setting release dates much further into the future, exacerbating problems regarding assessing future risk and limiting prisoner-incentive levels.

**Option 4**, in the context of its first limb applying to non-sexual offences, would be a relatively minor change, yet increase the potential workload of the Parole Board and QCS. The Council does not propose any changes be made to the current arrangements that require the setting of a parole release date under section 160B(3) of the PSA.

However, the Council agrees with the Parole System Review's conclusion (Recommendation 5) that court ordered parole should apply to a sentence imposed for a sexual offence.

While the second limb of option 4 would represent a higher impact on the Parole Board and QCS's workload (potentially significantly so), the positive change achieved is much greater in terms of valuing community safety and judicial discretion.

Court ordered parole has never been available for sexual offences. The Council does not agree with the rationale used to explain this omission at the time of the scheme's introduction in 2006.<sup>1407</sup> Not all offenders convicted of sexual offences pose a serious risk to the community. In the Council's view, those that do should be candidates for as many forms of supervised order as possible. Extending court ordered parole to sex offences will enhance community safety, not detract from it.

The Council's recommendation (an adoption of the second part of option 4 — but without adoption of the first part) means that courts imposing imprisonment for sexual offences would have discretion to choose between court ordered parole, a parole eligibility date, and partially and wholly suspended sentences for sentences of between 1 day<sup>1408</sup> and 3 years (with intensive correction orders remaining an option for sentences of up to 12 months for the time being).

Issues, data and legal analysis regarding use of custodial orders for sexual offences are explored in detail in Chapter 12. The discussion of the options in this chapter, therefore, should be read in the context of Chapter 12.

As is discussed in section 12.5.3 of this report, a high proportion of sexual offenders are currently placed on unsupervised forms of orders served in the community — most probably in many cases as a result of these offences not being included within the court ordered parole scheme. Council data (2005–06 to 2017–18) show imprisonment was the most common penalty imposed for a sexual offence, although a significant proportion of the sentences imposed were suspended:

- imprisonment with parole: 27.4 per cent;
- partially suspended sentences: 27.2 per cent; and
- wholly suspended sentences: 19.2 per cent.

Probation was combined with suspended sentences in court events involving multiple offences with a sexual offence MSO, specifically:

- In 40.2 per cent of those where a wholly suspended sentence was imposed, and
- In 29.8 per cent of those where a partially suspended sentence was imposed.

<sup>1407</sup> 'Those prisoners who are sentenced to three years or less and who are sex offenders or serious violent offenders will not have their parole date set by a court. These types of prisoners pose a serious risk to the community and no matter how long or short their sentence is they will either have to serve their full term in jail or be deemed suitable by a parole board before being released. In short there will be two options available to prisoners: serve your entire sentence behind bars or be deemed suitable by a court or parole board to serve some of your sentence in the community under supervision on parole': Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Corrective Services Bill 2006', 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).

<sup>1408</sup> References to sentences of 'one day' would instead read as 'six months and one day' if the Council's recommendation regarding removing parole from sentences of six months or less is adopted.

Combining probation with imprisonment (whether in the form of suspended sentence and probation, or imprisonment plus probation) arguably does not manage risk well as QCS has to make an application to a court to have the probation revoked or varied, with limited grounds for variation.

The Council acknowledges the Parole Board's strong warnings about the impact that this recommendation will likely have on its already heavy workload. More resources will be required.

An anticipated consequence of this change is that sexual offenders who have been identified as representing a risk warranting supervision will be sentenced to imprisonment with a parole release or eligibility date instead of a suspended sentence. The difference is between an offender who is released without active supervision,<sup>1409</sup> at no cost, and an offender who is under supervision for the duration of the entire order.

Many stakeholders recognised the public interest in supervision for such offenders (if meaningful pre-sentence information is available), and the Council is confident that the community would understand and appreciate the benefits flowing from the cost required to achieve this result. While the Council does acknowledge that in some cases, the appropriate sentence will remain a suspended sentence or imprisonment with a parole eligibility date, it is concerned that the current sentencing structure does not provide the option of imposing a fixed parole release date.

### **Legislating factors guiding the choice between eligibility and parole release**

The Council further recommends legislating factors that the courts must consider when imposing imprisonment of 3 years or less, with parole, for a sexual offence. This would act as guidance in determining whether a parole eligibility or release date should be fixed. An example could be:

In deciding whether to set a parole release date rather than a parole eligibility date in relation to a sentence of imprisonment of 3 years or less for a sexual offence, the court must consider:

- (a) whether the offence was committed while the offender was on parole;
- (b) whether the offender has previously had a parole order cancelled and the reasons for cancellation;
- (c) the risk posed by the offender of reoffending and the need to protect any members of the community from that risk;
- (d) the record of compliance of the offender with parole orders and any community based orders;
- (e) the availability of programs relevant to sexual offending;
- (f) the likelihood that the person will be released at, or shortly after, the date they would otherwise be eligible for release if a parole eligibility date (rather than a parole release date) is set.

The guidelines identified are important considerations in the context of the likely effect of the proposed changes, as they apply to people being sentenced for a sexual offence and a court is determining whether a parole release date or a parole eligibility date should be set.

The Queensland Court of Appeal has been clear that the likelihood of parole being granted by the Parole Board is not a matter of permissible judicial consideration.<sup>1410</sup> However, the setting of a parole eligibility date for short sentences of imprisonment creates the prospect of courts imposing parole eligibility dates within days, weeks or a few months of the sentence date for sexual offences where in-custody programs may be expected to be completed. This could mean that such sentences are constructive full-time periods of custody because they are too short to allow the application process to the Parole Board to occur.<sup>1411</sup> The time required might vary depending on myriad

<sup>1409</sup> Supervisory mechanisms remain, such as the under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld).

<sup>1410</sup> *R v Lindley* [2019] QCA 20, 2 (Burns J, Fraser and Gotterson JJA agreeing), *R v Weeding* (2007) QCA 311, 2 [3]–[4], 3 [13] (Keane JA, Cullinane and Lyons JJ agreeing), *R v Bliss* [2015] QCA 53, 2 [2] (McMurdo P), 5 [19] (Jackson J, Holmes JA agreeing), *R v Waszkiewicz* [2012] QCA 22, 8 [35] (White JA, de Jersey CJ and Atkinson J agreeing) and *R v Lynch* [2011] QCA 309, 6 [27] (Margaret Wilson AJA, Muir and Chesterman JJA agreeing). But see also section 12.10.4.

<sup>1411</sup> See, for instance, *Moran v Queensland Police Service* [2019] QDC 105, 6 [22] Muir DCJ, citing *Kues-Sales v Commissioner of Police* [2016] QDC 53, 5 [14] (McGill SC, DCJ). In the latter case, McGill DCJ held that a magistrate made an error in the sentencing process by fixing a parole eligibility date 'after one third of the head sentence [nine months], from the date on which the appellant went into custody, which superficially may have met the requirements, but that assumes that the appellant might expect to receive parole on or not long after that date. Given that this is a relatively short sentence, it is relevant, and I think appropriate, to take into account the realities that it takes time for an application for parole to be processed, and I am satisfied that there was no realistic possibility of the appellant actually achieving parole on or shortly after [the eligibility date]. In the context of a sentence of this length, to attempt to reflect a plea of guilty by fixing an early parole eligibility date in my opinion was entirely unrealistic. Given that a parole release date cannot be fixed, the Magistrate ought to have reflected the plea of guilty in some other way'. And 5 [15]: 'The re-sentencing discretion was also constrained by the fact that the appellant has now spent almost two months in actual custody. Accordingly... I resentenced

factors including Board workload and resources and the ability of prisoners to make the application in the first place. This denies the prisoner and the public the benefit of parole and would make the sentence unjust.

This risk would also be minimised by legislative guidance, discussed above, and further, by removing parole from short sentences of 6 months or more. This is discussed below.

The proposed guidelines assume several things: that the Council's recommendation regarding option 4 and parole for sexual offences is adopted and that a court advisory service is established and funded (and can link in with the Parole Board's information and perform meaningful pre-sentence risk assessment) to advise courts regarding several of these factors regarding past performance on orders).

The Council intends this recommendation to apply also to sentences imposed for offences committed in breach of existing court ordered parole orders, where courts are exercising the dual discretion recommended to be added to section 160B of the PSA (Recommendation 52). This is discussed further below.

Extending the availability of court ordered parole to sexual offences may result in courts being more likely to order immediate imprisonment, rather than making use of alternative forms of custodial orders, such as partially suspended sentences. There is a risk this will increase workload and resourcing strain on the Parole Board in dealing with suspensions, amendments and cancellations of parole orders for these offenders. Resourcing implications will need to be considered prior to giving effect to the Council's recommendations.

#### **RECOMMENDATIONS: EXTENDING THE COURT ORDERED PAROLE SCHEME TO SEXUAL OFFENCES**

47. Part 9, Division 3 of the *Penalties and Sentences Act 1992* (Qld) should be amended to create a dual discretion allowing courts to select between fixing a parole release date or a parole eligibility date when imposing sentences of imprisonment of 3 years or less for sexual offences.
48. Part 9, Division 3 of the *Penalties and Sentences Act 1992* (Qld) should be amended to create legislative guidance for courts in determining whether, when sentencing a person to a term of imprisonment of 3 years or less for a sexual offence, it should set a parole release date or a parole eligibility date.

## **11.7 Assessing the effectiveness of parole in Queensland – an unresolved issue**

### **11.7.1 Challenges in assessing the effectiveness of parole**

The Council considers its recommendation regarding option 4 and sexual offences is a practical position that takes into account those issues that ultimately discouraged preferring an option that gives courts the greatest possible level of discretion in fixing parole release and eligibility.

A reported lack of consensus (based on research evidence) of the relative effectiveness of court ordered versus Board ordered parole, combined with stakeholder concerns regarding how successful completions of parole orders are counted, has presented challenges for the Council in considering which parole option should be preferred.

The Council's position is that a sentence that enables an offender to be supervised in the community, where it can meet the purposes of sentencing and it is safe to do so, is preferable to one that involves imprisonment. To the extent that court ordered parole is one of a number of available orders that encourage this to occur, its use is supported.

The Parole Board shared concerns raised in the Council's Options Paper regarding evidence of the efficacy of court ordered parole and stated that, for the Parole Board, this was 'in part because of the way in which Corrective Services record whether a prisoner has or has not successfully completed a parole order':<sup>1412</sup>

The Board has significant concerns regarding whether the current definitions being utilised by Corrective Services have led to a distortion of the facts which represent whether a prisoner has or has not successfully completed their parole order.<sup>1413</sup>

The Parole Board outlined eight applicable completion categories used by QCS and applied examples of scenarios to four of them.<sup>1414</sup> For example, a parolee would be considered to have successfully completed parole if their order

---

the appellant to two months' imprisonment with a parole eligibility date fixed at the end of that sentence; effectively he will serve two months and then be released'.

<sup>1412</sup> Submission 12 (Parole Board Queensland) 9; and see discussion at 9–13.

<sup>1413</sup> Ibid.

<sup>1414</sup> Submission 12 (Parole Board Queensland) 9–10.

was transferred interstate and they were convicted of offences during the order in that state, or a prisoner's parole was suspended and they were returned to custody because of charges for offences allegedly committed on parole, but they are not convicted and sentenced for the new charges until after the parole order expires.<sup>1415</sup>

The Parole Board described this issue as 'inaccuracy in recorded data concerning whether a prisoner has successfully completed their parole order'<sup>1416</sup> and stated:

The Board believes that any further consideration of court ordered parole must be evidence based.

Further, the evidence regarding the effectiveness or otherwise of court ordered parole must be made public and should be subject to extensive stakeholder engagement. This is because the Board believes the granting of a parole order to a prisoner represents a significant social compact between the executive or judiciary, the prisoner and the community.<sup>1417</sup>

They provided three examples from case files showing offenders released on parole, who were then charged with serious offences leading to suspensions and returns to custody, counted as having successfully completed their parole orders 'because the parole order expires prior to the prisoner being convicted and sentenced for the [new] offences'.<sup>1418</sup>

In a further submission, the Parole Board emphasised that the 'completed after reinstatement' category 'is not limited to those parolees who are remanded in custody for further offences'.<sup>1419</sup> Referring to QCS' *Probation and Parole — Operational Practice Guidelines* the Parole Board highlighted that matters where 'the Parole Board has suspended a parole order until the expiration date and the offender does not return to community-based supervision during the order period' such as orders suspended due to a breach of condition (e.g. failing to report, breaching curfew or using an illicit substance) are included in the category 'completed after reinstatement'.<sup>1420</sup> The Parole Board provided a sample of 25 case examples showing parole orders suspended by the Parole Board and not reinstated by it (meaning the parolee remained in custody until the expiration of the head sentence), which were administratively finalised by QCS as 'successfully completed after reinstatement'.<sup>1421</sup> These did not involve further charges being laid.

The Parole Board emphasised that only they have the power to suspend parole or lift a suspension and reinstate an order.

It is therefore an affront to the Board for a parole order which has been suspended by the Board to be listed as having been successfully completed due to the nuances of QCS accounting methodology.

To blithely record a prisoner successfully completing his/her court ordered parole under the heading, 'completed after reinstatement', when that prisoner has been returned to custody for breaching his/her order, and has remained in custody until the expiration of the order, is not only at odds with the plain English dictionary meaning of the completion category heading, it is misleading.

Accordingly, the way in which a prisoner's parole order is finalised administratively by probation and parole staff, who are bound by the Probation and Parole — Operational Practice Guidelines published by QCS, obfuscates any meaningful analysis of the current data to determine the viability of court ordered parole.<sup>1422</sup>

The Parole Board submitted the Council should recommend:

- 'an independent inquiry into the recorded data currently administratively recorded by Corrective Services on whether a prisoner has successfully completed a parole order';
- the adoption of a simplified definition regarding successful completion (for example, 'a prisoner has successfully completed their parole order if at the expiry of the parole order the prisoner is in the community and his/her parole order has not been suspended or cancelled'); and

<sup>1415</sup> Ibid 9–11.

<sup>1416</sup> Ibid 11.

<sup>1417</sup> Ibid 12.

<sup>1418</sup> Ibid 11–12.

<sup>1419</sup> Submission 12 — supplementary submission (Parole Board Queensland) 3.

<sup>1420</sup> Ibid 4.

<sup>1421</sup> Ibid 4 and Annexure 1.

<sup>1422</sup> Ibid 4.

- ‘after a suitable period of time the new data referred to above is subject to critical analysis which forms the basis of a further inquiry into the reform of court ordered parole’.<sup>1423</sup>

QCS noted that:

Completion rates are captured for all community based orders, including [court ordered parole and Board ordered parole], and reported in the Report on Government Services (RoGS), governed by a national counting rule.<sup>1424</sup> This counting rule is also applied for state based reporting to ensure consistency across reported data ...

In calculating completion rates, the national counting rule considers the number of orders with a completion date during the counting period.<sup>1425</sup>

QCS had received recent queries regarding one of the categories (‘Completed after Reinstatement’, which primarily covers suspensions of parole without breach or revocation as well as cases where a parolee is ‘charged with further offences and remanded in custody until the expiration of the order’, at which time the further charges are still outstanding).<sup>1426</sup> QCS advised that:

During 2017–18, approximately 9.7% of all parole orders and 2.6% of all orders were finalised with this category...

Under section 208A(1)(c) of the CSA, the Chief Executive may request the [Parole Board Queensland] to immediately suspend a parole order on the grounds they pose an unacceptable risk of committing an offence. This enables QCS to act on parolees presenting at risk, and who have not necessarily formally breached their order conditions.

Under section 205(2)(c), the [Parole Board Queensland] may also amend or suspend a parole order if the prisoner subject to the order is charged with committing an offence. Only upon conviction of this offence would it then constitute a breach of the parole order condition.

In Queensland, an offender’s order may be breached and they may be penalised by a court for unsatisfactory compliance by varying the order rather than cancellation.<sup>1427</sup>

[This can occur in the case of community-based orders, but not parole].

In other jurisdictions, a court determination that a breach of the order has occurred would generally result in the termination of the order.

QCS’ application of the completion category ‘Completed after Reinstatement’ as a successful completion is therefore compliant with the national counting rule as the parole orders in question are suspended and remain in this state until the expiration of the order. These orders are neither revoked nor breached.<sup>1428</sup>

QCS reviewed orders from this completion category, ‘to determine the scope and detail of a potential decision to modify the procedure regarding the use of this completion category for parolees remanded in custody until the expiration of the parole order’.<sup>1429</sup> Results indicated that:

The proportion of orders that are completed under these circumstances is minimal and a change to current practice would have no material effect on reported results.

Calculations based on the removal of orders completed under the category ‘Completed after Reinstatement’ where the offender has been remanded in custody during 2017-18 would result in a 0.4 per cent decrease in the supervision order successful completion rate.

In respect to the separate Parole order types, applying this same removal would result in the Court Ordered Parole order completion rate decreasing from 70.3% to 68.3% while the change would result in a 1.5 per cent decrease in the successful completion rate for Board Ordered Parole.<sup>1430</sup>

QCS also noted the lack of consensus on the effectiveness of court ordered parole as against Board ordered parole:

<sup>1423</sup> Submission 12 (Parole Board Queensland) 13; Submission 12 — supplementary submission (Parole Board Queensland) 5.

<sup>1424</sup> The Parole Board Queensland stated that ‘the Board, despite a request, has yet to be provided with a copy of the ‘National Counting Rules’ which are referred to in the Queensland Corrective Services submission at page 12’: Submission 12 — supplementary submission (Parole Board Queensland) 6, endnote xii.

<sup>1425</sup> Submission 11 (Queensland Corrective Services) 21.

<sup>1426</sup> Ibid.

<sup>1427</sup> Ibid.

<sup>1428</sup> Ibid 22.

<sup>1429</sup> Ibid.

<sup>1430</sup> Ibid.

In part, this could be caused by perceptions arising from the difference in the number of people subject to [court ordered parole] over [Board ordered parole].

As noted on page 197 of the Options Paper, there are significantly more offenders subject to [court ordered parole] orders compared to [Board ordered parole] orders (Table 1), with offenders subject to [court ordered parole] outnumbering offenders subject to [Board ordered parole] by 3.8 times. Consequently, as should be expected, there is a higher number (not rate) of [court ordered parole] breaches compared to [Board ordered parole].

On a rate basis, offenders subject to [court ordered parole] currently have higher successful completion rates than [Board ordered parole] offenders. Even if the completion rates for [court ordered parole] and [Board ordered parole] were equal, however, it could be expected that non-completion events would be 3.8 times higher for [court ordered parole] over [Board ordered parole] due to the significantly higher volume of offenders ordered to [court ordered parole].<sup>1431</sup>

### 11.7.2 Board suspensions of parole orders

Parole suspensions matter because they have significant impacts on prison populations, offender rehabilitation and at least anecdotally might be viewed as indicators of parole success, especially regarding short sentences.

If parole is suspended, a warrant is issued for the person's arrest so they can be returned to custody.

In an earlier submission,<sup>1432</sup> the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS) pointed to data outlined in the Parole System Review Report regarding parole suspensions (under the superseded Parole Board model): Of the offenders who complete a court ordered parole order (that is, did not have their parole order cancelled), approximately 50 per cent receive at least one parole suspension and many receive multiple suspensions.<sup>1433</sup>

The Queensland Parole System Review noted two main negative consequences of parole suspensions — the adverse impact on the offender's reintegration into the community, and the adverse impact on the prison system and cost to the state.<sup>1434</sup> With respect to the impact on the reintegration of the offender, the review noted:

A period of imprisonment on suspension can be expected to cause serious disruption to any progress that an offender makes in the community on parole, isolating the offender from family and friends, destroying employment and housing arrangements, and separating the offender from rehabilitation service providers. When the offender is released back into the community it is likely that he or she will be in a worse position than before the suspension and the risks of the offender lapsing back into further offending behaviour, (particularly because of unaddressed drug addictions and/or mental health issues) may be intensified.<sup>1435</sup> In addition, for prisoners on suspension, like prisoners on remand and prisoners sentenced to short prison sentences, there is almost no access to intervention programs in custody.<sup>1436</sup>

As to costs, the review identified there is a cost in financial terms as well as community safety, being 'the adverse effect on the prison system and the cost to the State. Suspensions of parole result in increases to prisoner numbers and significant churn through the prisons'.<sup>1437</sup>

These consequences are detrimental to the safety of the community and impose a significant financial burden on Queensland. Considering the high rate of court ordered parole suspensions, **the effectiveness of court ordered parole in reducing reoffending must be closely studied.**<sup>1438</sup>

The Parole Board provided the following statistics to the Council:<sup>1439</sup>

- In the financial year 2017–2018 the Parole Board confirmed<sup>1440</sup> the suspension of 3,491 parole orders.

<sup>1431</sup> Ibid 20–21.

<sup>1432</sup> Preliminary submission (Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd) 8 February 2019, 3.

<sup>1433</sup> Queensland Parole System Review (n 10) 83 [383] (citing unpublished QCS data).

<sup>1434</sup> Ibid 84 [387]–[390].

<sup>1435</sup> The Parole Board Queensland (which was created subsequent to, and as a result of, that review) in its submission to the Council, endorsed and adopted this quote to this full stop.

<sup>1436</sup> Queensland Parole System Review (n 10) 222 [1136]. See also 84 [387]–[389] where the same points are made.

<sup>1437</sup> Ibid 84 [390]. See also 222 [1137].

<sup>1438</sup> Ibid 84 [393]. Emphasis added.

<sup>1439</sup> Submission 12 (Parole Board Queensland) 5–6.

<sup>1440</sup> The legislated power under s 208C of the *Corrective Services Act 2006* (Qld) concerning confirmation by the Parole Board of a suspension made by a member is set out at 11.13.4.

- In the financial year 2018–2019 (up to and including 19 May 2019) the Parole Board had confirmed the suspension of 3,472 parole orders.

A breakdown of the 3,472 suspensions by order type for 2018–2019 thus far showed:<sup>1441</sup>

- 74.0 per cent (2,568) were court ordered parole orders.
- 25.7 per cent (894) were Board ordered parole orders.

The Parole Board may suspend an order only if it holds a reasonable suspicion of at least one of four grounds.<sup>1442</sup> The Parole Board provided a breakdown of 2018–2019 suspensions (for court and Board ordered parole combined) against these grounds:<sup>1443</sup>

- unacceptable risk of committing an offence: 47.8 per cent (1,672);
- failed to comply with the parole order: 29.0 per cent (1,016);
- multiple reasons: 22.9 per cent (803);
- Serious and immediate risk of harm to another: 0.3 per cent (9)
- Preparing to leave the State without consent: 0.0 per cent (0).

The Parole Board is guided by the *Ministerial Guidelines to Parole Board Queensland*, which have, inter alia, specific provisions relating to failing to comply and further offending.<sup>1444</sup>

If a prisoner on parole is charged with a further offence, the Parole Board should consider suspending the order and seeking a return to custody until a court determines the charge, with factors relevant to this discretion including seriousness of the alleged offence and circumstances surrounding its commission, whether the prisoner has been remanded in custody or released on bail, the prisoner's personal situation (including employment status) and response to supervision to date, and the length of time needed to determine the outcome of the charge.

If a prisoner on parole has failed to comply with a parole condition, or a chief executive request for suspension is made, the Parole Board in considering whether to amend, suspend or cancel the parole order should consider the chief executive's reasons, seriousness and circumstances of the failure to comply, the prisoner's home environment, personal situation (including employment status) and response to supervision to date, and, if the prisoner is close to their full-time discharge date, whether the risk to the community would be greater if the prisoner does not remain on parole.

The Parole Board confirmed that, historically, the failure of prisoners to successfully complete their parole orders was as noted in the Queensland Parole System Review:

Consistently and continually, people with whom I spoke identified three things as the most important factors in a prisoner's success on parole: a home, a job and freedom from substance misuse. Parolees the subject of court ordered parole commonly start parole homeless. For others, there can be no parole without proof that there will be suitable accommodation; but accommodation is difficult enough to secure for anyone convicted of a serious crime and it is even harder to secure from behind the walls of a prison.<sup>1445</sup>

The Parole Board stressed the impact of parole suspensions to the Council:

The significant number of parole order suspensions confirmed by the Board between 3 July 2017 and 19 May 2019, namely **6,963**, should not be overlooked by the Queensland Sentencing Advisory Council.

That total of **6,963** of prisoners being returned to custody subsequent to their parole orders being suspended equates to **81.9%** of the total built cell capacity of all correctional centres in Queensland.<sup>1446</sup>

<sup>1441</sup> Submission 12 (Parole Board Queensland) 5. The remaining 0.3% (10) were youth justice orders. Youth Justice issues were scoped out of the Council's review. The Parole Board Queensland did not hold breakdown data for Board-confirmed suspensions in 2017–2018.

<sup>1442</sup> *Corrective Services Act 2006* (Qld) s 208B(2).

<sup>1443</sup> Submission 12 (Parole Board Queensland) 6.

<sup>1444</sup> Mark Ryan, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland*, 3 July 2017, 7–8 [6.1] regarding further offending, and 8 [6.2]–[6.3] regarding failure to comply.

<sup>1445</sup> Submission 12 (Parole Board Queensland) 6 quoting Queensland Parole System Review (n 10) 16 [97].

<sup>1446</sup> Submission 12 (Parole Board Queensland) 7 (emphasis in original), citing Queensland Corrective Services Snapshot — as at 3 June 2019, '1. Prisoner Population and Profile, Centre Overview'.

### 11.7.3 The Council's view — the need for more research on parole effectiveness

It appears to the Council that this data issue (at least in terms of the 'Completed after Reinstatement' category) is likely caused in large part by the fact that, in the context of reoffending, 'the expiry of the period of the parole order may not coincide with the expiry of the parole order'.<sup>1447</sup> Any sentence of imprisonment for an offence committed during a parole period may not occur until several years after the expiration of that parole period. The imprisonment then triggers the expiry of the parole order.<sup>1448</sup> It is not until that point that the completion is, in retrospect, unsuccessful.

As a general statement, more serious offences committed on parole are likely to take longer to finalise in court (due to the timeframes required for higher court jurisdiction, complex investigations and briefs of investigations, etc.). This would present a challenge to reporting these outcomes on an annual basis. In some cases, such as historical sexual offence complaints, convictions may not occur for many years after the offence.

However, the examples provided by the Parole Board regarding 'successful completions' of orders where suspensions arose due to administrative action, show that the issue is wider than this.

The Council has also taken into account that the current Parole Board is a relatively new model, which commenced operation on 3 July 2017<sup>1449</sup> and inherited existing workloads. On 21 December 2017, QCS separated from DJAG and was established as a department in its own right.<sup>1450</sup> The Council's review was announced by the Attorney-General and Minister for Justice in late October 2017. The Council's capacity to assess the effectiveness and operation of court ordered parole needs to be considered in this context.

The Council has not had time to investigate the effectiveness of the court ordered parole scheme beyond a high-level review of available research and administrative data (which for the reasons discussed earlier in this chapter at section 11.2 is limited), but considers this is to be an important area of future investigation and research. Issues regarding data more widely in the Queensland context are discussed in Chapter 14.

The concern raised in the Queensland Parole System Review that 'the effectiveness of court ordered parole in reducing reoffending must be closely studied'<sup>1451</sup> is unresolved. For this reason the Council recommends a review be undertaken to explore these issues further. It further recommends that the extension of court ordered parole beyond its current 3-year cap not be considered until such time as this review has been completed.

## RECOMMENDATIONS: COURT ORDERED PAROLE

### Evaluation of effectiveness of parole

49. Further evaluation and research should be conducted by an appropriate body regarding the effectiveness of court ordered parole and Board ordered parole in Queensland, including assessment of statistics in relation to recidivism and completion rates. Such a review could also include the breadth of Queensland Corrective Services' power to make lawful instructions under section 200 of the *Corrective Services Act 2006* (Qld) and the effectiveness and compatibility of provisions relating to the powers of a court where there is further offending while an offender is on court ordered parole, such as sections 209, 211 and 215 of the *Corrective Services Act 2006* (Qld) and section 160B of the *Penalties and Sentences Act 1992* (Qld) (as amended, if Recommendation 52 [regarding section 209 of the *Corrective Services Act 2006* (Qld) and section 160B(2) of the *Penalties and Sentences Act 1992* (Qld)] is accepted).
50. Powers regarding parole release and parole eligibility dates as they relate to sentences of over 3 years, should not be changed until such time as the effectiveness of the scheme has been further evaluated.

<sup>1447</sup> *Soanes v Commissioner of Police* [2013] QDC 26, 14 [35] (Long SC DCJ) as cited in section 11.9.5 regarding further offending on court ordered parole and sections 209, 211, 215 of the *Corrective Services Act 2006* (Qld) and section 160B of the *Penalties and Sentences Act 1992* (Qld).

<sup>1448</sup> *Corrective Services Act 2006* (Qld) ss 209, 215.

<sup>1449</sup> See Submission 12 (Parole Board Queensland) 2.

<sup>1450</sup> *Administrative Arrangements Order* (No. 4) 2017 (Qld).

<sup>1451</sup> Queensland Parole System Review (n 10) 84 [393].

## 11.8 Parole for short sentences of imprisonment

### 11.8.1 What is a short sentence?

‘Short sentences’ featured in the historical context part of this chapter in section 11.1. The Council discusses ‘short sentences’ in this section in the context of head sentences of 6 months’ imprisonment or less, but it acknowledges that the content may also be of relevance to sentences of imprisonment of up to 3 years.

There is no uniform definition of a short sentence by reference to duration.

The Parole System Review acknowledged that the CSA amendments meant that ‘prisoners on short sentences received automatic parole’ (head sentences of 3 years or less).<sup>1452</sup> On several occasions it referred to short sentences in the context of head sentences of 12 months or less.<sup>1453</sup>

The Australian Law Reform Commission (ALRC) during its inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples referred to short sentences initially as a period of 6 months or less, and ultimately as 2 years or less.<sup>1454</sup>

A QCS research paper considered short sentences to be sentences of 3 years or less (which aligns with the court ordered parole regime) and described sentences of 12 months or less as being ‘shorter sentences’.<sup>1455</sup>

### 11.8.2 Short sentences and parole

In the QUT literature review (see section 3.3), research suggests that periods of imprisonment under 12 months are the least effective at reducing recidivism, with offenders sentenced to imprisonment for less than 6 months having the highest reoffending rates. In comparison, the academic literature shows that probation is more effective than short terms of imprisonment (12 months or less) at reducing recidivism.<sup>1456</sup>

The Parole System Review noted the need for a review of ‘sentencing options available to the court in cases calling for short sentences, where supervision of an offender is desirable and where no time is to be served’ (leading, at least in part, to the Council’s review).<sup>1457</sup> It outlined the intention of the court ordered parole system in applying to short sentences as being:

to divert low-risk offenders from custody whilst ensuring post release supervision. As well as providing truth in sentencing and the benefit of supervision, court ordered parole also aimed to address the over-representation of short sentenced, low-risk prisoners. These prisoners were responsible for a high degree of turnover in the prison population. Court ordered parole was to be used to divert these offenders from custody, while providing post release support and supervision.<sup>1458</sup>

Despite this, the Parole System Review noted that allowing parole on short sentences ‘provides limited benefit to the prisoner or to the community and is an ineffective aspect of the parole system’.<sup>1459</sup> It further suggested there was:

a huge latent issue the existence of which has not been appreciated by courts, by the legislature or by the legal profession. It has ramifications for proper sentencing, for prisons, for the parole system and for the use of precious public moneys.<sup>1460</sup>

Ultimately, the Parole System Review concluded that ‘to recommend the removal of this option without proper consideration of the flow-on effects to prison population and court workloads would be imprudent’.<sup>1461</sup>

<sup>1452</sup> Ibid 56 [256].

<sup>1453</sup> Ibid 78 [363], 79 [368], 90 [430], 91 [441], 149 [742].

<sup>1454</sup> Australian Law Reform Commission (n 21). The consultation materials indicate a period of 6 months or less — *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (DP 84, 2017) stated, at 81, n 32: ‘For the purposes of this Discussion Paper, the phrase ‘short terms of imprisonment’ should be read to mean terms of 6 months or less, unless otherwise specified’. However, the final report stated: ‘The recommendations in this Report are primarily focused on reducing the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples who are cycling through the criminal justice system serving short sentences of two years and under. This group of offenders represent some 45% of all Aboriginal and Torres Strait Islander people entering into prisons’: 40 [1.12].

<sup>1455</sup> Queensland Corrective Services, (n 1302) 15.

<sup>1456</sup> See Chapter 3 and Appendix 3.

<sup>1457</sup> Queensland Parole System Review (n 10) 94 [456].

<sup>1458</sup> Ibid 57 [263].

<sup>1459</sup> Ibid 92 [446].

<sup>1460</sup> Ibid 94 [455].

<sup>1461</sup> Ibid 92 [446].

The criticisms of using parole for short sentences were discussed:

In sentencing offenders to a period of parole with the parole release day at the first day of the sentence, the Court did not intend to impose a sentence where these offenders would serve actual periods of time in custody. However, as demonstrated above, in reality many of these offenders are serving long periods of time in custody because of suspensions that ensue. The decision to suspend parolees and take them into custody is being exercised administratively and appears to be inconsistent with the intention of the sentencing judge.

It is difficult to reconcile allowing an offender to be sentenced to a period of imprisonment to be served entirely on parole with the purpose and intended operation of parole. The purpose of parole is to allow a prisoner to serve part of her or his period of imprisonment in the community so as to reintegrate the prisoner following a period of imprisonment through supervision and rehabilitation [this is expressly recognised in the Council's Terms of Reference]. Without serving any actual period in custody, the offender does not require such reintegration.

I am of the view that sentences involving court ordered parole where no actual time is served are a use of parole that was not envisaged at the time of implementing a parole regime in Australia and philosophically, is not the proper use of a parole order. However, with court workloads alarmingly high and the prison population drastically overcapacity, a dramatic change to sentencing options could successfully alleviate pressure on the system or be the straw that breaks the camel's back.<sup>1462</sup>

Risks identified by the Parole System Review with abolishing court ordered parole included:

- 'If court ordered parole were abolished, and if the Parole Board were unable to efficiently manage applications for parole by offenders on short sentences, the prison population would rapidly expand.'<sup>1463</sup>
- 'Currently, the majority of prisoners are serving short terms of imprisonment. Management of the current prison population relies very heavily on court ordered parole.'<sup>1464</sup>
- 'It is unlikely that the court would respond to a removal of court ordered parole for short sentences by ordering that the whole length be served in custody. However, without adequate alternatives, the court may be placed in a situation where it is constrained by precedent and is unable to fashion an appropriate order without ordering the offender be sentenced to a significant custodial sentence when they otherwise would have served the majority of their sentence on parole.'<sup>1465</sup>

### 11.8.3 Overview of position in other Australian jurisdictions

Queensland is alone in allowing parole to be ordered for short periods of imprisonment.

NSW expressly precludes parole from prison terms of 6 months or less.<sup>1466</sup> Tasmania and WA do not allow release on parole until after a period of imprisonment of 6 months has been served<sup>1467</sup> and Victoria restricts parole to sentences of 2 years or more.<sup>1468</sup> Other jurisdictions (ACT, NT and SA) restrict the availability of parole to sentences of imprisonment of 12 months or more.<sup>1469</sup>

For Commonwealth sentences of 6 months or less, a court may release the person on a recognizance release order.<sup>1470</sup> If a person is sentenced to imprisonment but not released on a recognizance release order, there is no power to fix a non-parole period and the person is required to serve the full sentence. Parole is not available for sentences of under 3 years.<sup>1471</sup>

WA has completely abolished short prison sentences.<sup>1472</sup> In 1995, prison sentences of 3 months or less were abolished on the basis they provided little utility since they do not deter, provide community protection, or address

<sup>1462</sup> Ibid 94 [453]–[455].

<sup>1463</sup> Ibid 86 [402].

<sup>1464</sup> Ibid.

<sup>1465</sup> Ibid 92 [445].

<sup>1466</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

<sup>1467</sup> *Corrections Act 1997* (Tas) s 70 (unless there are exceptional circumstances); *Sentencing Act 1995* (WA) s 89(2).

<sup>1468</sup> *Sentencing Act 1991* (Vic) s 11.

<sup>1469</sup> *Crimes (Sentencing) Act 2005* (ACT) s 65; *Sentencing Act 1995* (NT) s 53(1A); *Sentencing Act 2017* (SA) s 47(5)(a).

<sup>1470</sup> *Crimes Act 1914* (Cth) s 19AC(3).

<sup>1471</sup> Ibid s 19AB. A non-parole period can only be fixed for a sentence of 3 years or more under s 19AB(1) of the *Crimes Act 1914* (Cth). The exception is where the offence is a 'minimum non-parole period offence' under s 19AG of the *Crimes Act 1914* (Cth). Offences include terrorism, treason, urging violence, and advocating terrorism or genocide, and espionage.

<sup>1472</sup> *Sentencing Act 1995* (WA) s 86.

offending behaviour. In 2003, the threshold for imposing a sentence of immediate imprisonment was increased to 6 months.<sup>1473</sup> The abolition of short prison sentences extends to a 6-month minimum for suspended sentences.<sup>1474</sup>

In effect, the reforms mean that parole is not available for short prison sentences (as a court cannot impose a sentence of less than 6 months).

The Department of the Attorney-General in WA conducted a statutory review of the *Sentencing Act 1995* (WA) in 2013 and referred to an internal evaluation which revealed that offences that had previously attracted sentences of less than 6 months were now receiving longer sentences, suggesting ‘sentence creep’ was occurring.<sup>1475</sup> The review reflected on comments by magistrates that mandating a minimum custodial sentence reduced flexibility in their sentencing deliberations. Stakeholders also cited a ‘sentencing creep’ effect and unanimously advocated the abolition of the prohibition on sentences of 6 months or less.<sup>1476</sup> The review recommended that ‘minimum imprisonment sentences be returned to 3 months’ as initially legislated.<sup>1477</sup>

However, some sentencing commentators have identified problems with the conclusion reached on the basis that the review did not consider any changes over this period in the profile of offenders coming before the courts, and the data published by the Western Australian Crime Research Centre did not show any evidence that magistrates began imposing longer sentences after these changes were introduced.<sup>1478</sup> In 2016, amendments were introduced to reduce the minimum period for which a sentence of imprisonment can be imposed from 6 to 3 months.<sup>1479</sup> The relevant provision giving effect to this is yet to be proclaimed.

Victoria abolished suspended sentences in 2014.<sup>1480</sup> However, this change was made in the context of introducing a new form of intermediate sentencing order (the CCO), which provided the courts with an alternative sentencing option. The Victorian sentencing legislation expressly provides that a CCO ‘may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole or part that sentence of imprisonment’.<sup>1481</sup>

#### 11.8.4 The ALRC’s findings

The ALRC report *Pathways to Justice*, focused on the issues associated with short sentences rather than short sentences with parole.

It noted that ‘short sentences of imprisonment are highly problematic. However, in the absence of implementing the preceding recommendations [regarding availability of appropriate community-based sentencing options], the abolition of short sentences is likely to be detrimental’.<sup>1482</sup> It therefore recommended that short sentences not be abolished, ‘in the absence of the availability of appropriate community based sentencing options’.<sup>1483</sup> For the same reasons, it recommended retaining suspended sentences.<sup>1484</sup> It made other recommendations which also recognised the continued availability of short sentences under its reform proposals:

Recommendation 9-1: State and territory corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations that address offending behaviours and/or prepare people for release. These programs should be made available to, inter alia, prisoners serving short sentences.

Recommendation 9-2: To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should:

- introduce statutory regimes of automatic court-ordered parole for sentences of under three years, supported by the provision of prison programs for prisoners serving short sentences; and

<sup>1473</sup> *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 33(3).

<sup>1474</sup> *Sentencing Act 1995* (WA) s 86.

<sup>1475</sup> Western Australia, Department of the Attorney-General (n 1190) 57, citing Department of Corrective Services, Unpublished, *Report on the Effects of Rates of Imprisonment following Sentencing Legislation Reforms of 2003* (June 2007).

<sup>1476</sup> *Ibid* 57.

<sup>1477</sup> *Ibid* 58, Conclusion 45.

<sup>1478</sup> Don Weatherburn, ‘Rack ’em, Pack ’em and Stack ’em: Decarceration in an Age of Zero Tolerance’ (2016) 28(2) *Current Issues in Criminal Justice* 137, 147.

<sup>1479</sup> *Sentencing Legislation Amendment Act 2016* (WA) s 73. This amendment is yet to commence by proclamation.

<sup>1480</sup> *The Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

<sup>1481</sup> *Sentencing Act 1991* (Vic) s 36(2).

<sup>1482</sup> Australian Law Reform Commission (n 21) 268 [7.151].

<sup>1483</sup> *Ibid* 268, Recommendation 7–5.

<sup>1484</sup> *Ibid* 264, Recommendation 7–4.

- abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.

### 11.8.5 Issues

The concerns raised by the Queensland Parole System Review, the ALRC and others reflect the complexity of the considerations also relevant to this review in that a holistic analysis of all community-based sentences is required in determining potential solutions. Any amendments to community-based orders may need to be implemented and evaluated first before further consideration can be given to whether immediate release (or any release) on parole for short sentences serves any useful purpose. The Government's position that court ordered parole should be retained is also clear.

The problems with short terms of imprisonment were also mentioned by stakeholders in consultation undertaken as part of this review. Comments included:

- They are highly damaging, particularly to women. They often disrupt housing, childcare and healthcare arrangements.
- They can be problematic when combined with community-based supervision, risking a disproportionately punitive effect.
- To the extent they are needed, they should be focused on rehabilitation and imposing realistic conditions on offenders.
- Offenders serving short periods of imprisonment or time on remand prior to sentence are not able to address offending behaviour prior to their release from custody. They are either ineligible or not referred for most rehabilitation programs inside prison.
- Overwhelmingly, drivers of prison overcrowding (lack of housing, or of appropriate housing, mental illness, and violations of court orders) relate to people subject to short head sentences of up to 2.5 years.
- A minimum of 12 months is usually required to engage prisoners in intensive interventions in custody.

In an early submission to the review, ATSILS highlighted the negative impacts of short prison sentences, as well as parole suspensions:

Worse than the immediate effects of overcrowding and the churn of prisoners in the prison system, are the counterproductive effects caused by those short prison sentences <sup>1485</sup>

...

Not only do the short sentences fail to deliver positive benefits in the form of rehabilitation, they make it increasingly likely that an offender will return to prison.

Of those sentenced to imprisonment, **almost half the prisoners in the prison system are imprisoned for non-violent offences**. Unless there is a physical threat to the community, imprisonment is unlikely to achieve the objectives of sentencing. Instead, non-custodial sentences, including community service orders, are likely to be more appropriate, and far less costly to the taxpayer.<sup>1486</sup>

...

The time served in custody by offenders on parole suspensions has a significant effect, often destroying the advances that were made on parole.<sup>1487</sup>

### 11.8.6 Trends in use of short sentences in Queensland

The Council collated data for the period 2005–06 to 2017–18 (the data period) to analyse the trends in the use of short sentences by Queensland courts. A 'short sentence' for these purposes was defined as a term of imprisonment of 6 months or less that was not wholly or partially suspended. The data also considered sentencing trends by gender and Aboriginal and Torres Strait Islander status.

In summary, the data show:

- The imposition of short sentences has increased over the data period.

<sup>1485</sup> Preliminary submission (Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd) 8 February 2019, 2 (emphasis in original).

<sup>1486</sup> Ibid 3.

<sup>1487</sup> Ibid 4.

- Non-Indigenous male offenders are the most common demographic to receive a short sentence (59.4%).
- Short sentences imposed on non-Indigenous female offenders over the data period have increased the most compared to other demographic groups (241%).
- The most common offence type to receive a short sentence of imprisonment is a breach of violence order (12.9%), followed by breach of bail – failure to appear (10.5%).<sup>1488</sup>

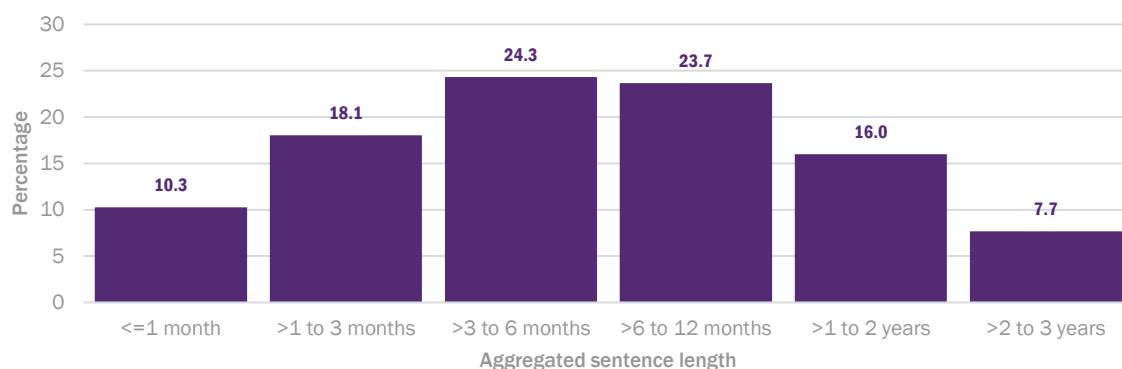
These data are useful when considering the type of offences and profile of offenders currently receiving a short sentence of imprisonment with court ordered parole (and potentially receiving a limited benefit from the short duration of supervision). The data could assist when considering alternative sentencing options to short sentences (see below).

Over the data period, 95.6 per cent (n=50,990) of sentenced events where a short sentence of imprisonment was imposed for the MSO sentenced were imposed by the Magistrates Courts. Only 3.9 per cent (n=2,078) were imposed by the District Court and 0.5 per cent (n=253) by the Supreme Court. This reflects both the volume of matters dealt with and the different criminal jurisdiction of these courts, with more serious matters, which are likely to attract longer prison sentences, dealt with by the higher courts.

The data in Figure 11-7 through to Figure 11-13 below in this section relate to Queensland Magistrates Courts and higher courts combined.

Figure 11-7 shows sentenced events during the data period where the offender received a term of imprisonment (not wholly or partially suspended) of 3 years or less (MSO). Of the sentenced events (N=101,296), over half (52.6%; n=53,282) were sentences of 6 months or less.

**Figure 11-7: Aggregated sentence length of imprisonment sentences 3 years or less (MSO), 2005–06 to 2017–18**



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

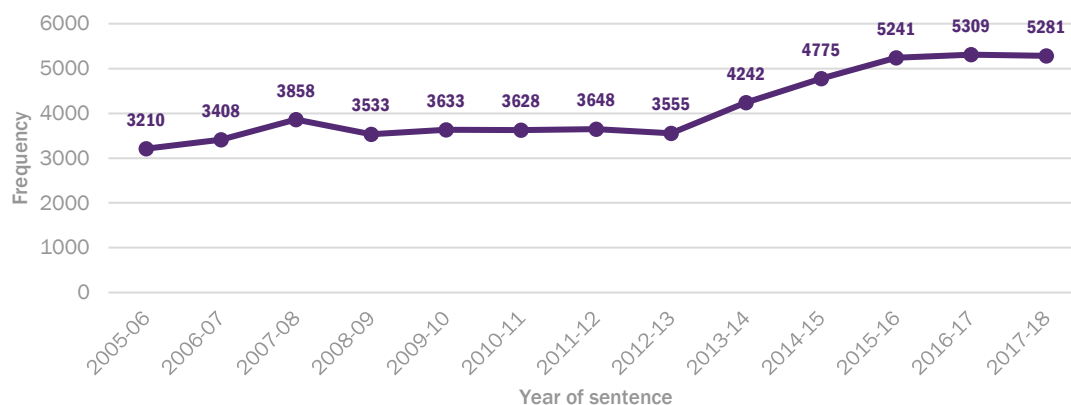
When considering all terms of imprisonment imposed (which were not wholly or partially suspended) of any length over the data period, the majority of prison sentences imposed (MSO) were short sentences of imprisonment:

- 49.4 per cent were sentences of 6 months or less;
- 22.2 per cent were sentences of over 6 months, but not more than 12 months;
- 25.0 per cent were sentences greater than 12 months, but not more than 5 years; and
- 3.4 per cent were sentences more than 5 years.

The number of short sentences has increased over the data period by 64.5 per cent, as shown in Figure 11-8.

<sup>1488</sup> Further on this point, see section 14.5 regarding the high volume of imprisonment in Magistrates Courts for breaches of domestic violence orders and bail orders.

**Figure 11-8: Number of imprisonment sentences 6 months or less (MSO) by year of sentence, 2005–06 to 2017–18**



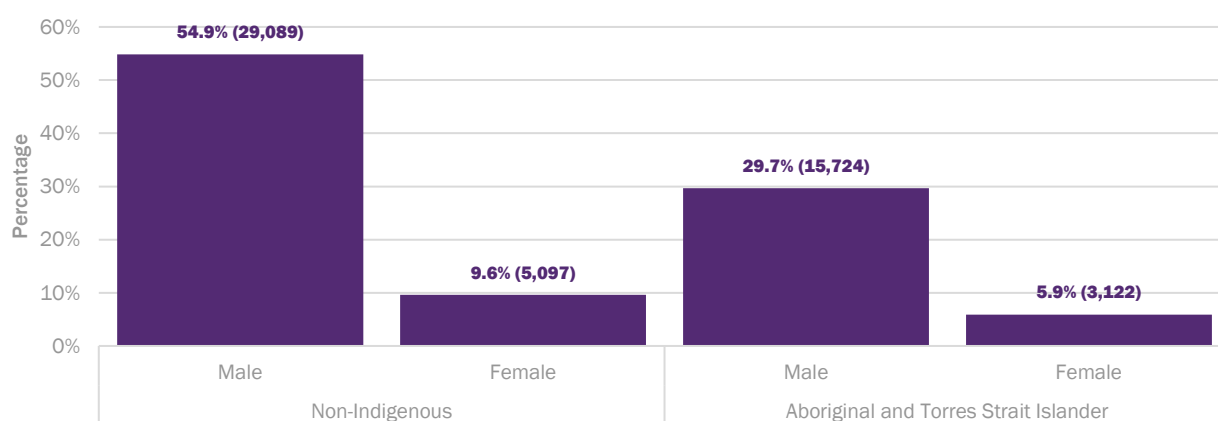
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

Figure 11-9 shows a breakdown by Aboriginal and Torres Strait Islander and gender status of those people sentenced to short sentences (MSO) over the data period. Taking into account the profile of offenders sentenced over this same period receiving any form of penalty (that is, not just a short term of imprisonment)<sup>1489</sup> this shows:

- non-Indigenous men represented 65.9 per cent of all people sentenced, and 54.9 per cent of those receiving short prison sentences;
- non-Indigenous women were 17.6 per cent of all people sentenced, and 9.6 per cent of those receiving short prison sentences;
- Aboriginal and Torres Strait Islander men were 11.4 per cent of all people sentenced, but 29.7 per cent of those receiving short prison sentences; and
- Aboriginal and Torres Strait Islander women were 5.1 per cent of all people sentenced, representing 5.9 per cent of those receiving short prison sentences.

This analysis shows Aboriginal and Torres Strait Islander men are significantly overrepresented among those receiving a short prison sentence. This does not, however, take into account factors such as offence type, the seriousness of the offence for which the person is being sentenced, or criminal history. It also does not take into account changing trends in the use of short sentences over time, which is discussed below.

**Figure 11-9: Gender and Aboriginal and Torres Strait Islander status of offenders sentenced to imprisonment 6 months or less, 2005–06 to 2017–18**



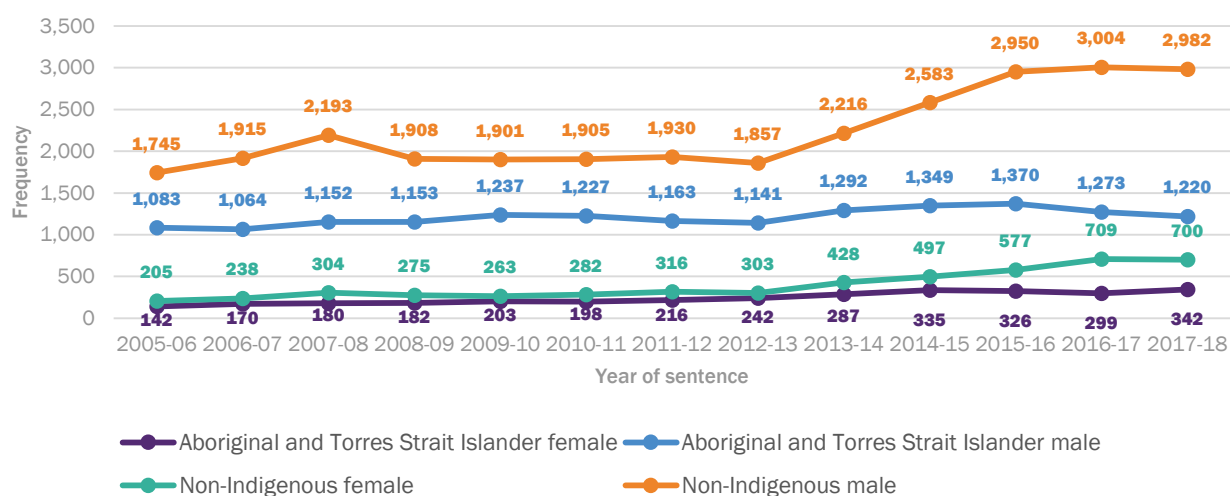
Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018.

Figure 11-10 highlights trends in short sentence events according to gender and Aboriginal and Torres Strait Islander status (MSO). Male offenders remain the group receiving the highest number of short sentences. Overall, there has been a 241 per cent increase in non-Indigenous female offenders receiving short sentences. Short sentences imposed on Aboriginal and Torres Strait Islander women have increased by 141 per cent. Non-Indigenous

<sup>1489</sup> Over the data period there were 1,862,681 sentenced events in all Queensland Courts. Of these, in 109,358 cases (5.5%), gender and/or Aboriginal and Torres Strait Islander status were unknown and have not been included in these calculations.

men show a 71 per cent increase in short sentences, with a sharp increase from 2012–13, while Aboriginal or Torres Strait Islander male offenders remained relatively consistent in comparison, increasing by 13 per cent over the data period.

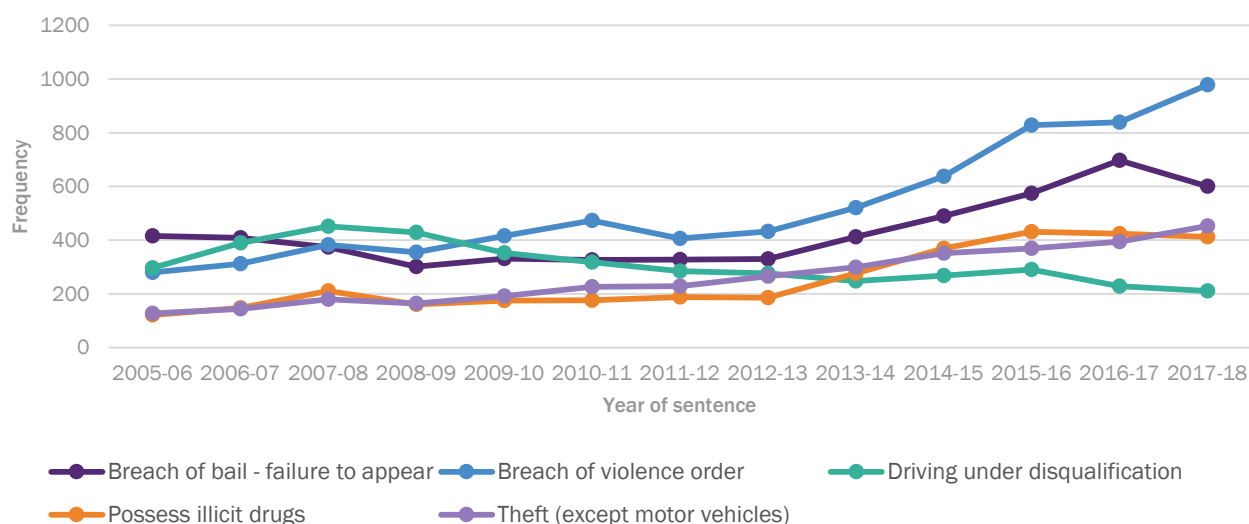
**Figure 11-10: Number of imprisonment sentences 6 months or less (MSO) by year of sentence, and gender and Aboriginal and Torres Strait Islander status, 2005–06 to 2017–18**



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

Figure 11-11 below shows the trends in the top five offences (MSO) for which offenders received short sentences over the data period. Short sentences for ‘breach of violence order’, ‘theft’ (except motor vehicles), ‘breach of bail – fail to appear’, and ‘possess illicit drugs’ increased considerably. Driving under disqualification was the only offence to decrease over the data period.

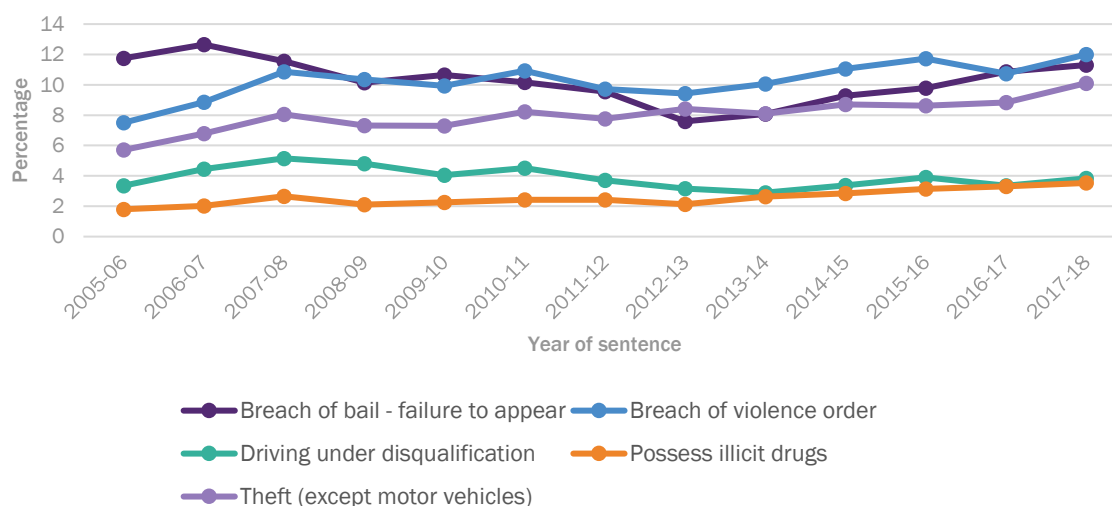
**Figure 11-11: Number of imprisonment sentences 6 months or less (MSO) by offence type and year of sentence, 2005–06 to 2017–18**



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

Figure 11-12 below shows the trends for the top five offences (MSO) for which offenders received short sentences in the use of short terms of imprisonment (as a proportion of all sentences imposed) over the data period.

**Figure 11-12: Proportion within each offence type (MSO) that received a short imprisonment sentence by year of sentence, 2005–06 to 2017–18**



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

In the cases of ‘breach of bail – fail to appear’ and ‘possess illicit drugs’, the increasing numbers of short prison sentences in more recent years reflect an overall increase in the number of these offences coming before the courts for sentence, with the proportion of these offences resulting in a short prison sentence being imposed remaining relatively stable.<sup>1490</sup>

For the categories of breach of a violence order and theft (except for motor vehicles), the picture is somewhat different, with both offence categories experiencing a significant increase in the numbers of offences being sentenced, as well as an increasing proportion of offences sentenced resulting in a short term of imprisonment:

- there was a 399 per cent increase in the use of imprisonment for breach of violence order (MSO) over the data period; 7.5 per cent of sentenced offences falling within this offence category resulted in a short term of imprisonment in 2005–06, rising to 12.0 per cent in 2017–18; and
- for theft (except motor vehicles), there was a 326 per cent increase in the use of imprisonment over the data period; 5.7 per cent of sentenced for these offences received a short prison sentence in 2005–06, rising to 10.1 per cent in 2017–18.

The majority of prison sentences imposed for these two offence categories were short terms of imprisonment of 6 months or less, although the overall proportion of short prison sentences (as a percentage of all prison sentences imposed) for these offence categories decreased – suggesting courts are imposing longer prison sentences. In 2017–18, 61.9 per cent of sentenced breach of violence order offences that resulted in a term of imprisonment were sentences of 6 months or less (down from 88.6% in 2005–06). For theft (except motor vehicles), the percentage of prison sentences that were for 6 months or less was higher at 78.8 per cent (down from 94.1% in 2005–06).

A potential explanation for the increase in the use of short sentences of imprisonment in preference to non-imprisonment penalties for a breach of violence order, and the move to longer sentences, is likely to be the introduction of the *Domestic and Family Violence Protection Act 2012* (Qld), which increased the penalty for contravening a domestic violence order,<sup>1491</sup> thereby signalling to courts the increased seriousness with which these offences are to be viewed.

<sup>1490</sup> Over the data period, the proportion of offences (MSO) sentenced resulting in a short term of imprisonment for these offences increased only slightly (in the case of driving under disqualification, from 3.3 per cent in 2005–06 to 3.8 per cent in 2017–18, and for possession of illicit drugs, from 1.8 per cent in 2005–06 to 3.5 per cent in 2017–18).

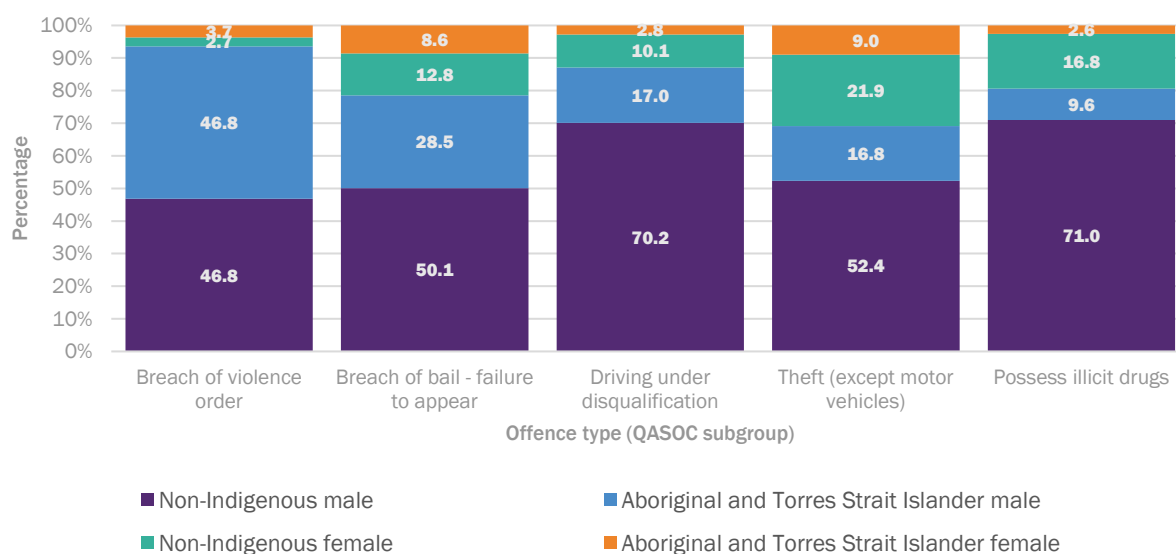
<sup>1491</sup> Previously, under section 37 of the *Domestic and Family Violence Protection Act 1989* (Qld) the maximum penalty was 12 months’ imprisonment. On 10 March 2003 the penalty was increased to 2 years’ imprisonment, if the respondent had previously been convicted on two different occasions within three years; otherwise, 40 penalty units or 1 year’s imprisonment (the offence was renumbered to s 80). When the *Domestic and Family Violence Protection Act 2012* (Qld) was introduced the penalty was 3 years’ imprisonment, if the respondent had previously been convicted within five years; otherwise, 2 years’ imprisonment. In 2015 the penalty was increased to a maximum penalty of 5 years’ imprisonment (if there was a previous conviction); otherwise, 3 years’ imprisonment (s 177(2)): *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld) s 7.

In addition to these changes: the PSA was amended in 2014 to remove the principle of imprisonment as a sentence of last resort.<sup>1492</sup> In 2016, this principle was reinstated.<sup>1493</sup> In 2016, amendments were also made to section 9 of the PSA to insert a new subsection – section 9(10A) – which requires a sentencing court to treat the fact an offence is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.<sup>1494</sup>

Similar trends in the use of sentences of imprisonment for theft have been observed in England and Wales, which some commentators have attributed to offending histories for these offences influencing courts' use of imprisonment as a penalty in preference to non-custodial penalties.<sup>1495</sup> Further research is required to identify potential contributing factors to the growth in the use of short sentences for theft in Queensland.

Figure 11-13 shows the profile of offenders for the top five offences attracting a sentence of imprisonment of 6 months or less. Aboriginal and Torres Strait Islander male offenders and non-Indigenous male offenders were most likely to be sentenced to a short sentence for a breach of violence order (46.8% equally). In all of the other top five offence types, non-Indigenous male offenders were most likely to receive a short sentence.

**Figure 11-13: Top five offences (MSO) sentenced to imprisonment 6 months or less by gender and Aboriginal and Torres Strait Islander status, 2005–06 to 2017–18**



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

### 11.8.7 An alternative to court ordered parole for short sentences

The Parole System Review posed two questions in respect of court ordered parole for short sentences:

1. If the purpose of parole is to allow a prisoner to serve part of his or her sentence in the community so as to facilitate the prisoner's reintegration into the community, why are offenders being sentenced to parole directly from court without having served any time in custody?
2. If there is no or little rehabilitative benefit in short sentences with short periods on parole, what is the value in allocating precious resources to the provision of community supervision with the danger of further imprisonment but not the benefit of rehabilitation and re-integration?<sup>1496</sup>

It suggested removing short sentences from court ordered parole would reduce the number of offenders on parole, which could result in more resources being available to administer parole supervision of offenders who have committed more serious offences, or who are of more risk to the community.<sup>1497</sup> However, the review cautioned that if parole for short sentences was removed as a sentencing option and a court ordered a prisoner to serve the

<sup>1492</sup> Youth Justice and Other Legislation Amendment Act 2014 (Qld) s 34.

<sup>1493</sup> Youth Justice and Other Legislation Amendment Act (No. 1) 2016 (Qld) s 61.

<sup>1494</sup> Inserted by Criminal Law (Domestic Violence) Amendment Act 2016 (Qld) s 5.

<sup>1495</sup> Roberts and Harris (n 149) 491–2. These comments related both to the use of immediate imprisonment and suspended sentences.

<sup>1496</sup> Queensland Parole System Review (n 10) 91 [439]–[440].

<sup>1497</sup> Ibid 91 [442].

entirety of that sentence in custody, ‘the existing problem of over-population in Queensland’s prison system would be catastrophically exacerbated’.<sup>1498</sup> Therefore, it suggested any change to sentencing legislation must provide the court with an adequate alternative, so as to avoid offenders being sentenced to significant custodial sentences where they would otherwise have served the majority of their sentence on parole.<sup>1499</sup>

In consideration of the Parole System Review, the Council invited submissions on whether sentences of 6 months or less should be excluded from having either a parole release or parole eligibility date set, which would bring Queensland more closely in line with other Australian jurisdictions that limit the availability of parole to longer sentences. If this change were implemented in Queensland, a court could still order that the sentence be suspended in whole or in part, or order imprisonment combined with a probation order (or, under other reforms proposed, a CCO). If, as a result of amendments, a court’s discretion is extended to allow for a suspended sentence and a community-based order to be imposed on a single offence, this option would also be available for a short-term sentence that would otherwise be ordered to be served on parole.

### 11.8.8 Consultation and submissions

The Council proposed in its Options Paper that all forms of parole be removed as a sentencing option for imprisonment of 6 months or less. It has decided to make a recommendation in this regard.

Members of the Council’s Aboriginal and Torres Strait Islander Advisory Panel who attended a special meeting of the panel on the Council’s Options Paper supported the removal of parole for short sentences provided courts were provided with the ability instead to order a suspended sentence, including in combination with the proposed new CCO.<sup>1500</sup>

QCS stated that:

Overcrowding and resourcing issues impact QCS’ ability to deliver rehabilitative programs to prisoners, particularly those with more complex criminogenic needs. When a prisoner is brought into QCS custody, a risk assessment is conducted and their access to programs is scheduled based on a hierarchy of needs approach. Usually 12 months is required for assessment, access and completion of interventions, however this increases for complex needs prisoners.<sup>1501</sup>

QCS did not have concerns with the proposal from an offender management perspective. However:

It is unclear what effect such a change may have on sentencing practices given the large number of offenders who are currently released to parole at the time of sentencing. This is an issue the Council may need to give consideration to in light of Principle 4 of the Council’s review that any change to sentencing options should aim to reduce Queensland’s prison population, while maintaining community safety.<sup>1502</sup>

The Parole Board agreed with the proposal and the two exceptions. As to risks:

The Board believes that any risk is less than what is currently being experienced because of the large number of prisoners being returned to custody due to homelessness and/or substance abuse, which leads to a failure to comply with [court ordered parole] conditions.<sup>1503</sup>

Fighters Against Child Abuse Australia (FACAA) suggested abolishing parole for sentences of under 12 months, because of a preference for increased periods of actual custody.<sup>1504</sup>

However, a number of legal stakeholders had serious reservations about this proposal, suggesting that parole still served a useful purpose for those on short sentences.

Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis of The University of Queensland School of Law supported retaining parole for short sentences on the basis that it ‘may provide an important opportunity to support rehabilitation and reintegration’, especially for offenders in custody for the first

<sup>1498</sup> Ibid 91 [443].

<sup>1499</sup> Ibid 92 [445].

<sup>1500</sup> ‘Talking points for Advisory Panel Members: Council meeting 18 June’, 2, summarising views of Panel members who attended an extraordinary meeting of the Panel on 17 May 2019.

<sup>1501</sup> Submission 11 (Queensland Corrective Services) 19.

<sup>1502</sup> Submission 11 – supplementary submission (Queensland Corrective Services) 1.

<sup>1503</sup> Submission 12 (Parole Board Queensland) Annexure 1, 21 [14.3].

<sup>1504</sup> Submission 4 (Fighters Against Child Abuse Australia) 29–30.

time.<sup>1505</sup> Abolition would mean ‘many offenders will miss out on the support that should be provided with parole (access to housing, support with education, training and work and other reintegrative supports)’.<sup>1506</sup> Whilst this might be the ideal, the feedback from stakeholders to the Council, and the findings of the Parole System Review, indicate that offenders are missing out anyway.

LAQ did not support the recommendation. They submitted:

- ‘[C]ourt ordered parole, in particular with short sentences, is being overused at the expense of alternatives like a suspended sentence or ICO.’<sup>1507</sup>
- There should be a wide range of sentencing options, and short terms of imprisonment with parole are another option.<sup>1508</sup>
- ‘[T]here are currently significant issues in the administration of parole attached to short sentences. Underlying these issues appears to be a lack of resources in terms of the early linking of people to programs/supervision, and the availability of meaningful programs within the short timeframes.’<sup>1509</sup>
- The failure of such orders ‘is not necessarily related to the form of the legislation, but the practicalities of administering the order’.<sup>1510</sup>
- In the absence of improving resourcing, they suggested that a legislative requirement of further investigation (e.g. a pre-sentence report) could be considered.<sup>1511</sup>
- Abolishing parole for short periods of imprisonment would risk shifting the cost of properly administering alternative orders to other criminal justice agencies — breaches would fall to the courts and not the Parole Board, offenders still sentenced to actual imprisonment would serve their entire term in custody with no post-release supervision, and there may be offenders being sentenced to suspended sentences (having a rehabilitative option removed) who might have warranted supervision through parole due to a combination of their criminal history and the nature of their offending.<sup>1512</sup>

The QLS shared LAQ’s concerns.<sup>1513</sup>

Sisters Inside supported amendments ‘to reduce *actual* periods of imprisonment of 6 months or less’ but expressed caution regarding abolishing court ordered parole, suggesting that this could result in longer sentences and more women spending actual time in custody.<sup>1514</sup>

They suggested an alternative option would be: ‘to provide strong legislative guidance that any periods of imprisonment under 6 months must be wholly suspended, unless it is in the interests of justice for a person to be sentenced to actual time in prison’.<sup>1515</sup> Sisters Inside did support court ordered parole remaining for activated suspended sentences and imprisonment imposed for offences committed on parole.<sup>1516</sup>

Sisters Inside stated that data they requested from Queensland Courts confirmed that ‘since 2007–08, an increasing number of women appear to be sentenced to a period of imprisonment with a parole eligibility date within 6 months of their sentence date’.<sup>1517</sup>

<sup>1505</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 8.

<sup>1506</sup> Ibid.

<sup>1507</sup> Submission 6 (Legal Aid Queensland) 12.

<sup>1508</sup> Ibid 13.

<sup>1509</sup> Ibid 12.

<sup>1510</sup> Ibid 13. In this regard, the Council notes the recommendations in the Queensland Parole System Review regarding increasing the number, diversity and variety of rehabilitation programs and training and education opportunities available to prisoners in custody, including short-term prisoners. See Queensland Parole System Review (n 10) recommendations 17–20, 26.

<sup>1511</sup> Ibid.

<sup>1512</sup> Ibid 13.

<sup>1513</sup> Submission 15 (Queensland Law Society) 21–2.

<sup>1514</sup> Submission 7 (Sisters Inside) 9 (emphasis in original).

<sup>1515</sup> Ibid.

<sup>1516</sup> Submission 7 (Sisters Inside) 9.

<sup>1517</sup> Ibid 7. Further: ‘In 2007–08, 27 Aboriginal and Torres Strait Islander women and 53 non-Indigenous women were sentenced to a period of imprisonment with a parole eligibility date within six months of their sentence date; in contrast, in 2016–17 — at the peak of this trend — 118 Aboriginal and Torres Strait Islander women and 313 non-Indigenous women had parole eligibility dates within 6

The Bar Association of Queensland did not support the abolition of parole for short sentences of imprisonment and noted that '[a]n alternative response to the difficulties with short periods on parole is to abolish sentences of imprisonment of less than 6 months'.<sup>1518</sup>

The Bar Association stated that 'short terms of imprisonment are of questionable utility, doing little to reduce recidivism or foster rehabilitation of the prisoner. It is further noted that prisoners who were ordered to serve their sentences in full would then be released from custody with no supervision'.<sup>1519</sup> They acknowledged that CCOs may provide an alternative to short periods of imprisonment with immediate release on parole. However, it was concerned 'the result of such a reform may in fact be a significant increase in the prison population. Such sentences are unlikely to be regularly challenged on appeal due to the timeframes involved in the appellate process'.<sup>1520</sup>

### 11.8.9 The Council's view

Various stakeholders agreed that often those aspects of the system (courts and legal practitioners) engaging with this sentencing option at the 'front-end' do not see subsequent churn of offenders through the system (which is governed by criteria set by the executive in the *Ministerial Guidelines*, not the sentencing principles in the PSA, and executed by other industry actors).

A major risk with this option is that the system cannot cope because other alternative orders are not used and longer head sentences of a duration exceeding what is appropriate are imposed in order to reach the new parole threshold.

However, if the change were successful, more offenders would be kept out of custody with consequent wide-ranging benefits and less prison overcrowding, and the stress on the Parole Board could be reduced.

This recommendation addresses the Parole System Review's criticisms of short sentence parole. Unlike that review, the Council can make this recommendation in tandem with others, which would provide alternatives and fill any potential gaps left by the removal of this option. These alternatives would divert the otherwise inevitable increased strain on an already overburdened system: CCOs (Recommendation 9) and the ability to impose suspended sentences with community-based orders on one charge (Recommendations 17 and 37).

Nevertheless, if courts did not use these options, and also made no adjustment to the sentence to take into account the fact that the full sentence would be served in custody, the effect on prison over-population warned about in the Parole System Review's Final Report would be a real risk.

The available evidence (which is not as determinative as the Council would like) suggests that parole for such short terms fails at its core function — achieving community safety through rehabilitation and reduced recidivism. What is more, short sentences with parole can reinforce the disadvantages it was designed to combat — underlying criminogenic factors of homelessness and lack of support structures.

If a lack of resources means that parole provides no actual support or rehabilitation, its chief use arguably becomes ensuring an orderly progression of newly convicted offenders through the system by virtue of set dates (provided the offender does not reoffend or fail to comply, in which case they instead progress more deeply into the workings of the parole system).

The Council recognises the limitations of short parole periods and the risk of 'churn' and suspensions whereby offenders are caught in the parole system and end up spending more time in custody because of it. The Council also notes the warnings regarding the potential increase in court workloads as a result of breaches of alternative community-based orders.

The Council wishes to be clear that in making this recommendation, its intention is that other forms of sentencing options would be taken up instead of short terms of imprisonment. It is not the Council's intention that sentences of less than 6 months served in full would be utilised.

While the Council recommends that parole is removed as an option for imprisonment of 6 months or less, it does not suggest that this change should occur until several other key activities are carried out. The outcomes of these may influence the Government's ongoing view of this recommendation.

The Council envisages that this recommendation be further considered in the context of a completed review of the effectiveness of parole. The Council's extensive research, including in-depth consultation with relevant stakeholders

---

months of their sentence date. Although the numbers decreased in 2017–18, the number of women being sentenced with a parole eligibility date in close proximity to their sentence remains significantly higher than 10 years ago': Ibid 8, citing an email from the Courts Performance and Reporting Unit, Department of Justice and Attorney-General, October 2018.

<sup>1518</sup> Submission 16 (Bar Association of Queensland) 3.

<sup>1519</sup> Ibid.

<sup>1520</sup> Ibid.

and a literature review, has not resulted in clear findings about how well parole works in Queensland, and how effective Board ordered parole is compared with court ordered parole.

By staging this reform after others, the amendment would be made in an environment different from the current one. Evaluation of ICOs would be complete. CCOs would be in place and they could be combined with suspended sentences. A dual parole order discretion for sexual offences for sentences of under 3 years would be operational.

As part of this recommendation, court ordered and Board ordered parole would remain available for activation of suspended sentences of any length, in whole or in part, and for sentences of imprisonment imposed for offences committed on Board ordered or court ordered parole.

### RECOMMENDATION: REMOVING PAROLE FOR SHORT SENTENCES

51. Subject to the implementation of the Council's proposed reforms to community-based sentencing orders and parole, and the outcomes of a review of the effectiveness of parole, Part 9, Division 3 of the *Penalties and Sentences Act 1992* (Qld) should be amended to remove any form of parole being applicable to sentences of imprisonment of 6 months or less for any offence. Such sentences would instead be served in full, as wholly or partially suspended sentences (with, or without, a community-based order also being made), or by way of intensive correction in the community under an intensive correction order (ICO). Recommendation 37 would allow suspended sentences to be imposed along with community-based orders on the same charge and this would be the mechanism to ensure supervision for short sentences of imprisonment.

Court ordered and Board ordered parole should still be available for:

- activation of suspended sentences, in whole or in part;
- sentences of imprisonment imposed for offences committed on Board ordered or court ordered parole.

This reform should not be progressed until recommendations are implemented, relating to:

- the assessment of intensive correction orders (Recommendation 7);
- the combination of suspended sentences with community-based orders (Recommendation 37);
- the creation of community correction orders (Recommendation 9);
- the change to parole powers allowing a dual discretion for fixing parole eligibility and release dates for sexual offences with sentences of 3 years or less (Recommendation 47);
- the creation of a dual parole release and eligibility date discretion regarding resentencing in section 160B(2) of the *Penalties and Sentences Act 1992* (Qld) and section 209 of the *Corrective Services Act 2006* (Qld) (Recommendation 52); and
- a review of the effectiveness of parole (Recommendation 49).

The Council acknowledges that the Government should be guided by the future findings and outcomes of Recommendations 7 and 49 regarding ICO use and parole effectiveness.

## 11.9 Statutory court ordered parole order cancellation and related legislative complexities

### 11.9.1 Under the CSA

A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order.<sup>1521</sup> This applies even if the period of the parole order has expired at the time of sentence. However, it does not apply if the further period of imprisonment:

- is required to be served in default of paying a fine or other amount or of making restitution as required under a court order, or
- is to be served as an ICO, is wholly suspended, or is required to be served until the court rises.<sup>1522</sup>

This automatic statutory cancellation invokes the power of the Parole Board to issue an arrest warrant, or to apply to a magistrate for an arrest warrant. When arrested, the prisoner must be taken to a prison to serve out the unexpired portion of the period of imprisonment.<sup>1523</sup>

Section 211 of the CSA provides guidance on calculating the remainder of the sentence in the event of court ordered parole cancellation. If a prisoner's parole is cancelled under section 209 or 205(2) of the CSA, the time for which

<sup>1521</sup> *Corrective Services Act 2006* (Qld) s 209.

<sup>1522</sup> *Ibid* s 209(3)(b).

<sup>1523</sup> *Ibid* s 210.

the prisoner was released on parole before the relevant event happens counts as time served under the prisoner's period of imprisonment. The relevant events are:

- when the prisoner failed to comply with the order;
- when the order was cancelled due to posing serious risk of harm to another/unacceptable risk of committing an offence/preparing to leave Queensland without permission; and
- the date of the commission of the offence leading to cancellation under section 209.

The Parole Board can, by written order, direct that the prisoner serve only part of the unexpired portion of the period of imprisonment<sup>1524</sup> and this is so even though section 206(3)(b) states that a prisoner arrested on a warrant issued because the Parole Board cancels a prisoner's parole must be taken to a prison to serve the unexpired portion of the period of imprisonment. However, the Parole Board can only do this if the prisoner goes through the entire process of re-applying for parole after cancellation of the parole order – whether a court ordered parole order cancellation or a Board ordered parole order cancellation.

A prisoner released on parole is taken to be still serving the sentence imposed.<sup>1525</sup>

### 11.9.2 Under the PSA

Part 9, Division 3 of the PSA (ss 160–160H) deals with parole and court orders regarding parole eligibility and parole release dates. Sections 160B to 160D are the only law under which a court may, when sentencing a person to an actual term of imprisonment for an offence, make an order relating to a person's release on parole.<sup>1526</sup> The focus of the provisions is on the imposition of the imprisonment and not the date of the commission of the offence.

Some of the general themes in Part 9, Division 3 of the PSA are:

- At any one time there will be only one parole release or eligibility date in existence for an offender.<sup>1527</sup>
- The date fixed by the court must be a date relating to the offender's period of imprisonment as opposed to a particular term of imprisonment.<sup>1528</sup>

A 'new' parole eligibility or release date required to be imposed as a result of further offending giving rise to imprisonment cannot be earlier than the release or eligibility date that it is replacing.<sup>1529</sup> If the offender has had a court ordered parole order cancelled under section 205 or 209 of the CSA during the offender's period of imprisonment, the court must fix the date the offender is eligible for parole – the certainty of a fixed release date is no longer an option.<sup>1530</sup>

The PSA also contains an automatic cancellation provision regarding parole release and eligibility dates in section 160E. An existing parole release date is automatically cancelled when a Queensland court fixes another parole release or eligibility date, or when it imposes a term of imprisonment for a serious violent or sexual offence or term of imprisonment resulting in the period of imprisonment exceeding 3 years. A similar subsection regarding parole eligibility dates is also included. It makes no difference if the court setting the new sentence is of lesser jurisdiction to that which imposed the date being replaced.<sup>1531</sup>

There can only ever be one parole release date, no matter how many times an offender is sentenced.<sup>1532</sup> This means that if an offender is sentenced to a new term of imprisonment while serving a current sentence of imprisonment, a new parole release or eligibility date is set, replacing the parole release date under the previous sentence, but this new date must not be earlier than the existing date.

Under section 160E(1) of the PSA, an offender's parole release date is automatically cancelled when:

- the court fixes another parole release date or parole eligibility date for the offender (under that division); or

<sup>1524</sup> Ibid s 211(3).

<sup>1525</sup> Ibid s 214.

<sup>1526</sup> *Penalties and Sentences Act 1992* (Qld) s 160A.

<sup>1527</sup> Ibid s 160F(1).

<sup>1528</sup> Ibid s 160F(2).

<sup>1529</sup> Ibid ss 160B(6), 160C(4), 160D(4).

<sup>1530</sup> Ibid s 160B(2).

<sup>1531</sup> Ibid s 160E(3).

<sup>1532</sup> Ibid s 160E(1).

- the court imposes a term of imprisonment for either a serious violent offence or sexual offence, or a term of imprisonment that is more than 3 years.

### 11.9.3 Issues with provisions dealing with further offending while on court ordered parole

Concerns have been raised by stakeholders concerning complexity and uncertainty around provisions of the CSA and PSA — namely, CSA sections 209, 211, 215 and PSA section 160B — regarding parole in the context of further offending. A summary of the relevant PSA and CSA provisions, as discussed in several judgments, is at Appendix 6.

Some stakeholders have suggested considering simplifying the provisions. Two propositions discussed as reform options above in section 11.6 of this report may be viewed as potential remedies to the complexity and uncertainty observed:

- creating a ‘dual discretion’ for courts to choose between parole release and eligibility dates for all head sentences of up to 5 years; and
- expanding court ordered parole to apply to sexual offences.

Another suggestion from consultation was giving courts discretion to make the fact that an offence was committed while the person was on parole a factor that the court must consider in deciding whether to set a release or eligibility date.

The Court of Appeal’s construction of the legislation has been endorsed as a ‘coherent system where a prisoner commits an offence during the period of a parole order’ by four Supreme Court judges.<sup>1533</sup> However, the statutory regime has garnered some negative judicial descriptions in cases, such as:

- ‘troublesome’ partly because of the language of the PSA;<sup>1534</sup> and
- having an ‘evident lack of clarity’.<sup>1535</sup>

The relevant decisions generally involve the question of whether a parole release or eligibility date was the necessary order to make in the case of an offender who had:

- been sentenced to imprisonment with a parole release date;<sup>1536</sup>
- offended while on that court ordered parole order;
- been subsequently sentenced to actual imprisonment for the ‘new’ offence; and
- the subsequent sentence included an eligibility date (thus requiring an application to the Parole Board), as well as, in some cases, serving further time being the ‘unexpired portion’ of the first sentence.

A number of District Court judgments initially addressed the issues, and two more recent Court of Appeal judgments brought further clarity, followed by two single Supreme Court judge decisions which provided further explanation. The relevant decisions, in chronological order, are:

- *R v Bond* [2009] QDC 28;
- *Kim v Arbuckle* [2009] QDC 267;
- *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487;
- *Soanes v Commissioner of Police* [2013] QDC 26;
- *Wiggins v Commissioner of Queensland Police* [2013] QDC 286;
- *R v Smith* [2015] 1 Qd R 323;
- *R v Bliss* [2015] QCA 53;
- *R v BLJ* [2018] 3 Qd R 255; and

<sup>1533</sup> *R v Smith* [2015] 1 Qd R 323, 327 [30] (Morrison JA, Muir JA and Daubney J agreeing); Dalton J agreeing in her judgment in *R v Hall* [2018] 3 Qd R 628, 632 [16].

<sup>1534</sup> *R v Hall* [2018] 3 Qd R 628, 630 [1] (Dalton J).

<sup>1535</sup> *Soanes v Commissioner of Police* [2013] QDC 26, 14 [34] (Long SC DCJ).

<sup>1536</sup> The issue does not arise where the original order involved a parole eligibility date. An offender to be sentenced under s 160B who had a Board ordered parole order cancelled will fall under s 160B(2) and the court must fix a parole release date. See also *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487, 8 [32] (Rafter SC DCJ).

- *R v Hall* [2018] 3 Qd R 628.<sup>1537</sup>

#### 11.9.4 The Court of Appeal: *R v Smith* [2015] 1 Qd R 323

Morrison JA, with whom Muir JA and Daubney J agreed, noted in *R v Smith* that section 209 of the CSA ‘contemplates at least two situations: first, where the offence and the sentence both occur within the period of the parole order; and secondly, where only the offence occurs during the period of the parole order, with the sentence occurring subsequently’,<sup>1538</sup> including even after the period of the parole order has expired.<sup>1539</sup>

In relation to section 210 of the CSA, the judgment noted that ‘there is no definition of what an ‘unexpired portion’ is’,<sup>1540</sup> but:

The meaning is revealed by s 211 ... the time up until the commission of the offence will count as time served under the period of imprisonment, but the balance will not. On that basis the balance of the parole period is not time served under the period of imprisonment, but is the ‘unexpired portion of the prisoner’s period of imprisonment’ for the purposes of s 210(3) of the CSA.<sup>1541</sup>

The judgment then explained the operation of section 209 of the CSA:

Cancellation under s 209 occurs automatically if the prisoner is sentenced for an offence committed during the period of the parole order, even if that sentence comes after the expiry of the period of the parole order. In that situation, the parole order will have expired **and** will have been cancelled under s 209. That situation does not come within s 215 of the CSA, which only operates where a parole order has expired **without** being cancelled under s 209.

With that analysis in mind one can conveniently summarise the operation of s 209 of the CSA.

Section 209 makes provision in respect of two different things, namely a parole order in subsection (1), and the period of the order under subsection (2). It is the parole order which is the subject of automatic cancellation under s 209(1). That cancellation can occur even after the period of the order has expired: s 209(2). Where that happens, the prisoner will not be taken to have served the period of imprisonment because s 215 is not engaged. Rather, s 211(2)(c) applies so that the only time served by the prisoner under the prisoner’s period of imprisonment is that which was served prior to committing the offence which subsequently, by way of sentence, results in the automatic cancellation of the parole order.

The construction above provides for a coherent system where a prisoner commits an offence during the period of a parole order. Where that occurs the prisoner becomes subject to a contingent liability that the sentence for that offence will have the result of automatically cancelling the parole order under s 209(1), even if the sentence bringing about that result occurs after the period of the parole order has expired: s 209(2). In that situation the contingent liability in terms of the period to be served is made clear by s 211(2)(c) of the CSA, which provides that the time served under the parole order up to the commission of the relevant offence is taken to be time served under the period of imprisonment, but the balance of the period is not. The balance of the period is the ‘unexpired portion’ which must be served if the prisoner is arrested: s 210(3) of the CSA.

It does not matter to that analysis that a prisoner is outside prison when the prisoner is on parole. Section 214 of the CSA makes it clear that a prisoner released on parole is still taken to be serving the sentence. Further, if the contingent liability comes to pass, in the sense that a parole order is cancelled under s 209, the prisoner will not be taken to have served the period of imprisonment.<sup>1542</sup>

<sup>1537</sup> *R v Bliss* [2015] QCA 53 and *R v Hall* [2018] 3 Qd R 628 were noted with approval by the Court of Appeal in *R v Brunning* [2018] QCA 263, 2 (Davis J, Philippides and McMurdo JJA agreeing).

<sup>1538</sup> *R v Smith* [2015] 1 Qd R 323, 326 [21] (Morrison JA, Muir JA and Daubney J agreeing).

<sup>1539</sup> Ibid 326 [22] (Morrison JA, Muir JA and Daubney J agreeing).

<sup>1540</sup> Ibid 326 [23] (Morrison JA, Muir JA and Daubney J agreeing).

<sup>1541</sup> Ibid 326 [24] (Morrison JA, Muir JA and Daubney J agreeing), noting at [25] and [26] that CSA sections 214 and 215 also support this approach. See also *Soanes v Commissioner of Police* [2013] QDC 26, 11 [29] (Long SC DCJ).

<sup>1542</sup> *R v Smith* [2015] 1 Qd R 323, 327 [27]–[32] (Morrison JA, Muir JA and Daubney J agreeing) (emphasis in original). In *R v Hall* [2018] 3 Qd R 628, Dalton J explained ‘the primary sentencing Judge in *R v Smith* made an additional, and slightly unusual, order as part of the sentencing, and that order led to some problematic statements in the final paragraphs of *R v Smith*’ (632–3 [18]); but: ‘If and insofar as these paragraphs imply that, absent the order which “backdated” the stealing sentence, s 160B(2) would not have applied, then they are, with respect, incorrect. In the absence of the “backdating” order, a parole eligibility date was nonetheless required for the reasons given at [17] above. This is consistent with the decision in *R v Bliss* which was relevantly on all fours with *R v Smith* factually, except that there was no “backdating” order’ (633 [21]). As to the reasons at 632 [17], Dalton J wrote: ‘Having regard to the legislative provisions just detailed, the primary Judge in *R v Smith* was right to impose a parole eligibility date pursuant to s 160B(2) of the PSA. At the time the primary Judge imposed a sentence, Smith began a term of imprisonment pursuant to that sentence. As well, because some of the offences for which Smith was sentenced had taken place during Smith’s release on parole, at the time the sentence was pronounced Smith also began to serve part of the term of imprisonment imposed on 24 July 2012. Thus, when

### 11.9.5 The Court of Appeal: *R v Bliss* [2015] QCA 53

*Smith* was applied by the Court of Appeal in *R v Bliss*.<sup>1543</sup> Jackson J, with whom McMurdo P and Holmes JA agreed, found, applying *Smith*:

- The sentencing judge was required to fix a parole eligibility date because Mr Bliss had a court ordered parole order cancelled under section 209 of the CSA ‘during the offender’s period of imprisonment’.<sup>1544</sup>
- Although the full-time discharge date for the first sentence pre-dated the second sentence date, the effect of the second sentence was to cancel parole on the first sentence retrospectively to the date of the first offence committed during release on parole.<sup>1545</sup>
- Accordingly, the 28-day period between the commission date of the first offence committed on parole and parole cancellation (cancelled, it appears, by the Parole Board) became time he was required to serve in prison, quite apart from any term of imprisonment ordered upon the new sentence. That period became part of the applicant’s ‘period of imprisonment’ within the meaning of section 160B(2) of the PSA.<sup>1546</sup>

District Court judges were alive to the retrospectivity issue in earlier single-judge decisions. In *Coolwell v Commissioner of the Queensland Police Service*, Rafter SC DCJ wrote:

If the aim of section 160B(2) PSA is to require an offender whose court ordered parole order was cancelled under CSA s 205 or 209, to apply for parole rather than having a parole release date fixed by the court, then it is difficult to see why the cancellation itself must occur during the period of imprisonment. An offender might commit an offence at any time during the period of a court ordered parole order but the offence might not be detected for some time. There may be a delay in apprehending the offender or in the matter being dealt with by the court.<sup>1547</sup>

Long SC DCJ noted this point in *Soanes v Commissioner of Police*,<sup>1548</sup> and added:

The expiry of the period of the parole order may not coincide with the expiry of the parole order.<sup>1549</sup>

There may be an analogy drawn with the position of an offender who is convicted of an offence that has occurred well in the past. Despite any intervening legislative changes and subject to s 11 of the *Criminal Code*, the position as recognised by s 20 of the *Acts Interpretation Act 1954*, is that any accrued liability under the laws existing at the time of the commission of the offence, is preserved and later brought into effect by any subsequent conviction.<sup>1550</sup>

---

sentence was pronounced by the primary judge in *R v Smith*, the defendant began serving a period of imprisonment consisting of these two terms. When sentence was pronounced, that triggered the cancellation of the parole order under s 209 CSA. In that sense the cancellation happened “during the offender’s period of imprisonment” within the meaning of s 160B(2) PSA. That period of imprisonment was an unbroken period of imprisonment including both the term imposed by the primary sentencing judge (in accordance with the definition at s 160 PSA) and the term imposed by the Magistrate in July 2012’.

<sup>1543</sup> *R v Bliss* [2015] QCA 53. The two sentences in question were:

*Sentence one:*

Sentence date 25 July 2012

Sentence: 3 years’ imprisonment (329 days pre-sentence custody)

Parole release date: 7 August 2012

Full time discharge date: 1 September 2014

Offences committed on parole — first on 29 October 2012

Parole cancelled — 26 November 2012 (28 days from first breaching offence, which pre-dated the final ‘new’ offence by 2 days)

*Sentence two (subject of the appeal):*

Sentence date 10 September 2014

Sentence: 2 years, 8 months, 15 days (8 days pre-sentence custody)

Parole eligibility date: 2 March 2015.

<sup>1544</sup> *R v Bliss* [2015] QCA 53, 4 [11] (Jackson J, McMurdo P and Holmes JA agreeing).

<sup>1545</sup> *Ibid* 4 [14] (Jackson J, McMurdo P and Holmes JA agreeing).

<sup>1546</sup> *Ibid* 4 [10], [14] (Jackson J, McMurdo P and Holmes JA agreeing).

<sup>1547</sup> [2010] QDC 487, 7 [26] (Rafter SC DCJ).

<sup>1548</sup> [2013] QDC 26.

<sup>1549</sup> *Ibid* 14 [35] (Long SC DCJ).

<sup>1550</sup> *Ibid* 15 [37] (Long SC DCJ).

### 11.9.6 Pre-sentence custody

In *Kim v Arbuckle*, Robin QC DCJ considered that time spent in custody on remand did not constitute a 'period of imprisonment' for the purposes of section 160B(2) of the PSA:

The question becomes whether, retrospectively, on a sentence when pre-sentence custody is made the subject of a declaration, a period of imprisonment whose status was unclear then becomes identifiable and must be treated as a period of imprisonment. That strikes me as unfair to an offender given the consequence that all he or she can then expect is the less satisfactory order for a parole eligibility date rather than a fixed date.<sup>1551</sup>

In *Coolwell v Commissioner of the Queensland Police Service* Rafter SC DCJ noted this as 'the view [Robin DCJ] formed'.<sup>1552</sup> In *R v Bliss*,<sup>1553</sup> the sentence date also post-dated the expiry of the parole period and the 8 days pre-sentence custody seems to have linked the two. Apart from stating them, the judgment in *Bliss* does not comment on the periods of pre-sentence custody.

In *R v Hall*, Dalton J stated:

The application of s 160B(2) cannot depend on stochastic factors [i.e. factors randomly determined]<sup>1554</sup> such as whether or not there is an order of the type made by the primary Judge in *R v Smith*;<sup>1555</sup> whether there was a declaration of time served, or whether the full-time release date of the prior sentence had passed at the time of the second sentencing occasion.<sup>1556</sup>

### 11.9.7 Cumulative terms under section 156A of the PSA

In *Soanes v Commissioner of Police*,<sup>1557</sup> an order for imprisonment with a parole release date was set aside and a wholly suspended sentence was supplemented. There was a totality issue in respect of section 156A of the PSA. That section requires that imprisonment imposed for a schedule 1 PSA (serious violent offences) offence be served cumulatively with any other term of imprisonment the offender is liable to serve if the schedule 1 offence was committed while the offender was serving a term of imprisonment or released on parole.

Section 209 of the CSA does not apply to ICOs or wholly suspended sentences.<sup>1558</sup> In Mr Soanes' case, a wholly suspended sentence meant that:

There would be no cancellation of the parole order, and therefore, at the time of sentence, no liability to serve any part of the earlier period of imprisonment and therefore nothing upon which to make such an order operate cumulatively, under section 156A of the PSA.<sup>1559</sup>

Otherwise:

... once a scheduled offence is committed in the period of the parole order, a liability to serve the then unexpired portion of the period of imprisonment arises, which liability is contingent on the fact of conviction of that offence, even if that occurs after the end of the period of the parole order.

In that sense and because of that contingent liability and if the contingency is effected, there is no unbroken liability to serve a period of imprisonment. The nexus is maintained because, when engaged, s 156A requires that any additional term of imprisonment be served 'cumulatively with any other term of imprisonment that the offender is liable to serve' and s 210(3) of the CSA has the effect of the offender being 'taken to prison to serve the unexpired portion of the prisoner's period of imprisonment'. In this sense, s 209 of the CSA does not operate, in such circumstances, to create some new and separate liability to serve the previously unserved portion of any prior period of imprisonment.

If an order for imprisonment of a kind which engages s 209 of the CSA is made, it is necessarily an order which would also engage s 156A of the PSA. Therefore what is required is an order that the relevant terms of imprisonment be required to be served cumulatively.<sup>1560</sup>

<sup>1551</sup> [2009] QDC 267, 5 (Robin QC DCJ).

<sup>1552</sup> [2010] QDC 487, 6 [24].

<sup>1553</sup> *R v Bliss* [2015] QCA 53.

<sup>1554</sup> Having a random probability distribution or pattern that may be analysed statistically but may not be predicted precisely. *Oxford English Dictionary* (online at 14 April 2019) 'stochastic'.

<sup>1555</sup> A 'backdated' order.

<sup>1556</sup> *R v Hall* [2018] 3 Qd R 628 [25] (Dalton J), citation omitted.

<sup>1557</sup> *Soanes v Commissioner of Police* [2013] QDC 26.

<sup>1558</sup> *Corrective Services Act 2006* (Qld) s 209(3)(b) and see *Soanes v Commissioner of Police* [2013] QDC 26, 9 [23] (Long SC DCJ).

<sup>1559</sup> *Soanes v Commissioner of Police* [2013] QDC 26, 9 [23] (Long SC DCJ) and see 23 [58].

<sup>1560</sup> *Ibid* 19–20 [47]–[49] (Long SC DCJ).

In *Addo v Senior Constable Jacovos*,<sup>1561</sup> Morzone QC DCJ dealt with an appeal against sentence imposed for offences committed while existing Board ordered parole<sup>1562</sup> with an eligibility date was suspended. His Honour wrote:

The appellant argues that the offence was committed when he was ‘unlawfully at large’<sup>1563</sup> and liable to serve the suspension period, but was not serving the sentence the subject of his parole pursuant to s 214 of the [CSA]. For this reason, it was submitted that the appellant was not then ‘released on a parole order’ for the purposes of s 156A(1)(b)(ii) of the PSA. It seems to me that the appellant’s argument would place a non-compliant and suspended parolee in a better position than an otherwise compliant parolee who reoffended.

The respondent relies on the continuum of the parole conditions, including that the parolee is under the chief executive’s supervision ‘until the end of the prisoner’s period of imprisonment’ [CSA s 200(1)(a)(i)].

Section 215 deals with the circumstances of cancellation by the Board under s 205 and the automatic cancellation effected by re-sentence under s 209. There is no similar provision for a suspension of a parole order. While a prisoner remains in the community following the suspension of a parole order he is said to be ‘unlawfully at large’ as defined in the [CSA]. Pursuant to s 206 of the [CSA], he was liable ‘to be taken to a prison ... to be kept there for the suspension period’ of 31 days’ imprisonment.

I do not accept the appellant’s argument because I do not see the concepts as being mutually exclusive in the context of a parolee. Fundamentally, a suspension of a parole order does not end that parole order, instead its temporal operation is suspended until the parolee serves the suspension period. The parole order will continue until it is cancelled or the underlying term of imprisonment expires. Until his arrest a noncompliant parolee is unlawfully at large but remains in the community having been released on parole. In my view a noncompliant parolee remains ‘released on parole’ until he is taken to prison to be kept there for the suspension period.

For these reasons, I conclude that the defendant did commit the subject offending while released on parole pending his arrest. Since the preconditions in s 156A(1)(a)(i) and s 156A(1)(b)(ii) are satisfied, a cumulative sentence was required by s 156A(2) of the [CSA] ...

This mandatory sentencing requirement is relevant to determining a punishment that is ‘just in all the circumstances’ under s 9(1)(a) of the PSA. Section 156A was to be read as subject to the sentencing guidelines [in] s 9 ... Where s 156A applied to an offender, the function of the sentencing court is to impose a sentence having regard to the criminality of the current offence. But in so doing the magistrate was required by s 9 to place the sentence in its proper context, namely that it would be imposed in circumstances where it would be cumulative upon completion of the sentence imposed for the past offences [*R v Shillingsworth* [2002] 1 Qd R 527].

In arriving at a just and appropriate sentence the court must avoid imposing artificially inadequate sentences in order to subvert or accommodate the rules relating to accumulation [ultimately His Honour held the aggregate of the relevant sentences, having regard to the non-parole period, would have been too crushing and disproportionate to the overall criminality; the sentence was manifestly excessive – [72]].<sup>1564</sup>

In *R v BLJ*<sup>1565</sup> Henry J sentenced an offender for, inter alia, a trafficking offence with dates that spanned the period just before and into the prior parole order. His Honour determined that this was an offence committed ‘during the period of the order’ for the purpose of section 209 of the CSA. Henry J stated that this was:

A continuing offence committed throughout the charged period so that it was committed during the period of the parole order within the meaning of s 209. To put it another way, it was committed while the defendant was released on parole within the meaning of s 156A *Penalties and Sentences Act 1992*.

It follows the sentences to be imposed here for both the trafficking and the possession, must be ordered to be served cumulatively on any other term of imprisonment the defendant is liable to serve. I should therefore sentence the defendant, taking into account, in the sense discussed in *R v Shillingsworth* [2002] 1 Qd R 527, that this sentence will trigger the defendant’s service, first, of the earlier imposed sentence ...<sup>1566</sup>

<sup>1561</sup> [2016] QDC 271.

<sup>1562</sup> Therefore the discussion of this case centres on s 156A of the PSA and cumulative sentencing. It was held that a parole release date should have been ordered because the original order breached was Board ordered parole arising from an eligibility date: [58].

<sup>1563</sup> For further information regarding a prisoner being unlawfully at large, see ss 112(4) and 124 of the *Corrective Services Act 2006* (Qld).

<sup>1564</sup> *Addo v Senior Constable Jacovos* [2016] QDC 271, [37]–[44] (Morzone QC DCJ) (emphasis in original)

<sup>1565</sup> *R v BLJ* [2018] 3 Qd R 255.

<sup>1566</sup> *Ibid* 257 [10]–[11] (Henry J), applying *R v Smith* [2015] 1 Qd R 323 and *R v Ianculescu* [2000] 2 Qd R 521, 528 [44] (Cullinane J).

### 11.9.8 Issues and stakeholder views

#### Reforms to section 160B of the PSA

FACAA commented that section 160B of the PSA was convoluted and difficult to understand. They suggested a simplification of language used in sections 160B(5)(b), (6) and (7) in order to minimise risks of sentencing errors.<sup>1567</sup> They suggested section 211(3) of the CSA should be removed because they objected to the Parole Board having discretion to order that part of an unexpired portion of imprisonment be served.<sup>1568</sup> They also suggested that section 211(1) include a ground for cancelling parole as being the making of a domestic violence order against the parolee, to act as a deterrent.<sup>1569</sup>

LAQ stated that ‘these provisions are difficult to traverse and are unnecessarily complicated. From a practical point of view it would be helpful to have them combined into one legislative scheme’.<sup>1570</sup>

Sisters Inside strongly supported amending these sections ‘to allow greater judicial discretion to craft sentences that support immediate release from imprisonment ... [i]n our experience, women are frequently sentenced with immediate parole eligibility dates or parole eligibility dates within a very short period of the sentence date. In these cases, it is absolutely unjust that women are required to apply to the Parole Board for parole’.<sup>1571</sup>

They also stated that ‘if the court imposes a community-based order (which we have seen in rare circumstances), in circumstances where a person’s parole is suspended, there ought to be a mechanism for the court to also order the person’s release from prison in respect of the suspended parole order’.<sup>1572</sup> On this point, the Council notes the Court of Appeal’s comments that supervision on parole is the sole province of the executive.<sup>1573</sup>

Sisters Inside raised concerns that:

women are increasingly becoming entrenched in cycles of criminalisation for ‘minor’ offences, as a result of social exclusion and disadvantage. While women’s marginalised situation is recognised by courts, because women are sentenced with a parole eligibility date, they are spending longer periods of time in prison because of systemic delays in the parole and social services system.

The operation of the Parole Board has significantly improved following implementation of the recommendations of the [Parole System Review]. However, women still face significant barriers to parole, especially in relation to housing, mental health services and advocacy with the Parole Board. Legislative amendments are required to ensure that the sentencing and parole system work together fairly and effectively, particularly for women.<sup>1574</sup>

In an earlier submission, ATSILS supported reform to restore discretion to avoid convoluted sentences being imposed.<sup>1575</sup>

The Parole Board did not consider that these provisions require amendment (but agreed with the section 160B(2) proposal, see below).<sup>1576</sup>

QCS did ‘not have concerns with the intent of sections 209 and 211 of the CSA, or consider that an amendment is required to the sections identified to clarify or amend the court’s powers in relation to further offending while the prisoner is on [court ordered parole]’.<sup>1577</sup> QCS conveyed concerns with how sections 209 of the CSA and 160B(2) of the PSA operate. However, it appears to the Council that interpretation of these provisions in Queensland case law addresses these concerns.<sup>1578</sup>

<sup>1567</sup> Submission 4 (Fighters Against Child Abuse Australia) 25–6.

<sup>1568</sup> Ibid 26.

<sup>1569</sup> Ibid.

<sup>1570</sup> Submission 6 (Legal Aid Queensland) 11.

<sup>1571</sup> Submission 7 (Sisters Inside) 8.

<sup>1572</sup> Ibid.

<sup>1573</sup> *R v SCZ* [2018] QCA 81, 9–10 [36]–[37] (Davis J, Morrison and Philippides JJA agreeing).

<sup>1574</sup> Submission 7 (Sisters Inside) 8.

<sup>1575</sup> Preliminary submission (Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd) 6 July 2018, 3.

<sup>1576</sup> Submission 12 (Parole Board Queensland) Annexure 1, Question 11.1.

<sup>1577</sup> Submission 11 (Queensland Corrective Services) 26.

<sup>1578</sup> First, QCS was concerned that ‘an offence committed by a prisoner while their parole order is suspended is not covered by section 209(1)’, which means a prisoner could remain eligible for a court ordered parole order on sentence for the new offence (Submission 11 (Queensland Corrective Services) 26). The Council notes, however, that this proposition was considered and rejected in *Addo v Senior Constable Jacovos* [2016] QDC 271, [37], [40], [41] (Morzone DCJ). Second, QCS commented that ‘the words *during the offender’s period of imprisonment* [in s 160B(2) of the PSA] result in the [court ordered parole] restriction [on re-sentence for an

During consultation, there was general consensus that these provisions were difficult to interpret, however, some comments noted the assistance which the subsequent case law from Queensland Courts gave in applying these provisions.

Contrary to this, early in the Council's consultation, the Bar Association of Queensland noted that the case law regarding these provisions 'is confusing and contradictory in some respects. Different judges interpret the sections differently, which creates considerable difficulties for lawyers trying to advise their clients of the likely outcome of their pleas'.<sup>1579</sup> The Bar Association of Queensland considered 'it would be worthwhile for there to be interaction between the [PSA] and [CSA] to be reviewed in order to provide a clear, unambiguous guide to the effect of further offending whilst on parole'.<sup>1580</sup>

The QLS stated that:

the PSA provisions regarding the Court's powers where an offender on parole commits further offences are confusing, occasionally contradictory and lack clarity ... many of the issues [would] be addressed by enabling the courts to have a discretion to set a parole release date where the sentence is for more than three years' imprisonment, including for sexual offences.<sup>1581</sup>

The Council's Options Paper had invited comment on any other particular sections of the PSA or CSA that make the sentencing calculation process in Queensland unnecessarily complex. Stakeholders did not identify further provisions.

### **Discretion to set a parole release date when a parole order is cancelled under section 209 of the CSA**

A discretion to set a parole release date or a parole eligibility date when a parole order has been cancelled under section 209 of the CSA was supported in written submissions from Sisters Inside,<sup>1582</sup> LAQ,<sup>1583</sup> the Parole Board<sup>1584</sup> and QLS,<sup>1585</sup> and enjoyed general stakeholder support throughout consultation. Professors Douglas and Walsh, Dr Lelliott and Ms Wallis stated that 'a court-ordered parole order should not be automatically cancelled under s 160B(2)'.<sup>1586</sup>

FACAA opposed the suggestion:

NO ! if parole is automatically cancelled then the custodial sentence must be immediately served. By granting the sentencing court the ability to simply set new parole date because it considers parole to be still be appropriate even though that parole had been automatically cancelled is not in the spirit of justice. It is simply giving parole violators, yet another chance and the parole is meant to be that second chance.<sup>1587</sup>

The Council notes that in such circumstances, the sentencing court would have to balance issues of totality and the nature of the offending with the circumstance of aggravation that new offending occurred whilst on parole.

## **11.9.9 The Council's views**

### **Reforms to section 160B of the PSA**

Rather than recommend specific legislative reform, the Council recommends that the effectiveness and compatibility of these provisions form part of a review of the effectiveness of court ordered parole and Board ordered parole in Queensland. The proposed amendment to section 160B (below) regarding a dual discretion in the context of a section 209 CSA parole cancellation may have a positive impact on the interplay of these provisions, and if better data can be created and accessed, better analysis could then be conducted. The Council notes that a number of District, Supreme and Court of Appeal judgments over a nine-year period to 2018 have clarified the operation of

---

offence committed on parole] not applying where a new period of imprisonment is imposed after the expiration of the original sentence'. This results in a favourable outcome for prisoners where their court hearing is delayed and provides an incentive for outstanding matters to be deferred until after the prisoner's original sentence expires. The Council points to the Court of Appeal's judgment in *R v Smith* [2015] 1 Qd R 323, 327 [30] (Morrison JA, Muir JA and Daubney J agreeing). See also the discussion of other relevant cases at 11.9.3–11.9.7.

<sup>1579</sup> Preliminary submission (Bar Association of Queensland) 13 July 2018, 4.

<sup>1580</sup> Ibid 5.

<sup>1581</sup> Submission 15 (Queensland Law Society) 18.

<sup>1582</sup> Submission 7 (Sisters Inside) 8; Submission 7 – supplementary submission (Sisters Inside) 1.

<sup>1583</sup> Submission 6 (Legal Aid Queensland) 12.

<sup>1584</sup> Submission 12 (Parole Board Queensland) Annexure 1, Question 11.2.

<sup>1585</sup> Submission 15 (Queensland Law Society) 19.

<sup>1586</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 7.

<sup>1587</sup> Submission 4 (Fighters Against Child Abuse Australia) 27.

sections 209, 211 and 215 of the CSA and section 160B of the PSA. The Council is mindful of the possibility that attempts at legislative simplification may necessitate the development of further jurisprudence.

### **Discretion to set a parole release date when a parole order is cancelled under section 209 CSA**

The Council's view is that section 160B(2) of the PSA should be amended so that if an offender's court ordered parole order has been automatically cancelled under section 209 of the CSA the sentencing court can still choose between setting a parole release date and setting a parole eligibility date.

To be clear, the Council is not suggesting that the automatic statutory cancellation of the pre-existing parole order referred to in section 209(1) of the CSA should be altered. It is the new parole date set as part of the triggering sentence of imprisonment for the breaching offence that should be the subject of the dual discretion.

Also, the Council is not suggesting that section 160B(2) of the PSA should be amended so that, where the Parole Board has acted on information before it and exercised its judgment and discretion under section 205 of the CSA and cancelled parole, the subsequent sentencing court should have the option of setting a parole release date. The Council does not suggest removing the mandatory requirement that the court must fix the date the offender is eligible for parole in this context.

Section 205 of the CSA deals with the Parole Board amending, suspending or cancelling a parole order. Section 160B(2) of the PSA limits the mandating of an eligibility date to circumstances where the Parole Board has cancelled the order.

Maintaining the effect of section 160B(2) read with section 205 means that a sentencing court must be made aware of the cancellation of parole by the Parole Board, which may not be as clearly discerned as a sentence triggering the section 209 cancellation. However, the Council's recommendation maintains the current position in relation to sentences of imprisonment after the Parole Board has cancelled a parole order, taking into account that the Parole Board will have had access to detailed information about the person's risk of reoffending that is not necessarily before a court.

### **RECOMMENDATION: COURT POWERS WHERE OFFENCE COMMITTED ON PAROLE – SECTION 209 OF THE CORRECTIVE SERVICES ACT 2006 (QLD)**

52. Section 160B(2) of the *Penalties and Sentences Act 1992* (Qld) should be amended so that if an offender's court ordered parole order has been automatically cancelled by a new sentence of imprisonment under section 209 of the *Corrective Services Act 2006* (Qld), the sentencing court can still choose between setting a parole release date and setting a parole eligibility date. The requirement for a parole eligibility date in the context of the Parole Board's discretionary cancellation of an order under section 205 of the *Corrective Services Act 2006* (Qld), as required by section 160B(2) of the *Penalties and Sentences Act 1992* (Qld), should remain unchanged.

## **11.10 Anomaly identified by the Court of Appeal: *R v Sabine* [2019] QCA 36**

### **11.10.1 Issue identified in *R v Sabine* [2019] QCA 36**

The Court of Appeal has recently identified an anomaly in these provisions and called for legislative attention. In *R v Sabine*,<sup>1588</sup> the Supreme Court in May 2018 sentenced an offender to 2-years' imprisonment for a drug offence with a parole release date fixed after 1 year was served (17 May 2019). On 3 August 2018 he was sentenced by a magistrate to 4-months' imprisonment for other drug offences, to run concurrently with the Supreme Court sentence (thus ending in December 2018, and more than 6 months before the parole release date set by the Supreme Court). The magistrate imposed a 'new' parole release date of the same date, 17 May 2019.

Morrison JA noted that the position prior to the Court of Appeal considering the application for leave to appeal can be summarised as follows, which demonstrates an anomaly in the provisions of Part 9, Division 3 of the PSA:

- (a) the Magistrate was obliged to fix a parole release date: s 160B(3);
- (b) for that purpose the Magistrate could fix 'any day of the offender's sentence' as the offender's parole release date: s 160G(1);
- (c) any day of the four months imposed by the learned Magistrate was always going to be months earlier than the expiry of the then 'current parole release date', set by the learned sentencing judge in [the Supreme] court; and

<sup>1588</sup> [2019] QCA 36, 7–10 [32]–[53] (Morrison JA, Holmes CJ and Philippides JA agreeing).

(d) however, under s 160B(4), because the applicant had a current parole release date, the date that the Magistrate could fix could not be 'earlier than the ... current parole release date'.<sup>1589</sup>

At the appeal, Mr Sabine had served 9 months of the sentence and argued that he should be re-sentenced to immediate release on parole.<sup>1590</sup> He appealed against the Supreme Court sentence on the grounds that it was manifestly excessive. He did not appeal against the Magistrates Court sentence.<sup>1591</sup>

The commission date of the Magistrates Court offences must have pre-dated the Supreme Court sentence date.<sup>1592</sup> It is not clear whether the offences were directly related to the drug offence dealt with in the Supreme Court. However, it does not appear there was any missed opportunity to transmit the Magistrates Court charges to the Supreme Court for sentence under section 651 of the *Criminal Code* (Qld): the Supreme Court matter had gone to trial, and it appears that Mr Sabine did not have any declarable pre-sentence custody.

While the Court of Appeal refused the application for leave to appeal, it was agreed that there was no obvious way around the anomaly identified.<sup>1593</sup>

Had the Court of Appeal granted the application, it would have had no power to order immediate parole release some 14 months prior to the existing release date. As Morrison JA wrote:

Even if this court then concluded that immediate parole release was appropriate, the definition of 'current parole release date' and the provisions of s 160B(4) of the *Penalties and Sentences Act* would mean that it could not set a parole release date other than at the date set by the Magistrates Court, that is, beyond when it determined the applicant should be released. This would be so even though the 'current parole release date' was set by reference to the sentence that this Court had set aside.<sup>1594</sup>

Even other action (arguably artificial and impermissible<sup>1595</sup> — for instance, imposing a suspended sentence instead) would not have helped because the Magistrates Court sentence stood. An analysis of a hypothetical reopening of the Magistrates Court sentence indicated that no resolution lay down that path.<sup>1596</sup>

While no concluded view was expressed, possible answers were:

- specifying that a subsequent court that is sentencing an offender to a lesser period of imprisonment than an existing sentence is not required to set a parole release date; or
- permitting the subsequent court in that case to set a parole release date at the limit of the term it imposes, but on the basis that that date does not cancel the later date set by the previous court.<sup>1597</sup>

### 11.10.2 Stakeholder views

As discussed above, Morrison JA (which whom the other members of the Court agreed), suggested two possible solutions (without expressing a concluded view):

- Removing the requirement to set a parole release date when a subsequent court is sentencing an offender to a lesser period of imprisonment than an existing sentence ('the first option').

<sup>1589</sup> Ibid 9 [44] (Morrison JA, Holmes CJ and Philippides JA agreeing).

<sup>1590</sup> Ibid 4 [15].

<sup>1591</sup> Ibid 8 [34].

<sup>1592</sup> Because s 209 of the *Corrective Services Act 2006* (Qld) was not triggered by the imprisonment imposed by the Magistrates Court (that is, the parole order consequent upon the Supreme Court sentence was not automatically cancelled), it is clear that those summary drug offences were not committed during the period of the Supreme Court imprisonment — see also *Penalties and Sentences Act 1992* (Qld) s 160B(2). Mr Sabine was also in custody from the date of the Supreme Court sentence.

<sup>1593</sup> *R v Sabine* [2019] QCA 36, 10 [47] (Morrison JA, Holmes CJ and Philippides JA agreeing).

<sup>1594</sup> Ibid 10 [46] (Morrison JA, Holmes CJ and Philippides JA agreeing).

<sup>1595</sup> And such action was not countenanced by the Court of Appeal. The Court most recently warned that it would not structure a sentence to evade the consequence for parole that is mandated by statute (in a different legislative and factual context though — the serious violent offence scheme) in *R v Carrall* [2018] QCA 355, 5 [23] (Sofronoff P), citing *R v Crossley* (1999) 106 A Crim R 80, 87 [30] (McPherson JA, Jackson and Bowskill JJ agreeing). Also, Mr Sabine had not performed well on a probation order (*R v Sabine* [2019] QCS 36, 6 [20]). As to examples of where the Court of Appeal has recognised the need for an offender to be subject to supervision and the corollary undesirability of instead imposing a suspended sentence, see *R v Farr* [2018] QCA 41, 8 (Philippides JA, Gotterson JA and Douglas J agreeing) and *R v Wano; Ex parte A-G* (Qld) [2018] QCA 117, 8 [44]–[45] (Henry J, Fraser JA and North J agreeing).

<sup>1596</sup> *R v Sabine* [2019] QCA 36, 10 [48]–[52] (Morrison JA, Holmes CJ and Philippides JA agreeing).

<sup>1597</sup> Ibid 10 [53] (Morrison JA, Holmes CJ and Philippides JA agreeing).

- In the same scenario, instead permitting the subsequent court to set a parole release date at the limit of the term it imposes, but on the basis that this shorter date does not cancel the later one set by the previous court ('the second option').

Save for QCS, stakeholders did not suggest alternatives.

The Parole Board,<sup>1598</sup> Professors Douglas and Walsh, Dr Lelliott and Ms Wallis<sup>1599</sup> and Sisters Inside<sup>1600</sup> supported the first option. The Queensland Council for Civil Liberties (QCCL) also did so, noting that this was 'the simplest and most preferable means of reforming this issue'.<sup>1601</sup>

LAQ also identified the first option as appropriate but noted that 'this question is only relevant if the current parole provisions are retained. We would support an overhaul to these provisions in the interest of greater clarity and flexibility'.<sup>1602</sup>

The QLS stated that the second solution 'would be problematic to legislate for, would be confusing, and would likely create many further issues'. The first 'has some potential attractiveness but would need careful drafting so as not to constrain the subsequent Court'.<sup>1603</sup> QLS cautioned that:

To simply specify that the subsequent Court not be required to set a parole release date may constrain that Court from delaying the parole release date in circumstances where it would be appropriate to do so.

Instead, there could be a discretion as to whether to set a new parole release date. The legislation would need very, very careful wording, but one potential solution is to legislate that if a subsequent Court is of the view that the current parole release date should not be disturbed, then they are not required to set a new one. If the subsequent Court is of the view that a release on parole should be on a date after the current parole release date, then they must do so subject to the usual provisions regarding release dates.

Such a solution could be workable but also has the potential to be unwieldy and very complex.

Alternatively, the PSA could be amended to include that if a subsequent Court sentences an offender to a current parole release date that remains unchanged, then the initial parole release date given by the initial Court remains in force.

Neither solution is particularly simple and both would require very intricate drafting. It will almost certainly be a work in progress.<sup>1604</sup>

QCS was 'concerned that neither option would necessarily resolve the anomaly' identified in *Sabine* for future cases, because the second court must still be 'satisfied with the preceding court's parole date'; and 'even if a prisoner is able to successfully appeal a preceding sentence, the court is still unable to set an earlier parole date'.<sup>1605</sup>

Therefore: 'This continues to restrict the court's role in hearing the appeal and disadvantages the prisoner'.<sup>1606</sup> QCS proposed the following as a solution:

Providing the ability for a subsequent court (even if restricted to a court hearing an appeal) to consider the prisoner's full existing sentence structure and provide the intended custodial end date and the parole release/eligibility date that would supersede any existing dates. Depending on the circumstances considered by the court, this could include a lesser parole release/eligibility date.

This case highlights the need for courts to be provided with the ability to consider a holistic view of the prisoner's imprisonment when fixing a future parole date and/or custodial end date. Amending the court's powers in this way would support flexibility in sentencing and remove confusion and complexity.<sup>1607</sup>

<sup>1598</sup> Submission 12 (Parole Board Queensland) Annexure 1, Question 10.

<sup>1599</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 7.

<sup>1600</sup> Submission 7 (Sisters Inside) 8.

<sup>1601</sup> Submission 8 (Queensland Council for Civil Liberties) 3.

<sup>1602</sup> Submission 6 (Legal Aid Queensland) 11.

<sup>1603</sup> Submission 15 (Queensland Law Society) 18.

<sup>1604</sup> Ibid.

<sup>1605</sup> Submission 11 (Queensland Corrective Services) 25.

<sup>1606</sup> Ibid.

<sup>1607</sup> Ibid 25–6.

### 11.10.3 The Council's view

The Council agrees with the majority of stakeholders that the first suggestion made by Morrison JA in *Sabine* should form the basis of necessary amendments to section 160B and any other consequential amendments to other provisions in Part 9, Division 3 of the PSA.

The Council considers that this amendment should also be made regarding parole eligibility dates. This was not explored in consultation.<sup>1608</sup> However, to make the change in respect of parole release dates but not eligibility dates would create inconsistency within Part 9, Division 3 of the PSA.

The terms 'current parole eligibility date' and 'current parole release date' in section 160 of the PSA are identical. Sections 160C(4) and 160D(4) (regarding eligibility dates) mirror section 160B(6) (regarding release dates): a subsequent parole release or eligibility date cannot be earlier than an existing one. Section 160E, regarding automatic cancellation of an existing parole date due to the imposition of a new one, applies equally to release and eligibility dates. So does section 160F, regarding ensuring that, at any one time, there is only one release or eligibility date in existence for an offender. This should not impact on section 184(3)(a) of the CSA given that the person will have a pre-existing parole eligibility date.

In relation to the QCS concern regarding applying a holistic view on sentencing, the Council acknowledges that, from an operational perspective, this would seem to be a logical fix. However, a court can only deal with the matters before it. Where sentences are imposed by a higher court and the Magistrates Courts (as will usually be the case in a 'clean-up plea' situation), appeals must be lodged with the Court of Appeal and District Courts, respectively.<sup>1609</sup> While a court must take into account totality issues regarding other sentences,<sup>1610</sup> it cannot amend or revoke those sentences, unless they are before that court the subject of an appeal or a statutory power to amend, vary or revoke exercisable by that court. These aspects fall outside the Terms of Reference for this review. Proposed amendments to section 651 (discussed in section 14.2.2) may serve to ameliorate these issues.

#### RECOMMENDATION: CORRECTING THE ANOMALY IN *R v SABINE* [2019] QCA 36

53. The anomaly identified by the Court of Appeal in *R v Sabine* [2019] QCA 36 should be corrected by specifying that a subsequent court that is sentencing an offender to a lesser period of imprisonment than an existing sentence is not required to set a parole release date. The same amendment should be made regarding parole eligibility dates.

## 11.11 The relationship between court ordered parole, pre-sentence custody declarations and unexpired portions of existing sentences

### 11.11.1 Background to the Council's review — complexity in sentencing and in sentence administration

In referring the matter of whether legislative reform is needed to reduce the complexity of the sentencing calculation process, the Council's Terms of Reference cite Recommendation 2 of the 2016 Queensland Audit Office (QAO) report, *Criminal Justice System — Prison Sentences, Report 4: 2016–17* (QAO Report), that:

The Department of Justice and Attorney-General in collaboration with the Queensland Police Service assess the need to review relevant sentencing legislation to reduce the complexity of sentence calculations.

Sentencing calculations, and section 159A of the PSA, are relevant in any event because of the interplay with court ordered parole and the statutory provisions that apply where an offender has reoffended while on parole.

The QAO Report was an audit of public sector entities responsible for administering sentences following two previous reviews. It examined how the criminal justice system exchanges and records data to calculate and administer custodial sentences accurately in respect of adults in Queensland.<sup>1611</sup>

<sup>1608</sup> In its written submission, Queensland Corrective Services did suggest that s 160C(4) of the *Corrective Services Act 2006* (Qld) raised similar issues: Submission 11 (Queensland Corrective Services) 25.

<sup>1609</sup> See *Criminal Code* (Qld) s 668D (although note s 669A regarding appeals by the Attorney-General on summary disposition of indictable offences) and *Justices Act 1886* (Qld) s 222.

<sup>1610</sup> See *Penalties and Sentences Act 1992* (Qld) ss 9(2)(k)–(m).

<sup>1611</sup> Queensland Audit Office, *Criminal Justice System — Prison Sentences* (Report 4: 2016–17, 2016) 2.

Inaccurate sentence calculations can have serious risks. If the sentence calculation is incorrect a prisoner may be discharged earlier than the court intended (which poses a risk to the community) or unlawfully detained (which infringes on a prisoner's rights).<sup>1612</sup> As well as these risks, errors in sentence calculations risk exposing the State to unnecessary costs.<sup>1613</sup>

The QAO Report identified a number of administrative and operational errors that resulted in inaccurate sentence calculations:

- Process and communication issues within and between criminal justice entities were the most common type of error (73 per cent) — where there are failures in sending, receiving or actioning verdict and judgment records and court or parole orders, as well as instances of releasing the wrong prisoner;
- Incorrect data entry (15 per cent) — where court staff incorrectly interpreted the handwritten decision of a Magistrate or Judge or incorrectly entered the court result or discharge date; and
- Inaccurate sentence calculations constituted the remainder (12 per cent) — where staff have incorrectly calculated a prisoner's sentence.<sup>1614</sup>

In respect of whether there was a need to review sentencing legislation, the QAO Report noted the following factors contributed to the complexity of sentence calculations:

- Where an offender has served time in custody prior to being sentenced (whether or not this is declared can make the start date of the sentence difficult to determine);
- Where an offender is sentenced for a large number of offences committed on different occasions (and sentences are ordered to be cumulative, concurrently or partially cumulative or a combination); and
- Where there is a change in an offender's sentence (for example, if an offender is sentenced for offences while undergoing an existing sentence; if the offender has been resentenced on appeal; or if an offender has been unlawfully at large).<sup>1615</sup>

No specific provisions of the PSA or the CSA were identified as requiring legislative amendment in the QAO Report.

The Department of Justice and Attorney-General's (DJAG) November 2016 response to the QAO Report indicated that collaboration between justice entities had commenced with the recent re-establishment of the Lawful Detention Expert Reference Group (LDERG) consisting of senior representatives from Queensland Courts Services, QCS and the Queensland Police Service (QPS). It would identify, agree and implement inter-agency actions to mitigate the risk of unlawful detention or release of prisoners.<sup>1616</sup>

The reply noted that DJAG would:

Consult with stakeholders, both internal and external to Government, to assess whether discharge and detention errors are due in part to any complexity inherent in the relevant legislative provisions.

This assessment will also consider any relevant findings and recommendations in the final report of the Queensland Parole System Review, led by Mr Walter Sofronoff QC ...<sup>1617</sup>

The QAO's recommendation was subsequently referred to in the Council's current Terms of Reference.

Since the QAO's Report, the LDERG has continued to report regularly, and also reports quarterly to an Oversight Committee.

LDERG membership has been expanded to include representatives from DJAG, QCS, the Parole Board, the QPS, Queensland Courts, and Youth Justice.

Membership of the LDERG and Oversight Committee is at senior decision-making level providing visibility and awareness of cross agency issues and assists with the implementation of actions by the respective agencies.

<sup>1612</sup> Ibid 1.

<sup>1613</sup> Costs such as 'managing prisoners beyond their sentence, locating and returning prisoners released in error and managing complaints, compensation, and legal costs': *ibid*.

<sup>1614</sup> Ibid 3, 29.

<sup>1615</sup> Ibid 13–16.

<sup>1616</sup> Letter from David Mackie, Director General, DJAG, 24 November 2016, attached to Queensland Audit Office (n 1611) 60–5, 2.

<sup>1617</sup> Queensland Audit Office (n 1611) 63.

Both groups continue to operate. The LDERG members with whom the Council liaised reported that the group had achieved positive results that allowed each member organisation to develop a system-wide understanding of issues and address them at a root-cause level.

The Council ascertained that the LDERG itself had not identified specific legislative provisions requiring amendment, and instead had a focus on procedural and system issues. The Council also met with individual LDERG member agencies in their own right. In particular, QCS provided feedback on specific legislative issues.

### 11.11.2 Part 9, Division 2 of the PSA, calculation — ‘no other reason’

Part 9, Division 2 of the PSA provide the legislative framework for sentence calculation by judicial officers imposing a sentence. Section 154 states that imprisonment for an offender sentenced on indictment starts ‘on the day the court imposes the imprisonment’.<sup>1618</sup> Imprisonment for an offender convicted summarily starts ‘at the beginning of the offender’s custody for the imprisonment’.<sup>1619</sup> The exceptions are if the imprisonment is ordered to be served cumulatively,<sup>1620</sup> the offender is on bail pending the determination of an appeal,<sup>1621</sup> or the offender is unlawfully at large.<sup>1622</sup>

Where an offender has served time in custody, section 159A of the PSA requires that time held in custody to be declared as time served, unless otherwise ordered. This section does not apply to a period of custody or imprisonment of less than one day, to a term of imprisonment that has been wholly suspended, or to the suspended part of a partly suspended prison sentence.<sup>1623</sup>

The method of declaring pre-sentence custody is supported by the ALRC, which commented:

Of the three methods available for crediting pre-sentence custody [backdating the commencement of a sentence, declaring time served or reducing the term of the sentence], declaring time as time already served is the most principled and transparent, and it lends itself equally to crediting time for continuous and interrupted periods of custody.

Adopting this method is consistent with having a federal sentence commence on the day it is imposed ... and it avoids the fiction associated with backdating sentences to take into account interrupted periods of custody which may result in a commencement date that does not correspond to a time when the offender was actually in custody. Further, this approach does not suffer from the disadvantages associated with crediting pre-sentence custody by reducing the sentence, namely, creating a public perception of inadequate sentences, and skewing statistics in relation to that category of offence and offender.<sup>1624</sup>

However, for a declaration of pre-sentence custody to be made under Queensland legislation, the offender must be ‘held in custody in relation to proceedings for the offence and for no other reason’.<sup>1625</sup> The term ‘no other reason’ has caused some difficulty for the courts. This term (both in the current s 159A, and the previous s 161) has always existed since the introduction of the PSA in 1992.<sup>1626</sup>

The provision excludes circumstances where there are multiple offences that are not all before the court at sentence, or where the offender is also serving a sentence for another offence. This is discussed further, with case examples, below.

#### The day of sentence

As discussed above, section 159A(2) of the PSA prescribes circumstances where pre-sentence custody cannot be declared and includes:

- a period of custody of less than one day; or

<sup>1618</sup> Ibid s 154(1)(a).

<sup>1619</sup> Ibid s 154(1)(b). It is unclear why there is different wording between a summary conviction and conviction on indictment. A possible explanation is that imprisonment can, in certain circumstances, be imposed on summary conviction in the absence of the offender: see sections 142 and 142A of the *Justices Act 1886* (Qld), which provides for a permissible procedure in the absence of the defendant in certain cases. This was discussed in *Kleinig v The Commissioner of Police* [2015] QDC 304.

<sup>1620</sup> *Penalties and Sentences Act 1992* (Qld) s 156(1).

<sup>1621</sup> Ibid s 158A.

<sup>1622</sup> Ibid s 159.

<sup>1623</sup> Ibid s 159A(2).

<sup>1624</sup> Australian Law Reform Commission (n 145) 301–2 [10.35]–[10.36].

<sup>1625</sup> *Penalties and Sentences Act 1992* (Qld) s 159A(1).

<sup>1626</sup> The provisions in the *Penalties and Sentences Act 1992* (Qld) were renumbered on 28 August 2006.

- imprisonment of less than one day.

Section 154 of the PSA provides that a term of imprisonment commences either on the day the court imposes imprisonment for a conviction on indictment or at the beginning of the offender's custody for the imprisonment for a summary conviction. However, this section operates independently of section 159A of the PSA.<sup>1627</sup>

Complexity in sentencing can arise when a judge (for a conviction on indictment) or magistrate (for a summary conviction) is declaring pre-sentence custody and must determine whether or not the day of sentence is to be declared as time served as part of the sentence.

In *R v Jamieson*<sup>1628</sup> the issue of pre-sentence custody was raised in the Court of Appeal. The appellant was sentenced on 26 September. At sentence, a pre-sentence custody certificate was tendered, which showed that the appellant was in custody from 19 September at 11 am until 26 September at 9 am with a total of six days declarable. The sentencing judge made a declaration in accordance with the pre-sentence custody certificate. On appeal, the Crown conceded that the period declared should have been from 20 September to 25 September. It was conceded that it was erroneous for the sentencing judge to count the day of sentence as time served.<sup>1629</sup>

In contrast, in a recent District Court decision it was held that the sentencing magistrate erred in not declaring the day of sentence as time served under the sentence.<sup>1630</sup>

Section 38 of the *Acts Interpretation Act 1954* (Qld) provides:

1. If a period beginning on a given day, act or event is provided or allowed for a purpose by an Act, the period is to be calculated by excluding the day, or the day of the act or event, and—
  - a. if the period is expressed to be a specified number of clear days or at least a specified number of days—by excluding the day on which the purpose is to be fulfilled; and
  - b. in any other case—by including the day on which the purpose is to be fulfilled.

In Victoria there is a similar scheme for crediting pre-sentence custody, which is 'reckoned'.<sup>1631</sup> Section 44 of the *Interpretation of Legislation Act 1984* (Vic), states:

1. Where in an Act or subordinate instrument a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.
2. Where in an Act or subordinate instrument a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period.

It is clear from the Victorian legislation that the day of sentence is not to be included when pre-sentence custody is reckoned.

During consultation, there was some uncertainty expressed about whether the day of sentence should be counted as pre-sentence custody or the first day of the sentence. Judgments show that different courses have been taken on different occasions. The Council recommends an amendment to provide clarity in this regard to promote certainty and consistency in sentencing.

<sup>1627</sup> *A-G (Qld) v Kanaveilomani* [2015] 2 Qd R 509, 529 [59] (Morrison JA): 'The two sections [154 and 159A] operate on different subject matters. Section 154 deals with calculation of the term of imprisonment. So much is plain from the heading. In other words, for the purposes of calculating the term of imprisonment, the term starts on the day that the court imposes imprisonment. That says nothing about whether the sentence is backdated, or deemed to have commenced at an earlier time, by reason of a declaration under s 159A(3)(c).'

<sup>1628</sup> [2016] QCA 11.

<sup>1629</sup> *Ibid* 9 [42]–[43] (Morrison JA, Gotterson and Philippides JJA agreeing). However, there have been a number of decisions where reference was made to the day of sentence being declared (although this was not considered on appeal). See *A-G (Qld) v Kanaveilomani* [2015] 2 Qd R 509, 516 [2] (McMurdo P) 'The sentencing judge declared ... time spent in pre-sentence custody from 20 November 2010 (the day after he completed his sentence for the rape offences) to 10 January 2012 (the day of his sentence for the 2009 offences), a total of 417 days' (emphasis added, footnotes omitted); *R v McCusker* [2015] QCA 179 (29 September 2015), 11 [47]: 'Of that period 35 days (from 10 February, when the two years and three month sentence expired, to 16 March 2015, the day of sentence) was advanced as able to be declared as time served under the sentence pursuant to s 159A(1) of the *Penalties and Sentences Act 1992* (Qld) and the primary judge did so.' See also *Prior v The Queen* [2012] QDC 169, 8 (Durward J); *Johnson v Commissioner of Police* [2010] QDC 268 (Samios J) 3–4. Cf *R v Farr* [2018] QCA 41 (20 March 2018), 2 (Philippides JA) where the day of sentence was not declared.

<sup>1630</sup> *Allen v Commissioner of Police* [2019] QDC 34, 6, 8 (Horneman-Wren SC, DCJ).

<sup>1631</sup> *Sentencing Act 1991* (Vic) s 18(1).

## RECOMMENDATION: PRE-SENTENCE CUSTODY – DAY OF SENTENCE

54. Section 159A of the *Penalties and Sentences Act 1992* (Qld) should be amended to clarify that the day of sentence is not to be taken to be imprisonment already served under the sentence for the purpose of a pre-sentence custody declaration.

### 11.11.3 *R v McCusker* [2015] QCA 179— an exception to the general rule

In *R v McCusker*,<sup>1632</sup> the following occurred in chronological order:

- Mr McCusker unlawfully killed someone.
- He then committed unrelated property offences two months later.
- He was sentenced to imprisonment with a parole release date for the property offences (a wholly suspended sentence pre-dating all of these offences was also fully invoked but does not otherwise feature).
- He was later charged (initially with murder, although the Crown ultimately accepted a plea of guilty to manslaughter) during the non-parole period of the imprisonment for the property offences.
- He was not released on his parole release date purely because of the operation of section 199(2) of the CSA (because he was on remand for the murder charge, see below).

The relevant parole board did not take any action (such as suspension) because it was barred by statute from issuing the court ordered parole order in the first place. McMeekin J noted the relevant statutory provisions:

- PSA section 159A(1) (Time held in pre-sentence custody to be deducted):
  - If an offender is sentenced to a term of imprisonment for an offence;
  - any time that the offender was held in custody in relation to proceedings for the offence and for no other reason [emphasis added];
  - must be taken to be imprisonment already served under the sentence;
  - unless the sentencing court otherwise orders.<sup>1633</sup>
- PSA section 159A(10): 'proceedings for the offence includes proceedings that relate to the same, or same set of, circumstances as those giving rise to the charging of the offence'.
- CSA section 199 (court ordered parole order): The chief executive (1) must issue a court ordered parole order for a prisoner in accordance with the date fixed for the prisoner's release on parole under the PSA — but (2) cannot do so if the prisoner is being detained on remand for an offence, unless bail is granted, or the charge is withdrawn.

The primary judge had held that the time from the parole release date for the property offences to the expiry of the period of that order could not be declared as time served under the subsequent manslaughter sentence:

I should take into account (although not in a precise mathematical way) the fact that you were required to serve the whole of the sentence imposed on you on the earlier offences because of your arrest for [the murder charge].<sup>1634</sup>

On this point, the Court of Appeal's judgment stated:

The approach that her Honour took, or at least expressed, is a very common one. It applies in the more usual case where the prisoner before the Court has no immediate right of release in respect of the other offences, offences not the subject of the proceedings, on which he or she is being held. Then there is a need to apply some judgment as to what part of the period ought to be brought into account. There is then some other reason for the incarceration of the prisoner. But that is not this case.<sup>1635</sup>

<sup>1632</sup> [2015] QCA 179.

<sup>1633</sup> As to the words 'otherwise orders': 'That provision mandates that a declaration for presentence custody must be made by the court, if there is declarable presentence custody, unless the sentencing court otherwise orders. There is no discretion conferred to make a declaration in respect of presentence custody, where it is not declarable in accordance with the terms of the provision': *R v Carter* [2016] QSC 86, 8 [34] (Mullins J).

<sup>1634</sup> *R v McCusker* [2015] QCA 179, 4 [9] (McMeekin J, Morrison and Philippides JJA agreeing).

<sup>1635</sup> *Ibid* 6 [25].

The approach the primary judge expressed — that the applicant was ‘required to serve the whole of the sentence imposed on [him] on the earlier offences because of [his] arrest for this offence’ — while true as a statement of what had transpired, did not reflect any requirement of the legislation. The legislation did not ‘require’ the applicant to serve any further imprisonment in relation to those earlier offences.<sup>1636</sup>

Mr McCusker was in fact entitled to have the entire 553 days spent in pre-sentence custody (from the property offences parole release date to his manslaughter sentence) declared to be time taken as imprisonment already served on the latter sentence (as opposed to 35 days initially declared).<sup>1637</sup>

It is clear that this time served was in large part Mr McCusker simultaneously serving out his entire head sentence for the property offences in addition to being held on remand on the murder charge, which triggered section 199(2). It was ‘obvious’, though, that the only reason for Mr McCusker’s incarceration after his parole release date was that he faced a murder charge:

Hence, the argument that there was some reason other than that ‘the offender was held in custody in relation to proceedings for the offence’ before the court — that offence being the murder charge — was technical at best. In justice, whether declarable or not, there was no reason why that time in custody should not have been treated — in full — as time served under the sentence imposed for the unlawful killing ...<sup>1638</sup>

Section 199(1) of the CSA otherwise entitled Mr McCusker to be released on his property offences parole release date.<sup>1639</sup> Had the sentence taken place on that parole release date, he ‘would have not served one day more of the sentence imposed for the prior and unrelated offences’.<sup>1640</sup> McMeekin J noted that:

This was an unusual case ... The considerations surrounding the pre-sentence custody served, while not unique, are not usually found.<sup>1641</sup>

#### 11.11.4 The ‘more usual’ case

In *R v Carter*,<sup>1642</sup> Mullins J considered McCusker and concluded:

*McCusker* represents an exception to the general rule that a declaration for presentence custody is not made where an offender is held on remand for a particular offence at the same time as serving an actual sentence for another offence. The exception was justified, however, by reference to the effect of s 199 of the CSA.<sup>1643</sup>

Further:

What can be noted about s 159A of the PSA (and s 161 as it stood when Mr Carter was sentenced at the trial) is that its focus is on giving credit to an offender for ‘presentence’ custody, while the proceedings for the relevant offences have not been finalised. In general terms, it does not apply to presentence custody where an offender is held on remand for a particular offence at the same time as serving an actual sentence for another offence.<sup>1644</sup>

Mr Carter was convicted of murder after a retrial and sentenced to the mandatory life sentence, with 54 days of pre-sentence custody declared as time served. Earlier, at his first murder trial, he had pleaded guilty to other offences resulting in an effective concurrent 2-year sentence (with 70 days declared for all non-murder offences). His appeal against the initial murder conviction was allowed about five weeks after the date he would have been released if he had only been sentenced to the 2-year term. He was released from custody on bail on the murder charge the following month. At the second murder sentence, Mr Carter sought unsuccessfully to reopen his sentence, seeking:

Credit against his current sentence of life imprisonment for the period of 487 days that he served as imprisonment on account of the sentence imposed for the offence of murder at the first trial which was served at the same time as he was serving the sentences for the [other offences resulting in the two-year term].<sup>1645</sup>

After commenting on *McCusker* as above, Mullins J noted:

<sup>1636</sup> Ibid 6 [20].

<sup>1637</sup> Ibid 6 [26].

<sup>1638</sup> Ibid 5 [15].

<sup>1639</sup> Ibid 6 [19].

<sup>1640</sup> Ibid 6 [20].

<sup>1641</sup> Ibid 4 [7].

<sup>1642</sup> [2016] QSC 86 6–7 [20]–[27] (Mullins J).

<sup>1643</sup> Ibid 7 [26].

<sup>1644</sup> Ibid 5 [19].

<sup>1645</sup> Ibid 3 [6]. The version of s 159A at play in this case was effectively an older, pre-2004 version — see 4 [13]. But this does not appear to alter the relevance of the case.

Mr Carter did, in fact, get the benefit of a presentence custody declaration on the basis of analogous reasoning to *McCusker* in respect of the period he had been in presentence custody between [the release date on the concurrent two-year term] and [the date of release on bail after the successful murder conviction appeal] on the basis that he would have been released from custody for the [non-murder offence on its release date].<sup>1646</sup>

Mullins J held that the 487 days Mr Carter sought credit for were attributable to the earlier sentence imposed at the first trial,<sup>1647</sup> which constituted a different reason for the prior period of imprisonment.<sup>1648</sup> Her Honour noted that ‘there is no discretion conferred to make a declaration in respect of presentence custody, where it is not declarable in accordance with the terms of the provision’.<sup>1649</sup>

In the normal course, where an offender who is being sentenced has been held on remand, but cannot get the benefit of presentence custody which is not otherwise attributable to any sentence, but for some other reason is not declarable under s 159A, it is usual for the sentencing judge to take that non-declarable presentence custody into account by reducing the sentence and/or the period before which the offender is eligible for parole.<sup>1650</sup>

There are numerous examples of sentence appeals in Queensland Court of Appeal judgments where this relief was sought by applicants who had reoffended while on parole and had had to return to custody to complete the unexpired portion of their existing sentence (s 211 CSA) and who had spent periods in custody that could not be declared under section 159A of the PSA.<sup>1651</sup>

Such appeals typically involve complaints regarding:

- inadequate application of the totality principle (expressed in the context of the global head sentence<sup>1652</sup> or because no allowance was made for a consequence of the commission of the offences being that the applicant had to serve a further period being the balance of previous sentences);<sup>1653</sup>
- failure to give sufficient weight to the period of non-declarable pre-sentence custody.<sup>1654</sup>

A sentencing judge is not obliged to take into account time spent in pre-sentence custody that is not declarable under section 159A — some allowance can be made for it, but it is not required to be the entirety of the pre-sentence custody.<sup>1655</sup> Furthermore, it is not mandatory to do so at the first opportunity, although this is generally desirable:<sup>1656</sup>

Where a period of custody cannot be declared, the sentencing judge should ‘make it plain in the sentencing remarks whether and to what extent and in what manner, such an allowance is being made on account of a period of that custody’.<sup>1657</sup>

While this ‘is an important guidance for sentencing judges, it does not prescribe a legal requirement, a noncompliance with which will necessarily involve an error in the exercise of the sentencing discretion’.<sup>1658</sup> A judge is ‘not obliged to announce effectively two sentences, one which would be imposed apart from this period, and the other sentence, which would be imposed by bringing it into account’.<sup>1659</sup>

<sup>1646</sup> Ibid 7 [27]. See for example, *R v Smith* [2018] QCA 228, 3–4 [7]–[13] (Henry J, Sofronoff P and Morrison JA agreeing).

<sup>1647</sup> Ibid 7 [32].

<sup>1648</sup> Ibid 8 [32].

<sup>1649</sup> Ibid 8 [34].

<sup>1650</sup> Ibid 8 [35], cited with approval in *R v Gray* [2016] QCA 322, 8 [37] (Morrison JA, McMeekin J agreeing). See also *R v Skedgwell* [1999] 2 Qd R 97, 99–100; *R v Holton* [1998] 1 Qd R 667, 671 (Pincus JA); *R v Jones* [1998] 1 Qd R 672, 674–5 (Davies JA, Thomas and Lee JJ).

<sup>1651</sup> Because there was ‘another reason’, including, as well as return to custody because of reoffending on parole, absence of a summary charge which also related to the remand period (*R v Smith* [2018] QCA 228, 3 [7]; *R v Vidler* [2018] QCA 232, 3, *R v NT* [2018] QCA 106, 5 [13]) and because the applicant had been on a supervision order made pursuant to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld): *R v Hansen* [2018] QCA 153.

<sup>1652</sup> *R v Macklin* [2016] QCA 244; *R v McAnally* [2016] QCA 329, 3 [7].

<sup>1653</sup> As in *R v Mohammed* [2018] QCA 289, 1 (McMurdo JA, Gotterson JA and Douglas J agreeing).

<sup>1654</sup> *R v Macklin* [2016] QCA 244, 2 [2]; *R v NT* [2018] QCA 106; *R v Gray* [2016] QCA 322, 3 [8].

<sup>1655</sup> *R v McAnally* [2016] QCA 329, 11 [52] (Morrison JA, Fraser and McMurdo JJA agreeing).

<sup>1656</sup> *R v Vidler* [2018] QCA 232, 3 (McMurdo JA, Sofronoff P and Henry J agreeing) citing *R v Fabre* [2008] QCA 386, 4 [14] (Fraser JA, Keane and Muir JJA agreeing). See also *R v Heta* [1997] QCA 179 (Fraser JA). The same point was made in *R v NT* [2018] QCA 106, 7 [27] (Atkinson J, Gotterson and Morrison JJA agreeing).

<sup>1657</sup> *R v Vidler* [2018] QCA 232, 4 citing *R v Skedgwell* [1999] 2 Qd R 97, 100 (McPherson JA, Davis JA and Shepherdson J agreeing).

<sup>1658</sup> Ibid. See also *R v Mohammed* [2018] QCA 289, 5 (McMurdo JA, Gotterson JA and Douglas J agreeing) commenting on *R v Macklin* [2016] QCA 244.

<sup>1659</sup> Ibid.

### 11.11.5 The complication of mandatory sentencing on pre-sentence custody and totality issues

Chapter 5 of this report, discussed how mandatory sentencing provisions can limit courts' discretion and give rise to uncertainty about their intended application.

Mandatory sentence provisions that cannot be mitigated or varied, such as those that apply to murder,<sup>1660</sup> weapons,<sup>1661</sup> and dangerous prisoner offences,<sup>1662</sup> also operate to constrain the ability of courts to make allowance for non-declarable time served; for example, by not allowing courts to reduce head sentences or non-parole periods in the ways detailed above.

This was highlighted in the case of *R v Fox*.<sup>1663</sup> In that case, the offender was on bail for attempted murder. While on bail, the offender committed further offences, including murder. He was arrested on 1 February 1997 and held for 98 days before his bail for the attempted murder was revoked on 9 May 1997. Until his conviction he was held in custody for both sets of offences (totalling 371 days). At sentence, only the 98 days was declared as time served.<sup>1664</sup> This was the subject of appeal, with the Court of Appeal finding:

... in the case of the appellant, it is not open to this Court, any more than it was to the trial judge, either to reduce the period to be served under the head sentence of life imprisonment, or to accelerate the date of eligibility of parole, by reference to the period spent in custody after 9 May 1997. In making the declaration that 98 days of that period of custody was to be treated as time served under the sentences imposed, his Honour acted in accordance with *R. v. Blake* [1995] 2 Qd.R. 167; but the law allowed him to go no further than that in recognising and giving effect to the 371-day period of pre-trial custody. It seems pointless to continue urging that the drafting and interaction of these provisions is obscure, and in need of legislative attention: see *R. v. Blake* [1995] 2 Qd.R. 167, 170; but little harm can be done by repeating the plea on this occasion.<sup>1665</sup>

### 11.11.6 Pre-sentence custody and imprisonment

In Queensland, if a person has spent time in custody prior to sentence, this may be declared and counted as time served under a sentence.<sup>1666</sup> As discussed above, time spent in pre-sentence custody cannot always be declared as time served.<sup>1667</sup> Whether a person is released on bail or remanded in custody prior to sentence is governed by the *Bail Act 1980* (Qld).<sup>1668</sup>

Figure 11-14 shows that the proportion of unsentenced people (i.e. on remand) in the custody of QCS has increased over the last 10 years, increasing from 20.4 per cent of prisoners in Queensland at 30 June 2009 to 30.0 per cent at 30 June 2019.<sup>1669</sup> The Australian Institute of Health and Welfare (AIHW) reported that unsentenced prisoners made up over half (58%) of Queensland prison entrants during the 2018 data collection period.<sup>1670</sup>

<sup>1660</sup> *Criminal Code* (Qld) s 305.

<sup>1661</sup> *Weapons Act 1990* (Qld) ss 50(1); 50B(1); 65(1).

<sup>1662</sup> *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) s 43AA(2) (contravening a relevant order by removing or tampering with a stated device for the purpose of preventing the location of the released prisoner to be monitored – minimum penalty – 1 year's imprisonment served wholly in a corrective services facility; maximum penalty – 5 years' imprisonment).

<sup>1663</sup> [1998] QCA 121.

<sup>1664</sup> The previous section was 161 of the *Penalties and Sentences Act 1992* (Qld), renumbered on 28 August 2006.

<sup>1665</sup> *R v Fox* [1998] QCA 121, 19 (McPherson JA, Pincus JA and Thomas J agreeing). Note: At the time the relevant provisions were sections 158 and 161 of the *Penalties and Sentences Act 1992* (Qld).

<sup>1666</sup> *Penalties and Sentences Act 1992* (Qld) s 159A.

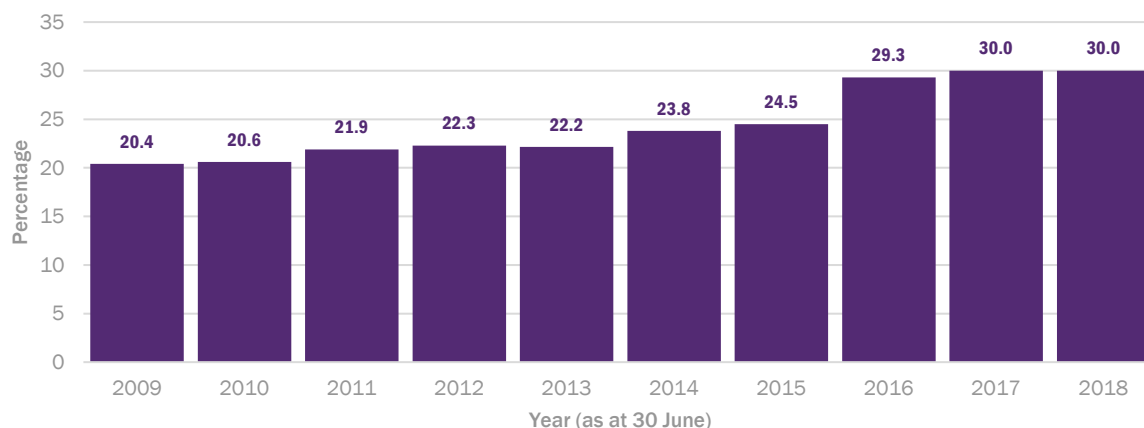
<sup>1667</sup> Under *Penalties and Sentences Act 1992* (Qld) s 159A(1), the offender must be in custody 'for no other reason'.

<sup>1668</sup> See *Bail Act 1980* (Qld) ss 7–9, 16.

<sup>1669</sup> Australian Bureau of Statistics (n 15).

<sup>1670</sup> Australian Institute of Health and Welfare (n 22) data Table S157.

**Figure 11-14: Proportion of people in Queensland Corrective Services custody that were on remand as at 30 June 2009–2018.**



Source: Australian Bureau of Statistics, *Prisoners in Australia*, Cat No. 4517.0 (2009 to 2018).

There can be significant consequences for a person as a result of being remanded in custody such as a loss of employment or income, exposure to a harsh prison environment, impact on familial relationships, disruption to education, and limits on a person's ability to contribute to their defence. This may result in a 'plea for convenience' (if the time spent on remand awaiting trial will be beyond the term ultimately imposed) and if a person is acquitted they receive no compensation for the time spent in custody.<sup>1671</sup> The ALRC observed that a large proportion of Aboriginal and Torres Strait Islander people held on remand either do not ultimately receive a sentence of imprisonment or are released with time served.<sup>1672</sup> People on remand may also not have the opportunity to engage or participate in programs aimed at preventing reoffending and addressing offending behaviour. This section considers another potential consequence – whether a person with pre-sentence custody is more likely to be sentenced to imprisonment and for a longer period than a person without pre-sentence custody.

Few Australian research studies are available on the relationship between pre-sentence custody and imprisonment; however, recent research from NSW by the Bureau of Crime Statistics and Research has examined this relationship.<sup>1673</sup> The research compared a cohort of defendants who were granted bail at their first court appearance (n=18,491) with a similar cohort of defendants who were refused bail and remanded in custody (n=23,871).<sup>1674</sup> The sentencing outcomes of these cohorts differed significantly, with 56.7 per cent of those refused bail at their first hearing<sup>1675</sup> receiving an imprisonment sentence at finalisation, compared to 18.4 per cent of those released on bail.<sup>1676</sup>

Multivariate analyses found that, controlling for factors that could influence sentencing outcomes, a person who was refused bail was 10 percentage points more likely to receive a custodial sentence for their primary offence.<sup>1677</sup> This indicates that 'bail status has a causal effect on the likelihood of a custodial penalty even after accounting for observed and unobserved characteristics'.<sup>1678</sup>

<sup>1671</sup> Natalia Antolak-Saper, 'The Relevance of Bail Conditions to the Sentencing of Offenders' (2017) 19 *Flinders Law Journal* 89, 90–1; Paul Heaton, Sandra Mayson and Megan Stevenson, 'The Downstream Consequences of Misdemeanor Trial Detention' (2016) 69 *Stanford Law Review* 711, 785–86; Sarah Ottone and Christine Scott-Hayward, 'Pretrial Detention and the Decision to Impose Bail in Southern California' (2018) 19(2) *Criminology, Criminal Justice, Law & Society* 24, 25; Will Dobbie, Jacob Goldin, and Crystal S. Yang, 'The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges' (2018) 108(2) *American Economic Review* 214.

<sup>1672</sup> Australian Law Reform Commission (n 21) 149 [5.1].

<sup>1673</sup> Sara Rahman, 'The Marginal Effect of Bail Decisions in Imprisonment, Failure to Appear and Crime' (Crime and Justice Bulletin No. 224. NSW Bureau of Crime Statistics and Research, 2019).

<sup>1674</sup> *Ibid* 9.

<sup>1675</sup> *Ibid* 8.

<sup>1676</sup> *Ibid*. The report noted that initial bail refusal does not determine final bail decisions as people who are initially refused bail may subsequently be released and those released may reoffend or apply to have their bail revoked prior to sentence. However, for this research, initial bail status is preferable to using bail status at finalisation as status at finalisation may not consider any further offending and may underestimate the incapacitative effects of remand: *Ibid* 4.

<sup>1677</sup> *Ibid* 11.

<sup>1678</sup> *Ibid*.

In another NSW study, conducted in 2016, the sentencing outcomes of 976 inmates remanded in custody were examined by NSW Corrective Services.<sup>1679</sup> Of the 976 inmates on remand, 589 (60.3%) remained on remand until finalisation of their case. The remaining 387 (39.7%) were later released on bail until the finalisation of their case. Of those who remained on remand, 70.0 per cent received a custodial sentence and 14.3 per cent received a community-based sentence.<sup>1680</sup> Of those who were released on bail, 27.1 per cent received a custodial sentence and 45.5 per cent received a community-based sentence.<sup>1681</sup> It was noted that further research into the remand population and judicial outcomes could lead to improved resource allocation for corrective services and program provision, as well as being a potential opportunity to explore alternatives to remand and to highlight the importance of developing an integrated justice information system to monitor individuals through the system.<sup>1682</sup>

The findings from these studies align with international research. Several studies from the United States of America (USA) have estimated the effects of pre-trial detention sentencing outcomes and found that pre-sentence custody increased the likelihood of receiving an imprisonment sentence.<sup>1683</sup>

The Vera Institute's Manhattan Bail Project, which is widely considered to be the first systematic investigation into the effects of bail, found that defendants who were remanded were more likely to be sentenced to incarceration.<sup>1684</sup>

As part of a decade-long study of bail in New York City by Mary Phillips, it was found that pre-trial detention significantly increased the likelihood of a jail or prison sentence being imposed.<sup>1685</sup> For felony offences, 87 per cent of defendants who were in jail for the entire pre-trial period were sentenced to incarceration, compared to 20 per cent of people who spent no time in custody during the pre-trial period.<sup>1686</sup> The study also found that, for felony offences, even after controlling for charge severity, type and the potential length of time required for a matter to be resolved, the number of days spent in pre-trial detention had a significant impact on sentence length for offenders in New York.<sup>1687</sup>

A study conducted by Marian Williams in the USA examined the effect of bail on the likelihood of a custodial penalty in Leon County, Florida.<sup>1688</sup> This research found that being refused bail significantly increased the odds of receiving a custodial penalty by a factor of 6 and remained significant when legal variables such as offence type, number of charges, attorney type, and defendant demographics were controlled for.<sup>1689</sup> The study stated that 'pretrial detention was the strongest predictor of incarceration, even when controlling for legally relevant and other extralegal variables'.<sup>1690</sup>

Lowenkamp, VanNostrand and Holsinger considered pre-trial detention and sentencing outcomes in Kentucky and found that, controlling for demographic differences, defendants that were detained for the entire pre-trial period were 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than those who were released on remand at some point pending trial.<sup>1691</sup>

In Harris County, Texas, a study found that of people charged with misdemeanours that were detained pre-trial, 75.0 per cent received a jail sentence, compared with 40.2 per cent of those who were released pre-trial.<sup>1692</sup> These differences remain after controlling for offence type, demographic characteristics and criminal history, with those

<sup>1679</sup> Jennifer Galouzis and Simon Corben, 'Judicial Outcomes of Remand Inmates in New South Wales' (2016) *Research Bulletin No. 34*.

<sup>1680</sup> Ibid 9 (calculated using data contained in Figure 5).

<sup>1681</sup> Ibid 8–9 (calculated using data contained in Figure 5).

<sup>1682</sup> Ibid 1, 13–14.

<sup>1683</sup> Charles E Ares, Anne Rankin and Herbert Sturz, 'The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole (1963) 38 *New York University Law Review* 67; Mary T Phillips, *A Decade of Bail Research in New York City* (2012) NYC Criminal Justice Agency, Inc; Marian R Williams, 'The Effect of Pretrial Detention on Imprisonment Decisions' (2003) 28 *Criminal Justice Review* 299. Cf Meghan Sacks and Alissa R Ackerman, 'Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?' (2014) 25 *Criminal Justice Policy Review* 59, 71 who found that '[t]he ability to post bail did not affect whether a defendant received a sentence of incarceration ...'.

<sup>1684</sup> Ares (n 1683).

<sup>1685</sup> Phillips (n 1683), 115.

<sup>1686</sup> Ibid 118–119.

<sup>1687</sup> Ibid 120, 127.

<sup>1688</sup> Williams (n 1683).

<sup>1689</sup> Ibid 312.

<sup>1690</sup> Ibid.

<sup>1691</sup> Christopher T Lowenkamp, Marie VanNostrand and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013), 10.

<sup>1692</sup> Heaton, Mayson and Stevenson (n 1671), 736.

who were detained pre-trial being 43 per cent more likely to receive a jail sentence than those who were released pre-trial.<sup>1693</sup>

Each of these studies present the same overall finding that being remanded increased the likelihood of receiving an imprisonment sentence. However, each reported differing marginal effects of pre-sentence custody on the likelihood of receiving a prison sentence. This is likely because the effects are specific to the location and the sample chosen and/or due to the different methods in measuring and controlling for variables that influence the outcome variable.

There is no known research considering the effect of pre-sentence custody on sentencing outcomes in Queensland, most probably due to the unavailability of relevant data. In Queensland there is no ability to link individual offenders from a bail decision to time spent in pre-sentence custody and then their final sentencing outcome. Pre-sentence custody is not recorded in the Queensland court data, unless it is declared as time served under the sentence.

This is discussed further in section 14.6 of this report.

#### 11.11.7 Analysis of declared pre-sentence custody in Queensland

Data have been collected from 2011–12 to 2017–18 (the data period) across all Queensland courts, to analyse pre-sentence custody declared for adult defendants. The data compare actual imprisonment (either with parole or as part of a combined prison and probation order<sup>1694</sup>) and partially suspended terms of imprisonment<sup>1695</sup> imposed for the MSO. These sentencing options are the only order types for which pre-sentence custody can be declared under the Queensland regime, and therefore recorded in the data. If a person has spent time on remand and the time is not formally declared by the sentencing court, this is not reflected in the data. Reasons pre-sentence custody may not be declared by the court include:

- a person has declarable pre-sentence custody but receives a non-custodial sentence, which does not enable their imprisonment to be accounted for;
- the court imposes imprisonment but exercises its discretion not to make a declaration;<sup>1696</sup> or
- a person has been held in custody for multiple offences that are not all sentenced at the same time; or has been in custody for other reasons such as serving a sentence; or is remanded on some charges but is on bail for others. In these circumstances the pre-sentence custody cannot be declared.<sup>1697</sup>

#### How often is pre-sentence custody declared?

Table 11-2 shows that over the data period, there were 74,831 sentencing events at which a person was sentenced to serve a sentence involving actual imprisonment. Of these, 68,149 (62.9%) involved an unsuspended term of imprisonment being imposed and 6,682 (37.1%), a partially suspended sentence.

Close to two in three (63.2%; n=43,093) sentencing events at which an unsuspended term of imprisonment was imposed did not involve any pre-sentence custody being declared, with the balance (36.8% or 25,056 cases), attracting a pre-sentence custody declaration. A slightly higher proportion of sentencing events at which a partially suspended sentence was imposed had pre-sentence custody declared (40.5%; n=2,704).

<sup>1693</sup> Ibid 747.

<sup>1694</sup> A combined prison and probation order can be imposed under section 92(1)(b) of the *Penalties and Sentences Act 1992* (Qld).

<sup>1695</sup> This analysis revealed that a number of suspended sentences recorded as wholly suspended (MSO) were recorded in the court data as having pre-sentence custody declared (n=1,107), which is not permitted under section 159A(2)(c) of the *Penalties and Sentences Act 1992* (Qld). These data have been excluded from the analysis and are discussed further in section 14.6 in relation to data quality.

<sup>1696</sup> *Penalties and Sentences Act 1992* (Qld) s 159A(1).

<sup>1697</sup> However, it can be taken into account in other ways such as a reduction of the sentence imposed; for example, see *R v Macklin* [2016] QCA 244, 10 [33]–[34]; *R v NT* [2018] QCA 106, 7 [26]–[30].

**Table 11-2: Pre-sentence custody declared for imprisonment sentences (MSO) by penalty type, 2011–12 to 2017–18**

| Pre-sentence custody             | Imprisonment  |              | Partially suspended sentence |              | Total         |              |
|----------------------------------|---------------|--------------|------------------------------|--------------|---------------|--------------|
|                                  | N             | %            | N                            | %            | N             | %            |
| No pre-sentence custody declared | 43,093        | 63.2         | 3,978                        | 59.5         | 47,071        | 62.9         |
| Pre-sentence custody declared    | 25,056        | 36.8         | 2,704                        | 40.5         | 27,760        | 37.1         |
| <b>TOTAL</b>                     | <b>68,149</b> | <b>100.0</b> | <b>6,682</b>                 | <b>100.0</b> | <b>74,831</b> | <b>100.0</b> |

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

Table 11-3 and Table 11-4 show pre-sentence custody lengths. Of the 25,056 offenders who had pre-sentence custody declared for a sentence of imprisonment, the median pre-sentence custody was 65 days, with an average of 120.6 days (range of 1 day to 2,760 days – approximately 7.6 years). Of the 2,704 offenders who had pre-sentence custody declared for a partially suspended sentence, the median pre-sentence custody was 77.5 days, with an average of 144.6 days (range of 1 day to 1,274 days – approximately 3.5 years).

**Table 11-3: Declared pre-sentence custody length for imprisonment sentences (MSO) by penalty type, 2011–12 to 2017–18**

| Penalty type                 | Declared pre-sentence custody (days) |              |             |            |               |
|------------------------------|--------------------------------------|--------------|-------------|------------|---------------|
|                              | N                                    | Average      | Median      | Minimum    | Maximum       |
| Imprisonment                 | 25,056                               | 120.6        | 65.0        | 1.0        | 2760.0        |
| Partially suspended sentence | 2,704                                | 144.6        | 77.5        | 1.0        | 1,274.0       |
| <b>TOTAL</b>                 | <b>27,760</b>                        | <b>122.9</b> | <b>66.0</b> | <b>1.0</b> | <b>2760.0</b> |

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

The majority of offenders (79.6%) who had pre-sentence custody declared for a sentence of imprisonment had pre-sentence custody equal to or less than 6 months, and 93 per cent had pre-sentence custody of less than one year declared. The majority of offenders who had pre-sentence custody declared for a partially suspended sentence (68.4%) had pre-sentence custody equal to or less than 6 months.

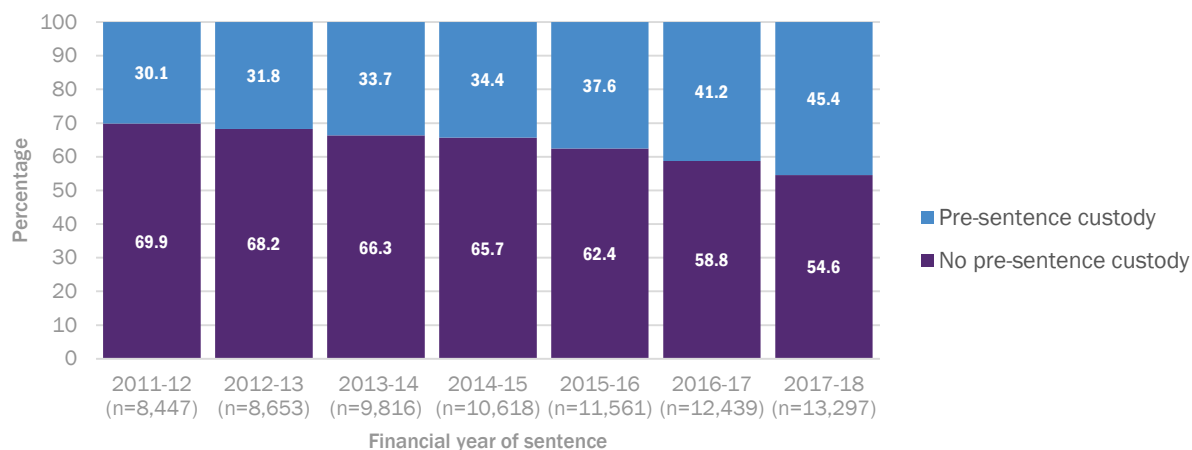
**Table 11-4: Declared pre-sentence custody length by penalty type (MSO), 2011–12 to 2017–18**

| Pre-sentence custody length                 | Imprisonment  |              | Partially suspended sentence |              |
|---|---------------|--------------|------------------------------|--------------|
|   | N             | %            | N                            | %            |
| Equal to or less than 1 week (7 days)       | 3,490         | 13.9         | 450                          | 16.6         |
| Equal to or less than 1 month (30 days)     | 7393          | 29.5         | 854                          | 31.6         |
| Equal to or less than 3 months (90 days)    | 15,252        | 60.9         | 1,445                        | 53.4         |
| Equal to or less than 6 months (180 days)   | 19,936        | 79.6         | 1,849                        | 68.4         |
| Equal to or less than 1 year (365 days)     | 23,294        | 93.0         | 2,409                        | 89.1         |
| Greater than 1 year (greater than 365 days) | 1762          | 7.0          | 295                          | 10.9         |
| <b>TOTAL</b>                                | <b>25,056</b> | <b>100.0</b> | <b>2,704</b>                 | <b>100.0</b> |

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

Figure 11-15 shows that, according to each financial year, the proportion of court events resulting in an imprisonment penalty with pre-sentence custody declared has increased each year from 30.1 per cent in 2011–12 to 45.4 per cent in 2017–18.

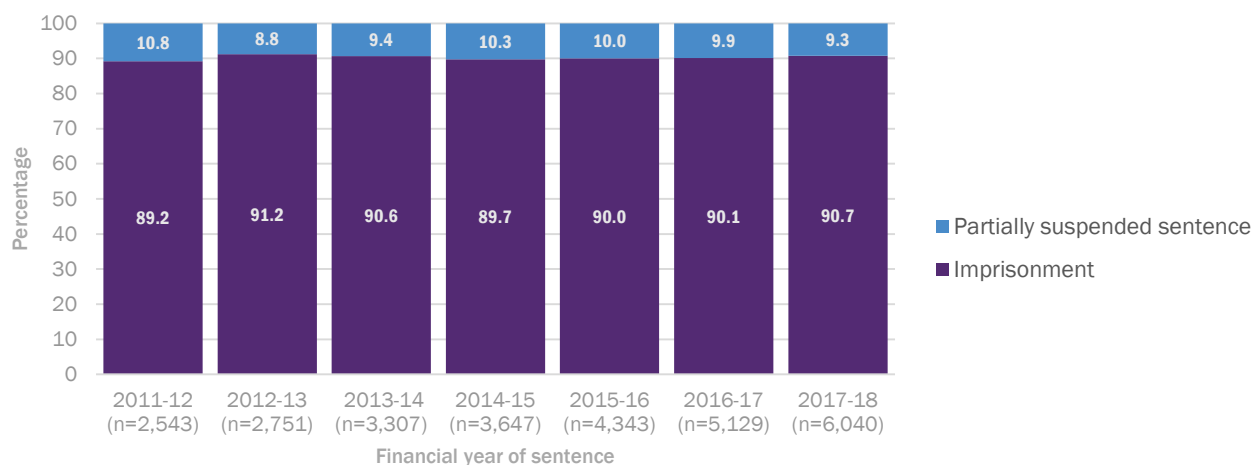
**Figure 11-15: All prison sentences (imprisonment and partially suspended) by pre-sentence declaration and year of sentence, 2011–12 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Of all cases throughout the data period with declared pre-sentence custody (N=27,760), on average, 90.3 per cent resulted in a sentence of imprisonment and 9.7 per cent resulted in a partially suspended sentence being imposed. Figure 11-16 shows that this proportion has remained stable across the data period each financial year.

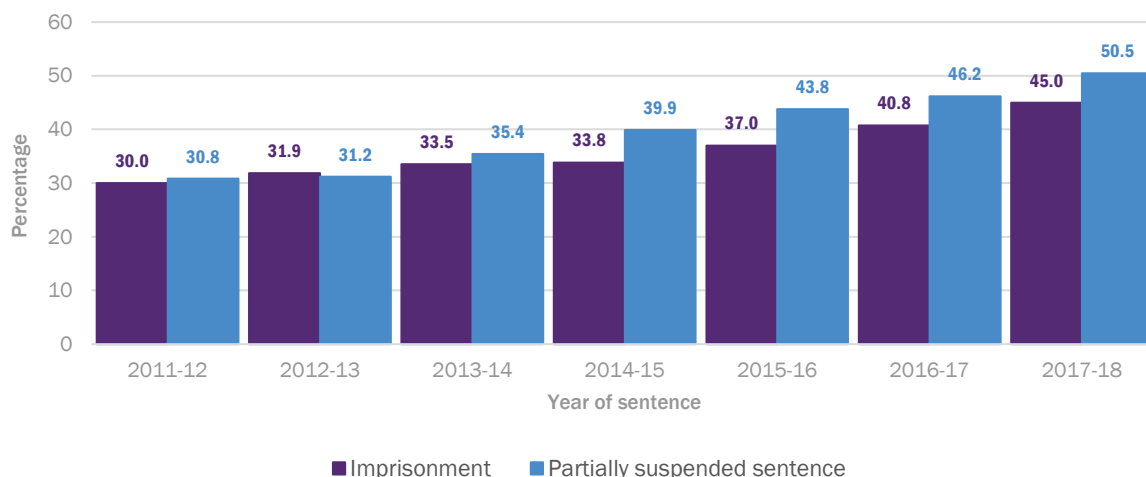
**Figure 11-16: Proportion of declared pre-sentence by penalty type (MSO), 2011–12 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Figure 11-17 illustrates that the proportion of sentenced events involving actual imprisonment being imposed with pre-sentence custody declared increased each year, from 30.0 per cent in 2011–12 to 45.0 per cent in 2017–18. The proportion of partially suspended sentences with pre-sentence custody declared also increased each year, increasing at a slightly faster rate than those with imprisonment sentences. In 2011–12, 30.8 per cent of partially suspended sentences had declared pre-sentence custody, which increased to 50.5 per cent in 2017–18.

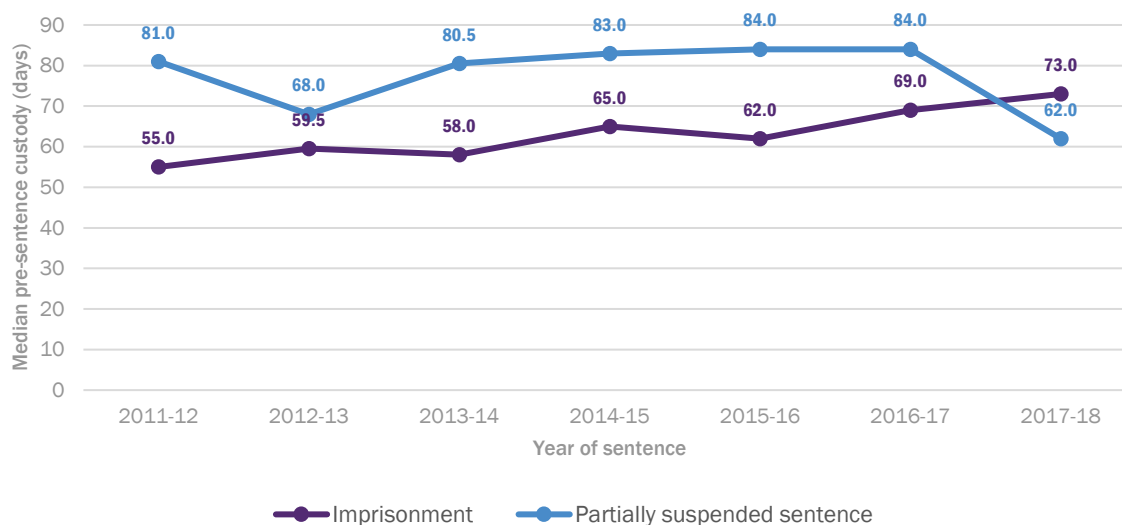
**Figure 11-17: Proportion of cases (MSO) with declared pre-sentence custody by penalty type and year of sentence, 2011-12 to 2017-18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Figure 11-18 shows that between 2011-12 and 2017-18 the median pre-sentence custody length for imprisonment sentences with time declared increased from 55 days to 73 days. Over the same period, the pre-sentence custody length for partially suspended sentences fluctuated, decreasing from 81 days in 2011-12 to 68 days in 2012-13 before increasing to 80.5 days in 2013-14. It remained stable at 83 and 84 days until 2017-18 when the median length dropped considerably to 62 days.

**Figure 11-18: Median declared pre-sentence custody length by penalty type (MSO) and year of sentence, 2011-12 to 2017-18**



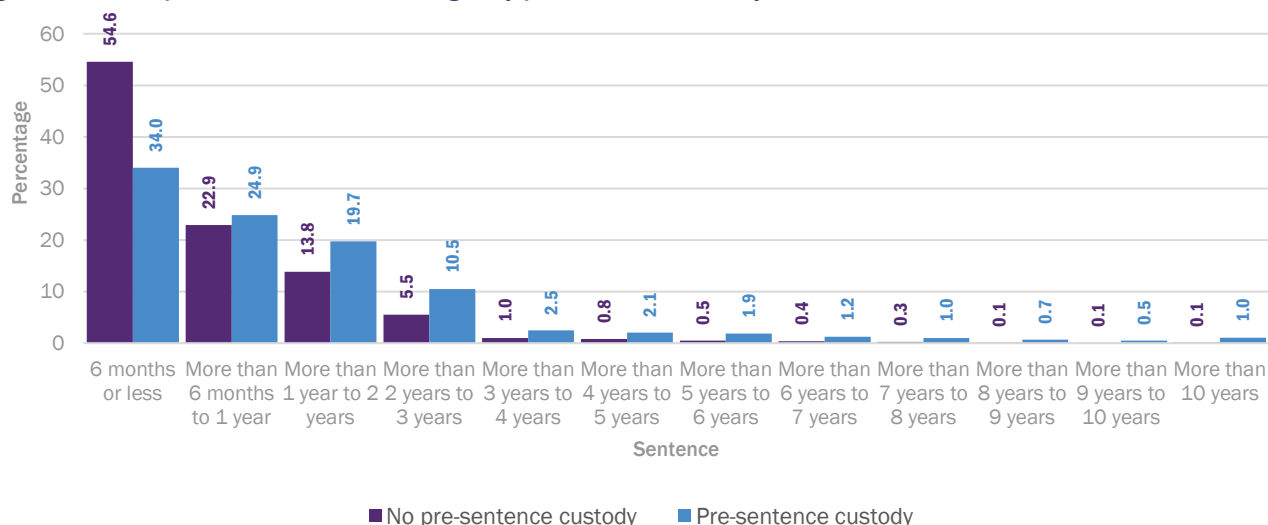
Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

### Imprisonment sentence lengths by pre-sentence custody

Over the data period, of the 68,149 sentenced events where actual imprisonment was imposed (excluding partially suspended sentences), 63.2 per cent (n=43,093) did not have any pre-sentence custody declared and 36.8 per cent (n=25,056) had pre-sentence custody declared (see Table 11-2). The data illustrate that offenders with no pre-sentence custody declared were more likely to have shorter prison sentences than those with declared pre-sentence custody.

Figure 11-19 shows that 54.6 per cent of those without pre-sentence custody declared received a sentence of 6 months or less. In comparison, 34.0 per cent of those with pre-sentence custody received a sentence of 6 months or less.

**Figure 11-19: Imprisonment sentence length by pre-sentence custody declared, 2011–12 to 2017–18**



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

Note: The category 'more than 10 years' includes life sentences.

The average sentence length of offenders who had pre-sentence custody declared was 1.6 years (approximately 19 months, with a median of 12 months), significantly longer than those without pre-sentence custody declared at 0.9 years (approximately 11 months, with a median of 6 months), as shown in Table 11-5.

**Table 11-5: Imprisonment sentence lengths by pre-sentence custody declared, 2011–12 to 2017–18**

| Penalty type                     | N             | Imprisonment sentence length (years) |            |                    |             |
|----------------------------------|---------------|--------------------------------------|------------|--------------------|-------------|
|                                  |               | Average                              | Median     | Minimum            | Maximum     |
| No declared pre-sentence custody | 43,081        | 0.9                                  | 0.5        | 0.0 (1 day)        | 16.0        |
| Declared pre-sentence custody    | 24,937        | 1.6                                  | 1.0        | 0.0 (1 day)        | 27.0        |
| <b>TOTAL</b>                     | <b>68,018</b> | <b>1.2</b>                           | <b>0.8</b> | <b>0.0 (1 day)</b> | <b>27.0</b> |

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

Note: Sentence lengths exclude life sentences as these cannot be quantified.

Figure 11-20 considers whether pre-sentence custody was declared for offences attracting a term of actual imprisonment according to offence category.<sup>1698</sup> The offences that were most likely to have a pre-sentence custody declaration made at the time of sentence were homicide offences<sup>1699</sup> (91.1%), robbery and extortion<sup>1700</sup> (60.7%), abduction and harassment<sup>1701</sup> (56.9%), and sexual assault<sup>1702</sup> (51%). The least likely offence type with pre-sentence custody declared in circumstances where a prison sentence was imposed were traffic and vehicle offences<sup>1703</sup> (16.0%), public order offences<sup>1704</sup> (19.4%), and drug offences<sup>1705</sup> (25.1%).

<sup>1698</sup> Offence category is defined in accordance with the Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification* (ANZSOC) (3rd ed, 2011).

<sup>1699</sup> Includes murder, attempted murder, manslaughter, dangerous operation of a motor vehicle causing death.

<sup>1700</sup> Includes robbery, blackmail and extortion.

<sup>1701</sup> Includes abduction and kidnapping, deprivation of liberty/false imprisonment, harassment and threatening behaviour (threat to cause harm).

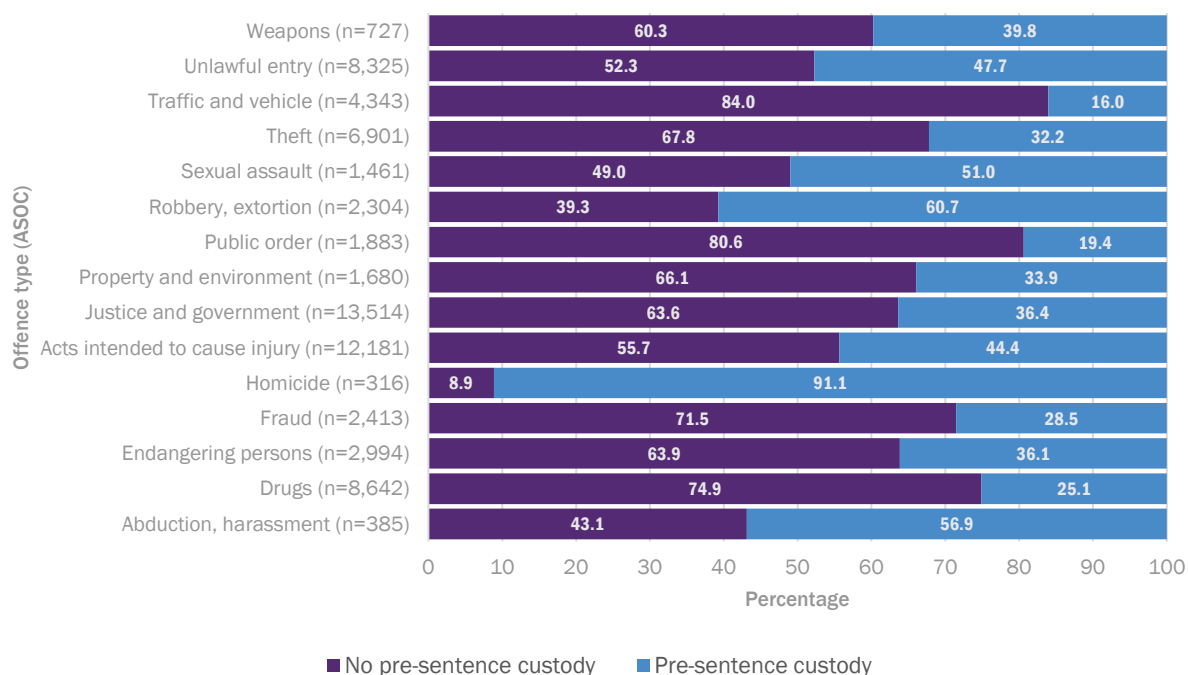
<sup>1702</sup> Includes rape, incest, unlawful carnal knowledge, possession of child exploitation material, grooming offences, sexual assault committed against a child, sexual assault and wilful exposure.

<sup>1703</sup> Includes driver licence offences, vehicle registration and roadworthiness offences, regulatory driving offences.

<sup>1704</sup> Includes trespass, possess instruments used for theft or burglary, public nuisance, begging in a public place, liquor and tobacco offences (such as sale of liquor to a minor) and animal cruelty.

<sup>1705</sup> Includes possession, importation, manufacture, supply and trafficking.

**Figure 11-20: Offence types by declared pre-sentence custody for imprisonment sentences, 2011–12 to 2017–18**

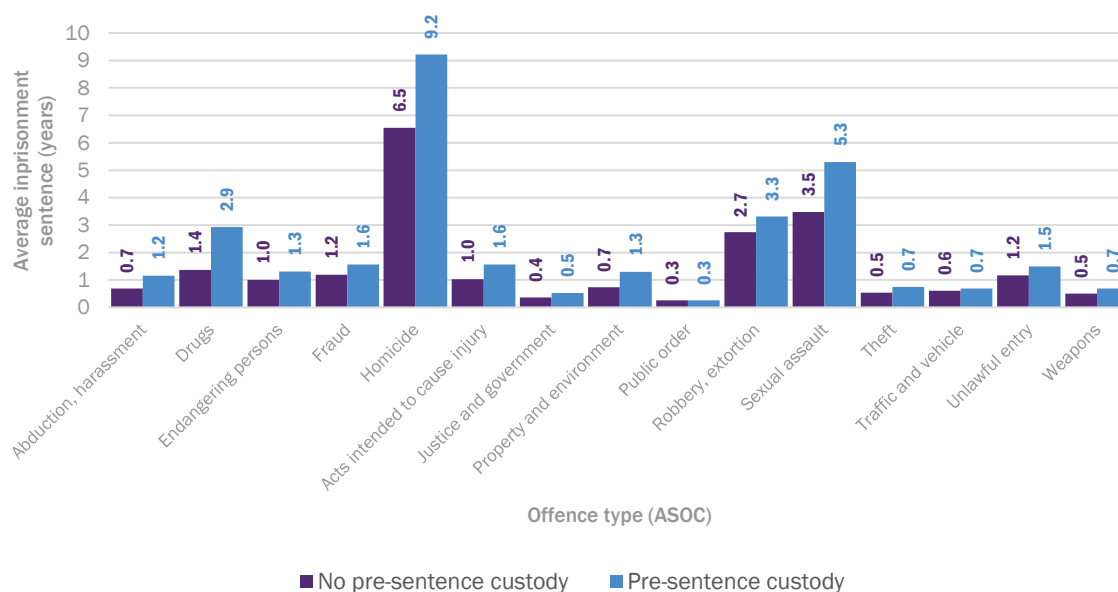


Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Across almost all offence categories, those offenders with declared pre-sentence custody had significantly longer average imprisonment sentences imposed than those without pre-sentence custody. As shown in Figure 11-21, public order was the only offence category without a difference, where the average sentence length was the same (0.3 years). The average prison sentence for homicide offences (excluding offences attracting a life sentence) with declared pre-sentence custody was 9.2 years, compared to 6.5 years for those without pre-sentence custody.<sup>1706</sup> The average sentence for drug offences with declared pre-sentence custody was over double that of those sentences for which pre-sentence custody was not declared (2.9 years and 1.4 years, respectively). Average prison sentences for sexual assault are longer for those with pre-sentence custody than without (5.3 years and 3.5 years, not including life sentences).

<sup>1706</sup> Homicide offences that exclude offences attracting a mandatory life sentence include attempted murder, manslaughter, and dangerous operation of a motor vehicle causing death.

**Figure 11-21: Average imprisonment sentence length by offence category and pre-sentence custody, 2011–12 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted September 2018.

Note: Sentence lengths exclude life sentences as these cannot be quantified.

## Discussion

The data in Figure 11-20 and Figure 11-21 illustrate that offenders with pre-sentence custody declared receive longer average prison sentences. These findings are consistent with international research that pre-trial detention results in lengthier sentences.<sup>1707</sup> There are a number of possible explanations for these results:

1. The different profile of people serving time on remand compared to those released on bail, including prior criminal history and the relative seriousness of their offending.
2. A person who is released on bail may have a greater ability to demonstrate positive steps taken towards their rehabilitation, which may justify a reduction in the sentence imposed.
3. The current data in Queensland do not reflect time spent in custody, which cannot be formally declared. If there is undeclared time, it may be taken into account by the sentencing court in setting the appropriate length of sentence, which may mean that the sentence imposed is for a shorter period even though the total time spent in custody is longer.

As discussed in *R v Newman*,<sup>1708</sup> the practice of a sentencing court reducing the sentence to take into account pre-sentence custody can be problematic both in terms of public perception of the adequacy of sentences and reliance placed on these sentences by other sentencing courts in the future:

If a sentence is decreased by a substantial period already served in custody, it can have the appearance of being inadequate both to public perception and when it appears in the statistical information that is now so often relied upon by sentencing courts.<sup>1709</sup>

...

Such a sentence [reduced for pre-sentence custody], particularly where there are few comparable sentences for similar offences, can also skew the statistical information derived from sentences imposed by other courts and give a false indication of the range of sentences that have been imposed for a similar offence or on a similar offender.<sup>1710</sup>

Considering the issue more generally of how time spent in pre-sentence custody affects court sentencing practices would require more sophisticated statistical analysis — for example, seeking to match offenders granted bail with

<sup>1707</sup> Lowenkamp, VanNostrand and Holsinger (n 1691), 11; Megan T Stevenson, 'Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes' (2018) 34(4) *The Journal of Law, Economics, and Organization* 511, 511; Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention* (2019) 4; Sacka and Ackerman (n 1683) 71.

<sup>1708</sup> *R v Newman* (2004) 145 A Crim R 361.

<sup>1709</sup> Ibid 368 [27] (Howie J, McCol JA agreeing).

<sup>1710</sup> Ibid 369 [30] (Howie J, McCol JA agreeing).

those who have had bail refused against key variables such as gender, Aboriginal and Torres Strait Islander status, offence type and seriousness, age, accommodation and employment status, remoteness of location, and criminal history. It has not been possible for the Council to undertake this type of analysis for offenders in Queensland.

The Council's proposals, which, if adopted, would remove some of the existing legislative barriers to declaring time served, are discussed below. Data issues are discussed in section 14.6.

### 11.11.8 Pre-sentence custody in other jurisdictions

A review of the relevant provisions in Australian jurisdictions (NSW, Victoria, the ACT, Tasmania, SA, WA and NT) as well as international jurisdictions (England and Wales and NZ) illustrates the different ways pre-sentence custody can be taken into account. While these provisions operate within the wider context of the sentencing regimes within those jurisdictions, comparing how they operate in the context of mandatory sentences (being the most restrictive on judicial discretion) can highlight whether such provisions may complicate sentencing.

There are three methods for crediting pre-sentence custody:

1. declaring pre-sentence custody as time served under the sentence;
2. backdating a sentence to take into account pre-sentence custody; or
3. reducing a sentence to take into account pre-sentence custody.

As discussed above, the Queensland regime provides for pre-sentence custody to be recognised as a declaration of time served under the sentence.<sup>1711</sup> Alternatively, a sentence may be reduced to take into account pre-sentence custody.<sup>1712</sup> Victoria also provides for a declaration in which time is 'reckoned as a period of imprisonment'.<sup>1713</sup>

In the ACT, NSW, Tasmania, SA, WA and the NT, legislation provides for 'backdating' the start of the sentence to an earlier date to take into account pre-sentence custody.<sup>1714</sup> A discretion to set a date for the sentence to commence prior to the sentence date may allow a court to recognise pre-sentence custody, which, under the current Queensland regime, could not otherwise be reflected.<sup>1715</sup> While there may be an element of fiction in this approach (as a sentence could be backdated to start on a date when the offender was not actually in custody), it can preserve the sentence as opposed to decreasing the sentence.<sup>1716</sup>

Victoria and the ACT refer to an offender being 'continuously in custody since arrest'. There was similar wording in the Queensland legislation and the practical difficulties were discussed in the 2002 decision of *R v Guthrie*.<sup>1717</sup> In 2004 the wording of section 161(4) – now section 159A(4) – was amended to remove the requirement for the offender to be in custody 'continuously' from arrest.<sup>1718</sup>

While the Queensland regime provides for a declaration of time served under the sentence, complexity in sentencing can occur where the offender is in custody other than 'for no other reason', such as if there are multiple offences, the offender is detained for another reason or is serving a sentence. This may result in a sentence being reduced to take the time served in pre-sentence custody into account. This type of pre-sentence crediting has been criticised

<sup>1711</sup> A declaration can be made if held for 'no other reason'. This creates complexity; for example, an offender could be detained under the *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) ss 8(2)(b)(ii), 13(5)(a), 20, 21(2)(a) or an offender could be detained by virtue of an interstate warrant, as occurred in *R v Guthrie* (2002) 135 A Crim R 292, 297 [28].

<sup>1712</sup> For example, see *R v Nolan* [2009] QCA 129, 7 [23]–[24], 9 [35] (Fraser JA, Chesterman JA and Dutney J agreeing); *R v Macklin* [2016] QCA 244; *R v NT* [2018] QCA 106. Cf *R v ABE* [2019] QCA 83, 10 [45] (Mullins J, Sofronoff P and Davis J agreeing) where it was held that reducing a sentence to take into account pre-sentence custody, instead of making a declaration to allow for a suspended sentence, was not appropriate.

<sup>1713</sup> *Sentencing Act 1991* (Vic) s 18.

<sup>1714</sup> *Crimes (Sentencing) Act 2005* (ACT) s 63; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24; *Sentencing Act 2017* (SA) s 44; *Sentencing Act 1997* (Tas) s 16; *Sentencing Act 1995* (WA) s 87.

<sup>1715</sup> See *R v Fox* [1998] QCA 121 and *R v Carter* [2016] QSC 86.

<sup>1716</sup> *R v Newman* (2004) 145 A Crim R 361, 368 [26]–[27] (Howie J, McColl JA agreeing).

<sup>1717</sup> *R v Guthrie* (2002) 135 A Crim R 292, 293–4 [5]–[9] (Williams JA).

<sup>1718</sup> In the Explanatory Notes, Justice and Other Legislation Amendment Bill 2004 (Qld) at [16] it was explained that: 'Section 161(4) [now 159A(4)] has been redrafted to replace the term "series of offences" with "a number of offences" to clarify that a connection between the offences is not required, and to remove the requirement in existing section 161(4)(b) [now 159A(4)(b)] for the offender to be in custody "continuously" from arrest'.

as it may cause confusion in respect of whether a discount was given,<sup>1719</sup> skew statistics, and create a public perception of an inadequate sentence.<sup>1720</sup>

England and Wales and NZ do not provide a sentencing court with a discretion to credit pre-sentence custody, which is instead done administratively.

### New South Wales

Under section 24(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a 'court must take into account any time for which the offender has been held in custody in relation to the offence'. There is no limitation for when there are multiple offences or if an offender is held in custody for another reason.

The Judicial Commission of NSW has noted:

The ambit of the phrase in s 24(a) — 'any time for which the offender has been held in custody in relation to the offence' — has been a source of ambiguity. The provision is silent on the question of whether pre-sentence custody attributable both to other offences and the offence for which the offender stands for sentence should be taken into account. The section also leaves the issue of exactly how such time is to be taken into account to the sentencer's discretion.<sup>1721</sup>

Under the NSW sentencing regime, a court also has a general power to reduce the penalty imposed on an offender, even if it is a life sentence,<sup>1722</sup> unless the offence is the murder of a police officer<sup>1723</sup> or assault causing death when intoxicated.<sup>1724</sup>

### Victoria

Section 18(1) of the *Sentencing Act 1991* (Vic) provides that any period an offender was held in custody 'must be reckoned as a period of imprisonment or detention already served unless the sentencing court ... otherwise orders'. Where there are multiple offences, section 18(6) provides:

If a person charged with a series of offences committed on different occasions has been in custody continuously since arrest, the period of custody for the purposes of subsection (1) must be reckoned from the time of his or her arrest even if he or she is not convicted of the offence with respect to which he or she was arrested or of other offences in the series.

Potentially, the wording 'been in custody continuously since arrest' could result in additional complexity if an offender has been granted bail prior to sentence and the time has not been 'continuous'. However, the provision does provide a basis to declare time where there are multiple offences.

The Victorian Court of Appeal has also affirmed its inherent jurisdiction to take into account pre-sentence custody independently of the operation of section 18 the *Sentencing Act 1991* (Vic) at the first opportunity (known as the '*Renzella* discretion' after the Court of Appeal decision that first affirmed this).<sup>1725</sup> This mirrors the situation in Queensland in *R v Fabre*<sup>1726</sup> and subsequent decisions as discussed above.

In Victoria there is a standard sentence scheme, but there is discretion for the fixing of non-parole periods.<sup>1727</sup>

### Australian Capital Territory

Under section 63 of the *Crimes (Sentencing) Act 2005* (ACT), the court may 'backdate' sentences. Where there is pre-sentence custody, 'the court must take into account any period during which the offender has already been held in custody in relation to the offence'.<sup>1728</sup> Where there are multiple offences and the offender has been in custody

<sup>1719</sup> *R v Newman* (2004) 145 A Crim R 361, 369 [29]–[30] (Howie J, McColl JA agreeing).

<sup>1720</sup> Australian Law Reform Commission (n 145) 301 [10.35], 301–2 [10.36].

<sup>1721</sup> Judicial Commission of NSW, *Sentencing Bench Book* (last updated September 2018) [12–500].

<sup>1722</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21, 61.

<sup>1723</sup> *Crimes Act 1900* (NSW) s 19B.

<sup>1724</sup> *Ibid* s 25B.

<sup>1725</sup> See *R v Renzella* [1997] 2 VR 88; and *R v Arts* [1998] 2 VR 261 cited by Freiberg (n 127) 821–6.

<sup>1726</sup> *R v Fabre* [2008] QCA 386, 4 [14] (Fraser JA, Keane and Muir JJA agreeing).

<sup>1727</sup> *Sentencing Act 1991* (SA) ss 5A, 5B(4)(b), 11 and 11A.

<sup>1728</sup> *Crimes (Sentencing) Act 2005* (ACT) s 63(2).

continuously since arrest, the period of custody ‘must be worked out from the time of the offender’s arrest’.<sup>1729</sup> This applies even if the offender is not convicted of an offence for which they were arrested.<sup>1730</sup>

Similar to Victoria, the words ‘continuously since arrest’ may be problematic if an offender has been released on bail. However, there is a discretionary power for courts to reduce the penalties imposed, even where an offender is liable to imprisonment for life.<sup>1731</sup>

### Tasmania

In Tasmania, section 16(1) of the *Sentencing Act 1997* (Tas) provides that when sentencing an offender to a term of imprisonment, a court ‘must take into account any period of time during which the offender was held in custody in relation to, or arising from, that offence’ and may order that a sentence can commence on a day earlier than the sentence date.

The wording does not limit a court’s discretion where an offender has been held in custody on multiple offences. The regime in Tasmania also provides courts with a discretionary power in respect of mitigating a life sentence for murder,<sup>1732</sup> and mandatory minimum sentences for causing serious bodily harm to a police officer can be mitigated if there are exceptional circumstances.<sup>1733</sup>

### South Australia

Section 44 of the *Sentencing Act 2017* (SA) provides that where there is pre-sentence custody, the court may take into account the time spent in custody and reduce the sentence or direct the day the sentence will commence on the day the offender was taken into custody or on a date specified. If a court fails to specify when the sentence is to commence and the offender is in custody for the offence, the sentence will commence on the day the offender was last taken into custody.<sup>1734</sup> If a court fails to specify when the sentence is to commence and the offender is in custody for some other offence, the sentence will commence on the day of sentence, unless the sentence is cumulative.<sup>1735</sup>

In SA, where there is a mandatory period of imprisonment, if the court is satisfied ‘that special reasons<sup>1736</sup> exist for fixing a non-parole period shorter than the prescribed period’ the court can impose that period.<sup>1737</sup>

### Western Australia

In the *Sentencing Act 1995* (WA), section 87 allows pre-sentence custody to be taken into account if the offender has spent time in custody for the offence or if the offender is in custody on another offence but on bail for an offence to be sentenced (unless the time in custody has already been taken into account).

The court can take the pre-sentence custody into account in one of two ways, either by reducing the appropriate period if sentenced to a ‘fixed term’<sup>1738</sup> or order the sentence to commence on a specified date (between when custody began but no later than the sentence date).<sup>1739</sup> An order for a sentence to begin prior to the sentence would apply to offences such as murder where there is no discretion to mitigate the sentence.<sup>1740</sup>

### Northern Territory

Section 63(5) of the *Sentencing Act 1995* (NT) states that where an offender has been in custody on account of the arrest, the court may order that the imprisonment commences on the day the offender was arrested or any other day (until the sentence date).

The provision does not restrict a court ordering a sentence to begin prior to the sentence date, which may allow a court to recognise time spent in custody if there are multiple offences or the offender is in custody for another

<sup>1729</sup> Ibid s 63(4).

<sup>1730</sup> Ibid ss 63(4)–(5).

<sup>1731</sup> Ibid s 32.

<sup>1732</sup> *Criminal Code Act 1924* (Tas) s 158.

<sup>1733</sup> *Sentencing Act 1997* (Tas) s 16A.

<sup>1734</sup> *Sentencing Act 2017* (SA) s 44(6)(b).

<sup>1735</sup> Ibid s 44(6)(c).

<sup>1736</sup> ‘Special reasons’ are limited to the matters in s 48(3) of the *Sentencing Act 2017* (SA).

<sup>1737</sup> *Sentencing Act 2017* (SA) s 48(2)(b).

<sup>1738</sup> Meaning ‘a term that is not life imprisonment’: *Sentencing Act 1995* (WA) s 85.

<sup>1739</sup> *Sentencing Act 1995* (WA) ss 87(1)(c)–(d).

<sup>1740</sup> Ibid s 90.

reason. In the NT, while there are non-parole periods for the offence of murder, there is a discretion for a court to fix a non-parole period that is shorter than the standard non-parole period<sup>1741</sup> if there are exceptional circumstances.<sup>1742</sup>

## Commonwealth

Under the *Crimes Act 1914* (Cth), the commencement of a sentence and non-parole period is the same as the law of the State or Territory in which the person is sentenced.<sup>1743</sup> If the State or Territory law has the effect that the sentence is to be reduced by the period the person has been in custody or is to commence on the day the person was taken into custody, then that law applies.<sup>1744</sup> In respect of Queensland's provision that provides for a declaration under section 159A of the PSA, despite concerns that a 'declaration' is not expressly provided for under the *Crimes Act 1914* (Cth),<sup>1745</sup> the Queensland Court of Appeal has ruled that it applies.<sup>1746</sup>

Where there is no provision under state or territory law for crediting pre-sentence custody, the *Crimes Act 1914* (Cth) provides that 'a court must take into account any period that the person has spent in custody in relation to the offence concerned'.<sup>1747</sup> This residual provision has been construed broadly and can include time spent in immigration detention prior to being charged and where an offender is initially charged and detained on a state offence but ultimately sentenced for a Commonwealth offence, provided there was a nexus between the conduct giving rise to the arrest and the sentenced offence.<sup>1748</sup> Even if the pre-sentence custody is for another offence, courts in some jurisdictions exercise a residual discretion under common law (referred to as the '*Renzella* discretion') to take this time in custody into account, while others do not.<sup>1749</sup> It has been cautioned, however:

Although it has been assumed that the *Renzella* discretion applies to the sentencing of a federal offender, there does not appear to have been any judicial consideration of whether the legislative scheme under the *Crimes Act 1914* (Cth) (particularly 16A, 16B and 16E) can accommodate the *Renzella* discretion, in the sense that it leaves a gap to be filled by the application of the common law principle.<sup>1750</sup>

As the *Crimes Act 1914* (Cth) provides for state and territory laws for crediting pre-sentence custody to be adopted in sentencing for a Commonwealth offence, pre-sentence custody for a Commonwealth offence, which carries a mandatory term of imprisonment (such as s 233B, 233C or 234A of the *Migration Act 1958* (Cth) for the offence of people smuggling<sup>1751</sup>), can be declared under section 159A of the PSA. While section 236C provides that time spent in immigration detention must be taken into account it is unclear how a Queensland court may declare this time if the person has been held in custody for another reason, such as for other offences not before the sentencing court.

## New Zealand

In contrast to Australian sentencing provisions, the sentencing court in NZ is not permitted to take any time spent in pre-sentence custody into account when determining the length of the imprisonment.<sup>1752</sup> The Chief Executive is responsible for determining and attributing any time spent in pre-sentence custody to the sentence of imprisonment under the *Parole Act 2002* (NZ).<sup>1753</sup> Pre-sentence detention includes any time that relates to:

- a) any charge on which the person was eventually convicted; or

<sup>1741</sup> *Sentencing Act 1995* (NT) s 53A(6).

<sup>1742</sup> *Ibid* s 53A(7). This does not apply to the offence of murder with aggravating circumstances: *ibid* s 53(3).

<sup>1743</sup> *Crimes Act 1914* (Cth) s 16E(1).

<sup>1744</sup> *Ibid* s 16E(2).

<sup>1745</sup> *R v Hargraves* [2010] QSC 188, 20–1 [64]–[65] (Fryberg J); Australian Law Reform Commission (n 145) 297 [10.16].

<sup>1746</sup> *R v Hill; ex parte Cth DPP* (2011) 212 A Crim R 359, 432–3 [278]–[279] (Atkinson J) and *R v Hoong* [1995] 2 Qd R 182, 184 (Macrossan CJ, Pincus JA and Ambrose J) where the Court of Appeal held that section 16E(2) of the *Crimes Act* made applicable to a sentence of imprisonment imposed in Queensland for an offence against the law of the Commonwealth s 161 of the PSA [now 159A]. See also Commonwealth Director of Public Prosecutions (n 212) 107–8 [469], that in practice, time spent in pre-sentence custody for a Commonwealth offence is declared.

<sup>1747</sup> *Crimes Act 1914* (Cth) s 16E(3).

<sup>1748</sup> Commonwealth Director of Public Prosecutions (n 212) 108–9 [470]–[473] citing *Alimudin v McCarthy* [2008] NTLR 102.

<sup>1749</sup> *Ibid* 109–10 [476]–[482] which discussed *R v Renzella* [1997] 2 VR 88 and *Karpinski v R* (2011) 32 VR 85) cf *R v Niass* (New South Wales Court of Criminal Appeal, 16 November 1988) and *Hampton v The Queen* [2014] 243 A Crim R 193, 197–200 [18]–[39] (Bellew and Johnson JJ, Price, Garling JJ and Gleeson CJ agreeing).

<sup>1750</sup> *Ibid* 110 [482].

<sup>1751</sup> *Migration Act 1958* (Cth) s 236B.

<sup>1752</sup> *Sentencing Act 2002* (NZ) s 82.

<sup>1753</sup> Sections 89–91.

- b) any other charge on which the person was originally arrested; or
- c) any charge that the person faced at any time between his or her arrest and before conviction.<sup>1754</sup>

### England and Wales

Similar to NZ, there is no discretion for a sentencing court in England and Wales to not credit time if it meets the legislative criteria. The *Criminal Justice Act 2003* (UK) provides for both time spent in custody prior to sentence and time spent on bail subject to a qualifying curfew and electronic monitoring condition to be credited as time served under a sentence of imprisonment.<sup>1755</sup>

Any time spent in custody for the offence or a related offence is to be counted as time served as part of the sentence,<sup>1756</sup> unless the person is also detained serving another sentence.<sup>1757</sup> It is immaterial whether the person was remanded in connection with another offence; however, a day counts as time served only in relation to one sentence.<sup>1758</sup>

If a court sentences a person to imprisonment and the person was on bail for the offence or a related offence and subject to a qualifying curfew condition and an electronic monitoring condition, the court must direct that the 'credit period' be counted as time served.<sup>1759</sup> Essentially, two days on bail with these conditions equates to one day in custody. The 'credit period' is calculated by adding the days the person was subject to the conditions, less any days the person was on temporary release, subject to any other order requiring electronic monitoring and days in which a relevant condition was broken.<sup>1760</sup> This result is then divided by two and, if necessary, rounded up to the nearest whole number.<sup>1761</sup>

### 11.11.9 Stakeholder views

In its Options Paper, the Council asked whether sections 159A(1) and 159A(4)(b) of the PSA should be amended to allow the court an ability to declare pre-sentence custody in circumstances where this is currently not permitted (e.g. by removing the words 'for no other reason'), and what the potential risks would be if such an amendment were made.

A number of stakeholders supported this proposal, in terms of both subsections.<sup>1762</sup> FACAA opposed a change to section 159A(1), stating that the emphasis should be on getting 'tougher on crime and giving harsher sentences'.<sup>1763</sup> Nonetheless, it supported amending section 159A(4)(b), in order 'to provide greater clarity' and provided that it was amended in a way that 'did not allow convicted criminals any means to get less time behind bars'.<sup>1764</sup>

The QPS noted what appeared to be 'inherent complexities' in the provisions:

especially where time spent in custody can be taken into account by a court whether it is declarable or not. As such, the QPS supports measures to enhance the accuracy and simplification of sentence calculations to ensure that administrative mechanisms and communication errors do not hinder community safety or unnecessarily infringe upon an offender's rights.<sup>1765</sup>

The Commonwealth Director of Public Prosecutions (CDPP) noted that:

Section 16E of the *Crimes Act 1914* (Cth) [Commencement of sentences] has been interpreted to apply the Queensland law permitting pre-sentence custody to be taken into account when fixing a sentence for a federal

<sup>1754</sup> *Parole Act 2002* (NZ) s 91(1).

<sup>1755</sup> *Criminal Justice Act 2003* (UK) ss 240ZA, 240A.

<sup>1756</sup> *Ibid* s 200ZA(3).

<sup>1757</sup> *Ibid* s 200ZA(10). Other exclusions are 'committal in default of payment of any sum of money; committal for want of sufficient distress to satisfy any sum of money; committal for failure to do or abstain from doing anything required to be done or left undone.'

<sup>1758</sup> *Ibid* s 200ZA(2)–(5).

<sup>1759</sup> *Ibid* s 200A(1).

<sup>1760</sup> *Ibid* s 200A(3).

<sup>1761</sup> *Ibid*.

<sup>1762</sup> Submission 7 (Sisters Inside) 8; Submission 6 (Legal Aid Queensland) 12; Submission 12 (Parole Board Queensland) Annexure 1, Question 13.1–13.2; Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 8.

<sup>1763</sup> Submission 4 (Fighters Against Child Abuse Australia) 28.

<sup>1764</sup> *Ibid* 29.

<sup>1765</sup> Submission 3 (Queensland Police Service) 2–3.

offender.<sup>1766</sup> At present, there is significant complexity associated with sentence calculation and ambiguity surrounding how the pre-sentence custody declaration applies to an offender who is sentenced to both federal and state terms of imprisonment on the one occasion, this being an increasingly common occurrence across a number of crime types such as online child exploitation, financial crime, and drug offending. That is, whether the pre-sentence custody applies to one or both of those sentences. The issue is particularly acute when sentences are imposed with any degree of accumulation and commencement dates are to be set.

A further complexity associated with the pre-sentence custody declaration provisions is whether pre-sentence custody is declarable in respect of offences committed either prior to release on parole or in circumstances where a prisoner is returned to custody on suspicion of a breach of parole due to further offending. Greater clarity could be provided on how the pre-sentence custody provisions apply in such cases in order to avoid the time served being applied to prior and subsequent offending and, in effect, attributed twice.<sup>1767</sup>

LAQ noted that ‘the complexity is in determining what is declarable’ and, while supporting the Council’s proposals, also indicated support for ‘a more simplified, administrative approach’.<sup>1768</sup>

LAQ pointed to section 218 of the *Youth Justice Act 1992* (Qld) (YJA) as providing a model that may be worth exploring with other agencies.<sup>1769</sup> The QLS shared this view.<sup>1770</sup> Section 218 requires that any period the child was held in custody pending the proceeding for the offence must be counted as part of the period of detention that is served. The Council notes that this carries the same issue with section 159A of the PSA, in that a period a child is also held in custody on sentence for another offence is not to be counted. The Council considers that amendment to the existing section would enable a more fluid change than embracing an entirely new provision.

The Bar Association of Queensland stated that a major issue relating to pre-sentence custody arises where an offender is returned to prison because of offences committed on parole. While there is general acceptance ‘that some of that period in custody is able to be taken into account in arriving at the sentence for the breaching offence’, the PSA lacks any guidance regarding how to do so. This leads to inconsistent sentencing practices.<sup>1771</sup>

The Bar Association stated that the process is relatively straightforward where a declaration for pre-sentence custody can be made, but:

The difficulty arises when the Court has to decide whether undeclarable time should be taken into account, and if so, how it is recognised. Even when everyone accepts that it should be taken into account there is no real certainty as to what extent, and it leads to inconsistent results. One judge may reduce a sentence by the whole amount, while another may reduce by half, while another may say they will take account of it but not give any apparent reduction. In the interests of transparency and consistency and to promote confidence in the system, this should be clarified.<sup>1772</sup>

The QLS noted the effect of the words ‘for no other reason’ in section 159A(1) of the PSA were ‘most often apparent where time is not declarable because of other outstanding offences or where an existing parole order is cancelled because of the commission of the offences’.<sup>1773</sup> Their removal would allow proper use of, and less ambiguity in exercising, judicial sentencing discretion, alleviate complexities and ‘provide a transparent and consistent approach in sentences comprising otherwise non-declarable time’.<sup>1774</sup>

The QLS voiced concern about courts not being required to take into account time that is not declarable (because of outstanding offences, or because of a cancellation of an existing parole order). When the time is taken into account, it creates sentencing complexity, ‘constructing a sentence that may not reflect the true intention of the court and has the potential to create artificiality in sentencing’, which may ‘negatively impact upon the principle of general deterrence and public perception of sentences in circumstances where the public may only be aware of the end result and not the reasoning behind the sentence’.<sup>1775</sup>

The QLS pointed out that:

<sup>1766</sup> *R v Hoong* [1995] 2 Qd R 184.

<sup>1767</sup> Submission 13 (Commonwealth Director of Public Prosecutions) 2–3 [13]–[14].

<sup>1768</sup> Submission 6 (Legal Aid Queensland) 12.

<sup>1769</sup> *Ibid.*

<sup>1770</sup> Submission 15 (Queensland Law Society) 19.

<sup>1771</sup> Preliminary submission (Bar Association of Queensland) 13 July 2018, 6.

<sup>1772</sup> *Ibid.* 6.

<sup>1773</sup> Submission 15 (Queensland Law Society) 19.

<sup>1774</sup> *Ibid.* 19–20.

<sup>1775</sup> *Ibid.*

The main risk of an unintended consequence in removing the words ‘for no other reason’ in section 159A(4) as opposed to section 159A(1) is that section 159A(1) prescribes that time in pre-sentence custody must be declared unless the sentencing court otherwise orders ... Section 159A(4) does not contain the same sentencing discretion.

The practical implication of this is that if the words ‘for no other reason’ were removed from section 159A(4) as it is currently drafted and a person were in custody for a number of offences and, for instance, a parole sanction then the pre-sentence custody time must be declared for the offences and there is no discretion for the sentencing court not to declare that time and have it attributable to the parole sentence.

This can be rectified by the inclusion in section 159A(4) of the words ‘unless the sentencing court otherwise orders’ to reflect the same intention prescribed in section 159A(1).<sup>1776</sup>

The Council has adopted this proposal in Recommendation 56. This might go some way to ameliorating the complexity that the CDPP explained.

During consultation, any risk of doubling up the counting of pre-sentence custody (for purely state offending) that might arise as a result of the proposed amendments was not put forward as a pressing concern. For instance, Professors Douglas and Walsh, Dr Lelliott and Ms Wallis stated:

The only risk we are aware of is that the offender might receive mitigation in a sentence for that offence and for any other offence that came to the attention of authorities while on remand. We do not think the risk is significant.<sup>1777</sup>

Other stakeholders suggested that, if considered desirable, an additional subsection could address this (along with notations on criminal histories). The real scenario to be avoided, it was suggested, was doubling up with sentenced time as opposed to pre-sentence time. It was noted that later sentences can be tailored to take account of earlier sentences imposed involving the same pre-sentence custody period.

The proposed amendments were identified as having the potential to encourage the finalisation of miscellaneous summary offences earlier than indictable ones. It was suggested that this could be facilitated by an education and information strategy aimed at the judiciary, the magistracy, and legal practitioners.

QCS noted that ‘the removal of these words may assist in resolving interpretation issues with how time held in pre-sentence custody is to be counted and reflected on the [pre-sentence custody certificates] supplied by QCS to prosecuting authorities’.<sup>1778</sup>

QCS also suggested that a court should be able to consider ‘a prisoner’s current sentence structure at the time of sentencing for new offences, and provide for one new parole release/eligibility date and custodial end date’.<sup>1779</sup> A NSW provision was proffered as a comparative model, although it does not require information about an end date.<sup>1780</sup> QCS suggested that ‘a similar amendment could be considered in Queensland, along with an amendment

<sup>1776</sup> Ibid 20. The full wording of subsections (1) and (4) in section 159A of the *Penalties and Sentences Act 1992* (Qld) is:

(1) If an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence and for no other reason must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders.

...

(4) If—

(a) an offender is charged with a number of offences committed on different occasions; and

(b) the offender has been in custody since arrest on charges of the offences and for no other reason;

the time held in presentence custody must be taken, for the purposes of subsection (1), to start when the offender was first arrested on any of those charges, even if the offender is not convicted of the offence for which the offender was first arrested or any 1 or more of the number of offences with which the offender is charged.

<sup>1777</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 8.

<sup>1778</sup> Submission 11 (Queensland Corrective Services) 27.

<sup>1779</sup> Ibid.

<sup>1780</sup> Section 48(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (Information about release date). Section 48(1) requires the court to specify ‘(a) the day on which the sentence commences or is taken to have commenced, and (b) the earliest day on which it appears (on the basis of the information currently available to the court) that the offender will become entitled to be released from custody, or eligible to be released on parole’. In doing so it is to have regard to ‘(i) that and any other sentence of imprisonment to which the offender is subject, and (ii) the non-parole periods (if any) for that and any other sentence of imprisonment to which the offender is subject’. Section 48(2) states that ‘The purpose of the section is to require a court to give information about the likely effect of a sentence.’ Under section 24 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a ‘court must take into account any time for which the offender has been held in custody in relation to the offence’. There is no limitation for when there are multiple offences or if an offender is held in custody for another reason. The NSW regime does not provide for different periods to be ‘declared’ as time served and so will either backdate a sentence to commence on an earlier date or reduce the sentence to take the time into account.

to sections 160C and 160D of the PSA to change the word ‘may’ to ‘must’. A consequential amendment would be required to CSA (removal of sections 181–185B) to support this amendment’.<sup>1781</sup>

The Council understands the operational benefits that this approach would bring to QCS. However, requiring courts to fix an end date for every sentence imposed would have a marked impact on court time required for each matter.

#### 11.11.10 The Council's view

The Council appreciates the level of stakeholder input on section 159A and pre-sentence custody declarations and believes that the recommended amendments should enhance judicial discretion, reduce sentencing complexity, and allow the court an ability to declare pre-sentence custody in circumstances where this is currently not permitted. Consequently, it recommends that the words ‘for no other reason’ should be removed from sections 159A(1) and 159A(4)(b) of the PSA and that the words ‘unless the sentencing court otherwise orders’, currently in section 159A(1), should be added to section 159A(4)(b).

#### **RECOMMENDATIONS: TIME SPENT IN PRE-SENTENCE CUSTODY THAT IS DECLARABLE (PSA, S 159A)**

55. *Penalties and Sentences Act 1992* (Qld) sections 159A(1) and 159A(4)(b) should be amended by removing the words ‘for no other reason’ to grant the court an ability to declare pre-sentence custody in circumstances where this is currently not permitted.
56. The words ‘unless the sentencing court otherwise orders’, currently in section 159A(1) of the *Penalties and Sentences Act 1992* (Qld), should be added to section 159A(4)(b).

#### 11.12 Judicial power to order parole conditions for court ordered parole orders

In a 2017 review of the system used to classify child exploitation material (CEM) for the sentencing process (the CEM Report), the Council recommended:

Adding a section to the *Penalties and Sentences Act 1992* (Qld) giving judicial officers discretion to order additional requirements of a parole order (including to submit to medical, psychiatric or psychological assessment) when ordering a parole release date.<sup>1782</sup>

The Council’s recommendation would give courts a discretionary power regarding court ordered parole akin to that held by the Parole Board using its combined legislative powers in sections 200(3) and 205(1)(b) of the CSA – extra conditions beyond the mandatory ones in section 200(1) of the CSA. However, it would also create the scenario where the Parole Board may amend or cancel specific conditions imposed by a court, not least because circumstances have changed since the sentence date and the Parole Board has new information.

The language used in the recommendation reflects the language in sections 94(a) and 115(a) of the PSA regarding ICOs and probation orders, save that the Council used the word ‘assessment’ instead of ‘treatment’. This reflects concerns raised by QCS about the problems associated with mandatory treatment, and their preferred approach that mandatory assessments instead be ordered to identify offender treatment needs.<sup>1783</sup>

The approach of mandating assessment rather than treatment recognises that the inclusion of additional requirements for court ordered parole is very different from including treatment requirements as part of a probation order or ICO as, unlike these other forms of sentencing orders, the offender does not need to consent to the order being made and comply with its conditions as a pre-condition to the order being made.

Also, in contrast to offenders sentenced to imprisonment with a parole eligibility date, an offender’s release on court ordered parole does not rely on the offender applying for release and agreeing to comply with release conditions, but rather is directed under legislation, subject to limited exceptions (see s 199 of the CSA).

The CEM Report recommendation was made in the context of the possibility that recommendation 5 of the Parole System Review might be accepted, meaning that court ordered parole would then become available for sexual offences. With the adoption of the Council’s recommendation to extend court ordered parole to sentences for sexual offences of 3 years or less, similar considerations will apply.

More generally, with respect to the ability to attach program conditions, stakeholders have noted:

<sup>1781</sup> Submission 11 (Queensland Corrective Services) 27.

<sup>1782</sup> Queensland Sentencing Advisory Council, *Classification of Child Exploitation Material for Sentencing Purposes – Final Report* (2017) 47, Recommendation 2, and see pages 42 and 43 for discussion.

<sup>1783</sup> See discussion at page 44 of the Council’s report.

- There would need to be proper investigation into the availability and appropriateness of programs. This could be supported through the preparation of PSRs, which would require additional funding. This might be achieved by expanding the court advisory service provided by QCS currently operating in Brisbane. This service helps courts to understand, at the time of sentencing, the availability and timeframes required for the delivery of programs that would enable an offender to comply with specific conditions.
- Special conditions should only be made where release on court ordered parole is ordered immediately, or almost immediately, when the judge would be best placed to assess the need for extra conditions.
- Courts must have discretion to amend or remove special conditions as well as impose them (similar to the current process for probation), rather than it being left as a matter for the Parole Board.
- Increasing conditions may risk setting offenders up to fail.
- The limited number of programs available in the community is another issue that needs to be considered.
- The imposition of more generalised conditions on an order, such as to submit to assessment and treatment directions, allows more flexibility and should be preferred over more specific conditions that may not be able to be serviced.

## 11.13 Executive powers regarding parole orders

### 11.13.1 The current legal framework

The chief executive of QCS must issue a court ordered parole order for a prisoner in accordance with the date fixed by the court, and provide a copy to the prisoner.<sup>1784</sup> However, the chief executive is not required to issue the parole order if the parole release date is the date the offender is to be unconditionally released from lawful custody<sup>1785</sup> (that is, the prisoner has served their full sentence on their release from custody).

The definition of ‘court ordered parole order’ in schedule 4 of the CSA recognises the interplay between the PSA and CSA: it means an order issued by the chief executive in accordance with a court order<sup>1786</sup> fixing the date for the prisoner to be released on parole.

A sentencing court’s involvement in the process ceases after it sets a release or eligibility date. It has no power over conditions and no participation in breach responses. The Court of Appeal has noted:

In Queensland there are two mechanisms by which a sentenced prisoner may be released on parole. The first is by order of the Parole Board Queensland ... In such a case, while the court imposing the sentence has the jurisdiction to set a date upon which a prisoner is eligible for parole, the decision to release the prisoner on parole is an exercise of executive, not judicial power. Upon sentence being imposed by the court ‘[the] controversy represented by the indictment [has] been quelled and, allowing for any applicable statutory regime, the responsibility for the future of the [prisoner] pass[es] to the executive branch of the government of the State’.<sup>1787</sup>

Court ordered parole, being the second mechanism for release on parole in Queensland is a relatively recent invention. By this regime, the sentencing court, not the executive, orders the release of the prisoner on parole. The only function of the executive in the release of the prisoner on parole is that it is the Chief Executive who formally issues a parole order in obedience of the court’s order. It is clear that once the parole order is made by the court, supervision of the prisoner on parole is the province of the executive.<sup>1788</sup>

The major practical distinction between an offender being released on court ordered parole or being released on a suspended sentence is the power of supervision vested in the executive where the prisoner is on parole. In addition, while a suspended sentence may only be breached by commission of a further offence during the operational period, a breach of parole may be committed upon a breach of any of the conditions prescribed by s 200 of the *Corrective Services Act* or by a failure to comply with directions given pursuant to those conditions. Imprisonment for an offence committed during a parole period automatically results in the prisoner being taken into custody. Commission of an offence during the operational period of a suspended sentence does not. The

<sup>1784</sup> *Corrective Services Act 2006* (Qld) s 199.

<sup>1785</sup> *Penalties and Sentences Act 1992* (Qld) s 160G(2).

<sup>1786</sup> Court order made under *Penalties and Sentences Act 1992* (Qld) s 160B(3).

<sup>1787</sup> *R v SCZ* [2018] QCA 81, 9–10 [36] (Davis J, Morrison and Philippides JJA agreeing), citing *Crump v New South Wales* – 2012) 247 CLR 1, 16–17 [28] (French CJ) and *Elliott v The Queen* (2007) 234 CLR 38, 42 [5] (Gummow, Hayne, Heydon, Crennan and Keifel JJ) (being the direct quote).

<sup>1788</sup> *R v SCZ* [2018] QCA 81, 10 [37] Davis J (Morrison and Philippides JJA agreeing).

prisoner may argue that it is unjust to activate the sentence, although in practical terms it would be unlikely that the suspended sentence would not, at least in part, be activated.<sup>1789</sup>

Unlike a court, the Parole Board is not subject to the sentencing principles or factors in the PSA. It must operate within its functions and powers under the CSA and is guided by the *Ministerial Guidelines to Parole Board Queensland*, which includes the guiding principles for the Parole Board (community safety is paramount) and a section regarding suitability when deciding the level of risk that a prisoner may pose to the community.<sup>1790</sup>

A court must fix a parole release date when sentencing an offender to a term of imprisonment of 3 years or less for an offence that is not declared to be a serious violent offence or is not a sexual offence (provided no pre-existing court ordered parole order has been cancelled).<sup>1791</sup>

Parole release or eligibility dates do not apply if a court sentences an offender to a term of imprisonment and makes any of the following orders:

- an intensive correction order (ICO);
- a probation order mentioned in section 92(1)(b) of the PSA;
- an order that the whole or part of the term of imprisonment be suspended.<sup>1792</sup>

However, they do apply to orders activating a term of imprisonment, following the contravention of a suspended sentence or ICO, that require an offender to serve the whole or part of suspended imprisonment and the unexpired portion of an ICO.<sup>1793</sup>

### 11.13.2 Statutory conditions of court ordered parole orders

A prisoner released on court ordered parole is subject to the standard, mandatory conditions set out in section 200(1) of the CSA, which require the offender to:

- be under the chief executive's supervision;
- carry out the chief executive's lawful instructions;
- give a test sample if required to do so by the chief executive;
- report, and receive visits, as directed by the chief executive;
- notify the chief executive within 48 hours of any change in the prisoner's address or employment during the parole period; and
- not commit an offence.

Further, all court ordered parole orders include a condition reflecting section 200A of the CSA. Section 200A enables corrective services officers to direct a prisoner to remain at a stated place, wear a stated device, or permit installation of a device or equipment at the prisoner's residence.<sup>1794</sup> Corrective Services officers have further power under this section to give other reasonable directions necessary for the proper administration of one of these directions.<sup>1795</sup> The purpose of the power is to enable movements of a prisoner subject to a parole order to be restricted and the location of the prisoner to be monitored.<sup>1796</sup> A parole order can also contain a condition requiring a prisoner to comply with such a direction.<sup>1797</sup>

A prisoner must comply with the conditions included in the parole order.<sup>1798</sup>

When an offender's release date is the day of their sentence hearing (often referred to as 'an immediate release' to parole supervision) — assuming this is not the prisoner's full-time discharge date (that there is in fact a period for

<sup>1789</sup> Ibid 15 [43] (Davis J, Morrison and Philippides JJA agreeing).

<sup>1790</sup> Mark Ryan, Minister for Police, Fire and Emergency Services and Minister for Corrective Services (n 1309) 2.

<sup>1791</sup> *Penalties and Sentences Act 1992* (Qld) s 160B.

<sup>1792</sup> Ibid s 160A(6).

<sup>1793</sup> Ibid s 160, definition of 'impose' and s 160A(1).

<sup>1794</sup> *Corrective Services Act 2006* (Qld) s 200A(2).

<sup>1795</sup> Ibid s 200A(3).

<sup>1796</sup> Ibid s 200A(1).

<sup>1797</sup> Ibid s 200(2).

<sup>1798</sup> Ibid s 200(4).

supervision following the imposition of the sentence by the court) — the offender is taken immediately to be subject to a court ordered parole order:

- containing the conditions mentioned in section 200(1) of the CSA;<sup>1799</sup> and
- requiring the offender to report to a Probation and Parole office and obtain a copy of the parole order (failure to do so means the offender is unlawfully at large).<sup>1800</sup>

The sentencing court must, when fixing the offender's parole release date in such circumstances, tell the offender about the conditions, the reporting requirement, and the consequences of failing to comply with it.<sup>1801</sup>

Restrictions and permissions regarding interstate travel are dealt with in CSA sections 212 and 213.

### **11.13.3 Board can add further conditions — and otherwise amend, suspend or cancel — a court ordered parole order, including prior to release from custody**

A sentencing court cannot impose conditions on court ordered parole (this is discussed as a possible change later in this report). Under section 200(1), the CSA sets mandatory statutory conditions that can never be altered. The Parole Board can add, amend and remove other conditions it considers necessary, by the combination of sections 205(1)(b) and 200(3) of the CSA.

By section 200(3) of the CSA, a parole order granted by the Parole Board (as opposed to a court ordered parole order) may also contain conditions the Parole Board reasonably considers necessary:

- to ensure the prisoner's good conduct; or
- to stop the prisoner committing an offence.

Examples given are conditions about the prisoner's residence, employment or participation in a particular program, a curfew and provision of a test sample.

These grounds, especially those concerning good conduct, are very wide and supplement the separate departmental power in the standard condition — section 200(1) — regarding 'lawful instructions'.

This power is extended to court ordered parole orders by virtue of section 205(1)(b) of the CSA (Amendment, suspension or cancellation), which gives the Parole Board power to add conditions to a court ordered parole order by amending the order through inserting a condition mentioned in section 200(3), if the Parole Board reasonably believes the condition is necessary for a purpose mentioned in the subsection (as listed above).<sup>1802</sup>

Section 205(1) expressly recognises the ability to amend or remove an existing section 200(3) condition, but only speaks of 'inserting' a section 200(3)-type condition into a court ordered parole order — perhaps because section 205(1)(b) marks the first opportunity for the Parole Board to exercise power in respect of a section 200(3)-type condition for a court ordered parole order.

The Parole Board can also amend a parole order if it reasonably believes the prisoner poses a serious risk of self-harm.<sup>1803</sup>

Furthermore, section 205(2) gives the Parole Board power in respect of court ordered parole (and Board ordered parole) orders to amend, suspend or cancel if it reasonably believes the prisoner:

- has failed to comply with the parole order;
- poses a serious risk of harm to someone else;
- poses an unacceptable risk of committing an offence; or

<sup>1799</sup> *Penalties and Sentences Act 1992* (Qld) s 160G(3)(a).

<sup>1800</sup> *Ibid* s 160G(3)(b).

<sup>1801</sup> *Ibid* s 160G(5).

<sup>1802</sup> An example of a Board imposed condition is found in *Vaughan v Parole Board Queensland* [2019] QSC 10, 4–5 [12] (Brown J): 'the prisoner must actively participate in treatment with a psychologist to address his appending profile as directed by an authorised Corrective Services officer or the Board' and 'the prisoner is to permit any medical, psychiatrist, psychologist, social worker, counsellor or other mental health professional to disclose details of attendance and compliance with treatment and provide opinions relating to level of risk of reoffending to a Corrective Services Officer if such a request is made'.

<sup>1803</sup> *Corrective Services Act 2006* (Qld) s 205(1)(c).

- is preparing to leave Queensland without permission.<sup>1804</sup>

It can also amend or suspend if the prisoner is charged with committing an offence,<sup>1805</sup> and suspend or cancel if it reasonably believes the prisoner subject to the parole order poses a risk of carrying out a terrorist act.<sup>1806</sup>

These powers are all exercised by written order, which have effect when made by the Parole Board.<sup>1807</sup>

The 'imported section 200(3) power' as regards court ordered parole orders in section 200(1)(b) is particularly significant because of the wider grounds justifying Parole Board action in section 200(3) ('good conduct', 'stop the prisoner committing an offence') as distinct from what might be viewed as more constrained grounds in section 205(2).

The *Ministerial Guidelines* require the Parole Board to consider making additional conditions to reduce the risk of reoffending if it decides to amend a parole order (in the context of failure to comply).<sup>1808</sup>

The Parole Board has wide powers to amend a court ordered parole order to ensure community safety through setting additional conditions designed to ensure the prisoner's good conduct and/or that are aimed at stopping the prisoner from committing an offence. It allows the Parole Board to tailor a court ordered parole order (when needed) to the actual risk posed by an individual prisoner.

In terms of a Board ordered parole order, in addition to the above, the Parole Board has the ability to amend, suspend or cancel a Board ordered parole order in circumstances where it receives information that, had it known the information at the time of granting parole, it would have included additional conditions to mitigate that prisoner's risk, or perhaps not even have granted parole release at that time.<sup>1809</sup>

The Parole Board's powers in section 205 can be exercised prior to a prisoner's release from custody to court ordered parole (often referred to as a pre-emptive suspension of the court ordered parole order or a 'pre-release suspension'). This was confirmed by the Court of Appeal in *Foster v Shaddock*<sup>1810</sup> (which dealt with a suspension of a court ordered parole order prior to physical release as opposed to amending by adding conditions):

The entitlement and therefore expectation of a prisoner to be released on the parole release date fixed by the sentencing court, which will be set out in the court ordered parole order, and the expectation reflected in Part 9 Division 3 of the PSA that an offender whose parole release date is fixed by the court will be released on that date, are modified by the power given to the parole board in s 205 of the CSA to amend, suspend or cancel that parole order. It is modified to the extent only that the parole board's powers may not be exercised except in the specific circumstances set out in subsection 205(2)(a) of the CSA ... The parole board's power is thus circumscribed. It cannot act unless one these conditions is satisfied.

The circumstances in which the parole board is empowered to act apply only once a person is subject to a parole order. A parole order will necessarily have to be made before a person may be released on parole ...

A failure to comply with the parole order can only occur after a person is released on parole; however, the other circumstances, posing a serious risk of harm to someone else or a serious risk of committing an offence or preparing to leave Queensland, may, as a matter of fact, occur before or after the person subject to the parole order has been released from prison on that parole order. It follows that, if the parole board reasonably believes that one of those circumstances has arisen before the person is released on any parole order, the board has the power to suspend, amend or cancel the parole order before the person is released on that parole order. There is nothing in the wording of the legislation that suggests that this power (that is the power in the specified circumstances to amend, suspend or cancel the person's parole order prior to release) does not apply to a person subject to a court-ordered parole order. On the contrary, it is clear from the wording of the legislation that it does and there is no temporal limitation on when that power may be exercised once a parole order has been made.

<sup>1804</sup> Ibid s 205(2)(a).

<sup>1805</sup> Ibid s 205(2)(c).

<sup>1806</sup> Ibid s 205(2)(d).

<sup>1807</sup> Ibid s 205(5).

<sup>1808</sup> Mark Ryan, Minister for Police, Fire and Emergency Services and Minister for Corrective Services (n 1309) 8 [6.3].

<sup>1809</sup> *Corrective Services Act 2006* (Qld) s 205(2)(b).

<sup>1810</sup> [2017] 1 Qd R 201.

[44] ... There is a clear expression of a statutory curtailment on the unfettered or absolute right to be released on the parole date set by the sentencing court as the parole release date. The parole board may amend, suspend or cancel a parole order under s 205 of the CSA whether before or after a prisoner is released on parole.<sup>1811</sup>

The Queensland Parole System Review identified three benefits of this power to pre-emptively suspend or cancel the issuing of a parole order:

1. Safeguards community safety — QCS can consider offender behaviour close to release and make recommendations where appropriate regarding parole amendment, suspension or cancellation before release, on limited grounds.
2. Aids in maintaining prison discipline to some degree, by providing an offender with an incentive to behave while in custody.
3. Retains certainty for the Court and the community as to the length of time in custody that will actually be served by a prisoner — unless the offender's conduct in prison demonstrates an unacceptable risk to the community close to his or her release.<sup>1812</sup>

The Parole Board must — 'if practicable' — give a prisoner (1) an information notice and (2) reasonable opportunity to be heard on a proposed amendment, before amending a parole order.<sup>1813</sup>

It is not required to give either in the case of a suspension or cancellation,<sup>1814</sup> but it must:

- give the prisoner an information notice on the prisoner's consequent return to prison;
- consider all properly made submissions; and
- inform the prisoner, by written notice, whether the Parole Board has changed its decision, and if so, how.<sup>1815</sup>

The distinction between amending on one hand and suspending or cancelling on the other is underlined by the difference in the definition of 'information notice'. For an amendment, the definition speaks of proposed action with 21 days for written submissions prior to the decision.<sup>1816</sup> For cancellation or suspension, the definition describes the Parole Board's decision in the past tense, with 21 days for written submissions showing cause why the Parole Board should change its decision.<sup>1817</sup>

#### 11.13.4 Chief executive powers regarding amendment, including conditions, and suspensions

Prior to amendments in 2017, the chief executive of QCS was authorised to temporarily amend or suspend a parole order.<sup>1818</sup> Since 3 July 2017, the chief executive can only temporarily amend a parole order (on the basis of a reasonable belief the prisoner has failed to comply with the order, poses a serious and immediate risk of harm to someone else, or poses an unacceptable risk of committing an offence).<sup>1819</sup> The express example of amendment given is imposing a curfew. The power is exercised by written order, which has effect for not more than 28 days.

The Parole Board may cancel the chief executive's order at any time.<sup>1820</sup>

While the chief executive no longer has the power to suspend a parole order, the chief executive can ask the Parole Board to suspend a parole order under section 208A of the CSA. The applicable grounds are the same as those that apply to temporary amendment in section 201, as well as a reasonable belief about the prisoner preparing to leave the State without permission.

<sup>1811</sup> *Foster v Shaddock* [2017] 1 Qd R 201, 208–9 [40]–[42], [44] (Atkinson J, McMurdo P and Fraser JA agreeing). See also the affirmed judgment of Daubney J: *Foster v Shaddock* [2015] QSC 36, 2–3 [3], 6 [13], [16], 6–7 [18]. There, the suspension followed adverse behaviour by the prisoner in the days leading up to his release, including attempting to contact the aggrieved victim by telephone.

<sup>1812</sup> Queensland Parole System Review (n 10) 89 [421]–[424].

<sup>1813</sup> *Corrective Services Act 2006* (Qld) s 205(3).

<sup>1814</sup> *Ibid* s 205(4).

<sup>1815</sup> *Ibid* ss 208(1)–(2).

<sup>1816</sup> *Ibid* s 205(6).

<sup>1817</sup> *Ibid* s 208(4).

<sup>1818</sup> *Ibid*, former ss 201(1)–(2), since amended by the *Corrective Services (Parole Board) and Other Legislation Amendment Act 2017* (Qld) ss 9, 11.

<sup>1819</sup> *Ibid* s 201.

<sup>1820</sup> *Corrective Services Act 2006* (Qld) s 202(4).

When such a request is made, section 208B of the CSA requires the Parole Board or a prescribed Board member<sup>1821</sup> to urgently consider and decide whether or not to suspend the parole order. The only grounds permitting acceptance and suspension are the four upon which the chief executive can base the initial request.

If the Parole Board decides to suspend, the decision is taken to have been made under section 205(2). If a Board member decides to suspend and issue a warrant for the prisoner's arrest, the Parole Board must either confirm or set aside that decision within two business days.<sup>1822</sup> If the decision is set aside, the suspension and warrant stop having effect<sup>1823</sup> and the prisoner is not taken to have been unlawfully at large over the period running from the member's decision to the Parole Board's decision to set it aside.<sup>1824</sup>

### 11.13.5 Lawful instructions

Section 200(1) of the CSA requires all parole orders to include conditions requiring the prisoner to be under the chief executive's supervision and to carry out the chief executive's lawful instructions. The intended scope of supervision and the 'lawful instructions' power are not further defined. By contrast, section 200A provides corrective services officers with specific powers to direct a person to remain at a stated place for a stated period, to wear a stated device (such as an electronic monitoring device), and to permit the installation of any device or equipment at the place where the person lives for the purposes of: (a) enabling the movements of the person subject to a parole order to be restricted; and (b) enabling the location of the prisoner to be monitored.

The Council notes that 'a direction under [s 200A] must not be inconsistent with a condition of the prisoner's parole order'<sup>1825</sup> and further, that 'a parole order may contain a condition requiring the prisoner to comply with a direction given to the prisoner under section 200A'.<sup>1826</sup>

### QCS concerns

In its final submission, QCS raised as an issue the inability of corrective services officers to impose conditions on parole orders.<sup>1827</sup> This is distinct from QCS powers to make reasonable directions in the context of community-based orders under the PSA, dealt with separately at section 8.12.

As discussed earlier in this chapter, section 200(1) of the CSA requires all parole orders to have conditions requiring the prisoner to be under the chief executive's supervision, and to carry out the chief executive's lawful instructions.

QCS wrote that it 'is not uncommon for QCS officers to make "lawful instructions" to offenders in order to manage their risk in the community (for example, directing them to participate in a relevant program)'. However, 'the CSA does not confer power on the Chief Executive to impose a condition on a parole order. Thus, an instruction issued cannot confer any power on the chief executive to impose a new condition on a parole order'.<sup>1828</sup>

QCS pointed to the examples of conditions in section 200(3) (being conditions only the Board can order), which include residence, employment, participation in a particular program and curfew. QCS stated that because only the Parole Board can impose conditions beyond the mandatory statutory ones, QCS's ability 'to use professional discretion in using section 200(1)(b) to issue instructions to offenders in the way it was intended' is limited:

For example, to be able to direct a child sexual offender to stay away from schools or places where children regularly gather, or direct a domestic and family violence perpetrator to complete a perpetrator program or comply with a non-contact condition of a police issued Domestic Violence Order.<sup>1829</sup>

The Council notes that these types of directions go beyond programs or rehabilitation.

<sup>1821</sup> 'Prescribed Board member' means the president, a deputy president or a professional board member: sch 4, *Corrective Services Act 2006* (Qld).

<sup>1822</sup> *Corrective Services Act 2006* (Qld) s 208C.

<sup>1823</sup> Ibid s 208C(4).

<sup>1824</sup> Ibid s 208C(6).

<sup>1825</sup> Ibid s 200A(4).

<sup>1826</sup> Ibid s 200(2).

<sup>1827</sup> Submission 11 (Queensland Corrective Services) 16–17. For a summary of the relevant provisions, see section 11.13.2.

<sup>1828</sup> Ibid 17.

<sup>1829</sup> Ibid.

QCS further noted that applying to the Board to vary or amend a court ordered parole order ‘may be impractical’ and that ‘the Board does not have the capacity to manage the volume of amendments that would have to be made to effectively manage offenders in the community’.<sup>1830</sup>

QCS suggested that any amendments to court ordered parole should be accompanied by:

Broad discretion ... for QCS to direct a parolee to participate in assessments and programs relevant to their identified risks and needs, and that are available and accessible for the parolee, rather than it being mandatory to all parolees, which could further address stakeholder concerns and align with the intent of the court in supporting offender rehabilitation to reduce recidivism for the safety of the community.<sup>1831</sup>

QCS envisaged amended mandatory court ordered parole conditions to align ‘with those available in CCOs’, which could ‘ensure CCOs do not become more intensive to comply with’ than court ordered parole orders.<sup>1832</sup>

QCS also noted that the proposed court ordered parole model did not include specific reference by the Council to an ability to incrementally reduce supervision as a consequence of positive parolee response to it (raised as an option in the management of the proposed new CCO) and stated that ‘the intensity of supervision should be commensurate to risk’.<sup>1833</sup>

Recent amendments to the CSA, giving effect to a recommendation of the Parole System Review, *removed* the chief executive’s power to suspend a parole order, which now vests exclusively in the Parole Board,<sup>1834</sup> at least in part because ‘Queensland appear[ed] to be the only jurisdiction in Australia where the correctional service can suspend an offender’s parole order and issue a warrant for arrest’.<sup>1835</sup>

QCS noted that, in the context of this new issue raised:

All Australian jurisdictions [except Queensland<sup>1836</sup>] empower community corrections officers to instruct persons subject to a parole order to undergo treatment or refrain from visiting certain places, to support the conditions of their parole order. Victoria, New South Wales and the Australian Capital Territory adopt a broader approach to lawful instructions in their Act or Regulations.<sup>1837</sup>

As this issue was raised comparatively late in the review, the Council did not have time to consider the proper administrative powers of corrective services officers in managing offenders on parole in detail, or to consult with other stakeholders regarding this issue.

### The approach in select jurisdictions

Victoria, NSW and the ACT have different parole regimes from Queensland’s. As noted in 11.3.2, Victoria and the ACT are among those Australian jurisdictions that do not have court ordered parole or something similar, instead having systems of entirely discretionary parole.

The NSW system involves an offender’s early release from custody for sentences of 3 years or less, without consideration by the Parole Authority, at the end of any non-parole period set by a court. The offender is taken to be subject to a statutory parole order directing release on parole at the end of the non-parole period.<sup>1838</sup> For sentences of over 3 years, where a non-parole period has been set, the Parole Authority determines whether to release the offender on parole.<sup>1839</sup>

---

<sup>1830</sup> Ibid.

<sup>1831</sup> Ibid.

<sup>1832</sup> Ibid.

<sup>1833</sup> Ibid.

<sup>1834</sup> *Corrective Services (Parole Board) and Other Legislation Amendment Act 2017* (Qld) ss 9, 11.

<sup>1835</sup> Queensland Parole System Review (n 10) 223 [1142]. See Recommendations 78 and 79.

<sup>1836</sup> Although unclear from QCS’s submission, based on feedback received, it is assumed that QCS does not consider its officers to have these same powers under existing legislation, unless a relevant program or place-restriction condition is attached to the parole order by the Parole Board.

<sup>1837</sup> Submission 11 (Queensland Corrective Services) 17.

<sup>1838</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 158. This only applies to sentences of 6 months or more as a court is prevented from setting a non-parole period for a sentence of imprisonment of 6 months or less: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

<sup>1839</sup> Ibid ss 134, 137, 143.

## New South Wales

NSW parole orders<sup>1840</sup> are subject to ‘the standard conditions imposed by the relevant Act or regulations’ and ‘any additional conditions imposed by the Parole Authority’.<sup>1841</sup> The standard conditions, set out in a regulation, are to be of good behaviour, not commit any offence, and to ‘adapt to normal lawful community life’.<sup>1842</sup>

The Parole Authority may impose additional conditions (and vary or revoke them).<sup>1843</sup> The relevant Act acknowledges two further conditions (prohibition or restriction on association with a specified person; and on frequenting or visiting a specified place),<sup>1844</sup> which are also the subject of the reasonable directions power of a community corrections officer in the supervision conditions in the regulation.<sup>1845</sup>

It ‘is a condition of a [NSW] parole order that the offender is to be subject to supervision, as prescribed by the regulations’.<sup>1846</sup> The Act further defers to the regulation the period of supervision.<sup>1847</sup>

The supervision condition in the regulation is extremely wide: reporting to a community corrections officer and complying with ‘all reasonable directions’ of such an officer relating to any of the following:<sup>1848</sup>

- residence;
- participation in programs, treatment, interventions or other related activities and in employment, education, training or other related activities;
- not undertaking specified employment education, training, volunteer, leisure or other activities;
- non-association and place-based restrictions; and
- drug and alcohol abstinence and testing and compliance monitoring requirements, including giving consent to third parties.<sup>1849</sup>

There are further requirements to:

- ‘comply with any other reasonable directions’;
- permit residential visits including entry;
- notify of changes to residence, contact details and employment; and
- not leave the State or country without permission.<sup>1850</sup>

The Parole Authority can exempt an offender from the supervision condition for a specified period in exceptional circumstances.<sup>1851</sup>

A community corrections officer can suspend a supervision condition for a period, periods, or indefinitely,<sup>1852</sup> and may also suspend a non-association or place condition or curfew condition for a period or periods.<sup>1853</sup> The regulations specify factors the officer must take into account before suspending a supervision order,<sup>1854</sup> and require

<sup>1840</sup> This discussion is limited to orders generally and does not examine specific exceptions such as parole for life sentences (s 128B) of the *Crimes (Administration of Sentences) Act 1999* (NSW).

<sup>1841</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(1).

<sup>1842</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 214(1).

<sup>1843</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(2).

<sup>1844</sup> Ibid s 128A, which also has ousters regarding where a parolee will not contravene these conditions.

<sup>1845</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) ss 214A(1)(c)(v) and (vi).

<sup>1846</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 128C(1).

<sup>1847</sup> Ibid s 128C(2) and *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 214A(2) – generally, 3 years or the period that the parole order is in force – whichever is the lesser.

<sup>1848</sup> The reasonable directions are identical to the provision for intensive correction orders *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 187, and also contain those for community correction orders: s 188.

<sup>1849</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 214A.

<sup>1850</sup> Ibid ss 214A(1)(d)–(h).

<sup>1851</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 128D.

<sup>1852</sup> Ibid s 128E(2).

<sup>1853</sup> Ibid s 128E(3).

<sup>1854</sup> Risk of reoffending, seriousness of criminal history, benefits of continuing and resources available to supervise the offender and other offenders who may be at a higher risk of reoffending: *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 218(1).

the approval of a more senior officer.<sup>1855</sup> Unlike the exercise of Parole Authority's power in the Act, no exceptional circumstances are required.

The regulation states that the Parole Authority cannot make an order containing terms or conditions relating to residence or treatment without first considering a community corrections report as to the offender's circumstances and being satisfied of the feasibility of securing compliance with such conditions. If the condition requires the cooperation of another person, that person must consent.<sup>1856</sup> There does not appear to be a similar constraint on community corrections officers exercising reasonable directions, apart from the word 'reasonable'.

The New South Wales Law Reform Commission (NSWLRC) examined reasonable directions in its 2015 parole report.<sup>1857</sup> It noted stakeholder suggestions that 'most of the supervision obligations could be dropped and offenders instead be simply required to obey reasonable directions', making 'the list of obligations shorter and more straightforward'. The NSWLRC preferred supervision obligations 'listing the main matters about which a supervising officer might give directions [which] makes it clear that a supervising officer's directions must always be reasonable, gives officers guidance about the matters that are suitable subjects of directions, and allows officers greater flexibility in dealing with individual circumstances'.<sup>1858</sup>

The NSWLRC also considered 'a limit being placed on directions linked to the purpose of parole' (in addition to the requirement that any direction should be reasonable), perhaps as 'a clause requiring any directions given to a parolee to be for the purpose of reducing risk to community safety'.<sup>1859</sup> In rejecting this proposal, it recommended that:

Corrective Services NSW's Community Corrections Policy and Procedures Manual should state that, to assist in complying with the requirement that they be reasonable, directions should be given to parolees for the purpose of managing risks to community safety and that directions given for other purposes might not be reasonable.<sup>1860</sup>

The NSWLRC was concerned about nexus arguments in the case of such a limit where directions were not as obviously or directly connected to managing the risk to community safety (e.g. contrasting a direction to attend a program with a direction to remain clothed and keep lights on during a home visit).<sup>1861</sup> There was also concern that 'in some situations, officers might also use directions partly to manage risk to community safety and partly as a sanction in response to low-level breaches. For example, if a parolee has been seen in restricted areas several times, an officer might direct the parolee to report more frequently to the Community Corrections office'.<sup>1862</sup>

## Victoria

The terms and conditions of a Victorian parole order are those 'mandatory terms and conditions set out in the regulations', and 'any others set out in the regulations that the Board imposes on the order'.<sup>1863</sup> Further, the Board may attach an electronic monitoring requirement and vary terms and conditions to which the order is subject.<sup>1864</sup> Non-compliance with an electronic monitoring or prescribed condition without a reasonable excuse is an offence.<sup>1865</sup>

The regulations set the mandatory terms and conditions as:

- not breaking any law;
- reporting, as directed, by a community corrections officer;
- notifying a community corrections officer of any change of address and employment;

<sup>1855</sup> *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 218(2).

<sup>1856</sup> *Ibid* s 215.

<sup>1857</sup> New South Wales Law Reform Commission, *Parole Report 142* (2015), Chapter 9.

<sup>1858</sup> *Ibid* 203–204 [9.42] and see Recommendation 9.2. The contents of this recommendation are close to the supervision requirements in the current regulation.

<sup>1859</sup> *Ibid* 208 [9.63].

<sup>1860</sup> *Ibid* 208 [9.66] and 209, Recommendation 9.4.

<sup>1861</sup> *Ibid* 208 [9.64].

<sup>1862</sup> *Ibid* 208 [9.65].

<sup>1863</sup> *Corrections Act 1986* (Vic) s 74(4).

<sup>1864</sup> *Ibid* s 74(5). The electronic monitoring requirement carries with it conditions that the prisoner comply with any direction by the Board or Secretary considered necessary for compliance and accept any residential visit by the Secretary. 'Secretary' means Secretary to the Department of Justice and Regulation: s 3.

<sup>1865</sup> *Ibid* s 74(5C): penalty is 3-months' imprisonment or 30 penalty units or both. This condition involves departmental directions powers. The same penalty applies to a separate offence of breaching a prescribed term or condition without reasonable excuse while release under parole: s 78A(1). Prescribed terms and conditions are listed in *Corrections Regulations 2019* (Vic) s 125.

- being under the supervision of a community corrections officer;
- making themselves available for interview by a community corrections officer, regional manager, or the Board as directed;
- attending a community corrections centre as directed;
- not leaving the State; and
- complying 'with any direction given by a community corrections officer, the Regional Manager or the Board that is necessary ... to ensure that the prisoner complies with the parole order'.<sup>1866</sup>

The regulations also set 'other' terms and conditions which the Board may impose. These relate to:

- alcohol consumption;
- assessment (as directed by a community corrections officer or the Regional Manager) regarding suitability: (1) for alcohol or drug abuse or dependency or for medical, psychological or psychiatric treatment (and undergoing or submitting to that treatment is assessed as suitable); and (2) for satisfactory participation in a program or training specified in the order (and participation);
- testing for drug or alcohol consumption as directed by the Secretary under the Act;<sup>1867</sup>
- reporting to the supervising officer as specified, for the period fixed in the order;
- area restrictions (or requirement to remain);
- curfew;
- Internet limitations;
- community service as directed by a community corrections officer or the Regional Manager), unless employed or in a program or training;
- residence, no-contact;
- provision of financial information to the Board as it directs; and
- compliance with a Board direction regarding data audits on computers or devices.<sup>1868</sup>

The Board may specify that one or more 'other' terms and conditions imposed on a parole order are subject to an intensive parole period (which the Board must fix) during which time the prisoner must complete the relevant term or condition.<sup>1869</sup>

A parolee ordered to attend a location<sup>1870</sup> can be given any directions during their attendance considered necessary for the purposes of efficiency, good behaviour, and safety while there.<sup>1871</sup> Directions can be given by a wide range of people, including a community corrections officer, security officer, volunteer or employee and a member of a prescribed class of persons who works at a location as a psychiatrist, registered medical practitioner, dentist, nurse, midwife or health worker.<sup>1872</sup>

In relation to a parole order, community corrections officers are subject to the directions of the Board.<sup>1873</sup>

<sup>1866</sup> *Corrections Regulations 2019* (Vic) s 111 (for parole orders made on and from 28 April 2019 to 31 October 2019) and s 112 (for parole orders made on and from 1 November 2019).

<sup>1867</sup> *Corrections Act 1986* (Vic) s 76A; 'Secretary' means Secretary to the Department of Justice and Regulation: s 3.

<sup>1868</sup> *Corrections Regulations 2019* (Vic) s 113 (for parole orders made on and from 28 April 2019 to 31 October 2019) and s 114 (for parole orders made on and from 1 November 2019). The former does not contain all conditions.

<sup>1869</sup> *Ibid* s 115 (for parole orders made on and from 28 April 2019 to 31 October 2019) and s 116 (for parole orders made on and from 1 November 2019).

<sup>1870</sup> Location means any of the following places — (a) a community corrections centre; (b) a place at which an offender is by a correctional order required to live; (c) a place which an offender is by a correctional order or Part 9 required to attend for educational recreation or for any other purpose: *Corrections Act 1986* (Vic) s 3.

<sup>1871</sup> *Corrections Regulations 2019* (Vic) s 118. This section is not prescribed in s 125 as a term or condition a breach of which is an offence in *Corrections Act 1986* (Vic) s 78A. See also s 90(6) of the Act.

<sup>1872</sup> *Corrections Act 1986* (Vic) s 85 'officer'.

<sup>1873</sup> *Ibid* s 73(1).

## Australian Capital Territory

Parolees must comply with core conditions, any additional conditions,<sup>1874</sup> and requirements under nominated legislation.<sup>1875</sup>

A parolee must comply with a 'direction' by the director-general under three different provisions.<sup>1876</sup> There is also power to direct to give a test sample.<sup>1877</sup>

The core and additional conditions include compliance with 'any direction' from the director-general in relation to the offender's parole, and with any condition prescribed by regulation that applies to the offender.<sup>1878</sup> The remaining conditions are:

- not committing another offence punishable by imprisonment;
- disclosing any new charge;
- seeking departmental approval of any change of contact details;
- appearing before the Board as required; and
- complying with any other prescribed condition.

There are also core conditions prescribed by regulation.<sup>1879</sup> Those that relate to the director-general's powers are:

- living at approved premises;
- reporting to a person at a nominated time and place;
- not leaving the ACT for longer than one day without prior written permission (and comply with relevant conditions); and
- 'comply with any direction given to the offender by the director-general'.

The term 'any direction' is inherently broad, but the regulation does provide four specific examples:

- associating with particular people;
- visiting any place, including a particular suburb;
- obtaining, being available for, or keeping employment; and
- attending or taking part in an approved activity or program.<sup>1880</sup>

The remaining prescribed core conditions are:

- not using a prohibited substance;
- authorising each doctor, therapist or counsellor to give information to the chief executive;
- not leave Australia without the Board's permission; and
- a prohibition regarding weapons.<sup>1881</sup>

## New Zealand

The Council also examined the NZ parole scheme. Standard release conditions relate to a parolee's obligations to a probation officer regarding:

<sup>1874</sup> See *Crimes (Sentence Administration) Act 2005* (ACT) s 130(2) 'the board may impose any condition (an additional condition) it considers appropriate on the offender's parole order'.

<sup>1875</sup> Ibid s 136.

<sup>1876</sup> Ibid s 137(1)(d): 'any direction' from the director-general under either of the *Crimes (Sentence Administration) Act 2005* (ACT) or the *Corrections Management Act 2007* (ACT) and s 138 'give directions' and *Crimes (Sentence Administration) Regulation 2006* (ACT) s 4(i) 'any direction'. Furthermore, there is a general legislative power to give 'a direction' to 'a person who is in the director-general's custody under this Act' including those considered necessary for the welfare or safe custody of the person or anyone else or ensuring compliance with any requirement under the Act or any other territory law: *Crimes (Sentence Administration) Act 2005* (ACT) s 321. This section is recognised in Chapter 7, Parole, in s 138(2). An offender on parole is taken to be under the sentence of imprisonment for which the parole was granted: s 140(1). A reference to the director-general is similar to the Chief Executive of Queensland Corrective Services.

<sup>1877</sup> *Crimes (Sentence Administration) Act 2005* (ACT) s 138. For Queensland, see *Corrective Services Act 2006* (Qld) s 41.

<sup>1878</sup> Ibid ss 137(1)(d), 137(1)(f).

<sup>1879</sup> *Crimes (Sentence Administration) Regulation 2006* (ACT) reg 4.

<sup>1880</sup> Ibid.

<sup>1881</sup> Ibid.

- reporting;
- notifying of residential address and employment if asked to do so and not moving to a new residential address in another probation area without prior consent;
- giving reasonable notice of an intention to change residential address within a probation area and advising of the new address;
- not residing at any address at which the person is directed to not reside;
- not leaving NZ;
- supplying biometric information (for legislated purposes);<sup>1882</sup>
- not engaging in prohibited employment or occupation;
- non-association; and
- that 'the offender must take part in a *rehabilitative and reintegrative needs assessment* if and when directed to do so by a probation officer'.<sup>1883</sup>

These standard conditions apply to every offender released on parole, generally for 6 months or for the period that special conditions are in force as determined by the Board.<sup>1884</sup>

The Board may impose further special conditions<sup>1885</sup> only for reasons set out in the legislation,<sup>1886</sup> non-exhaustive examples of which are listed in the relevant section.<sup>1887</sup> The examples listed are those relating to:

- residence;<sup>1888</sup>
- finances or earnings;
- participation in a programme;
- prohibitions relating to substances (and requirements to take prescription medication);
- non-association<sup>1889</sup> and place restrictions;
- electronic monitoring; and
- intensive monitoring (which can only be imposed as a consequence of a court order).<sup>1890</sup>

These conditions remain in force generally for the period specified by the Board.<sup>1891</sup>

In terms of treatment and consent, a special condition regarding taking prescription medication cannot be imposed, unless the offender has been fully advised by a qualified person about its nature and likely or intended effect and known risks, and the offender consents.<sup>1892</sup> Withdrawal of consent is not a breach of conditions, but 'may' give rise to recall (return to custody).<sup>1893</sup>

'Programmes' are defined in the Act as:

- psychiatric or other counselling or assessment;
- attendance at any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative, or reintegrative programme; and

<sup>1882</sup> *Parole Act 2002* (NZ) s 14A: managing offenders to ensure public safety, identifying them before they leave NZ, enforcing the condition not to leave the country.

<sup>1883</sup> *Ibid* s 14 (emphasis added).

<sup>1884</sup> *Ibid* ss 29(1), 29(4), 29AA(1)–(2). See also ss 18(2)(a), 19(4)(a)(i). The other periods for which the conditions may be in force are beyond the scope of this work.

<sup>1885</sup> *Ibid* s 29AA.

<sup>1886</sup> *Ibid* s 15(2): risk reduction, rehabilitation/reintegration, providing for reasonable concerns of the victim, complying with a court-imposed intensive monitoring condition.

<sup>1887</sup> *Ibid* s 15. See also ss 18(2)(b), 19(4)(a)(ii).

<sup>1888</sup> These are regulated by *Parole Act 2002* (NZ) ss 33–6. Unlike the standard release conditions, these relate to approval regarding a specific address and curfew, home detention of up to 12 months, and electronic monitoring.

<sup>1889</sup> The non-association condition can apply to both standard and special conditions.

<sup>1890</sup> *Parole Act 2002* (NZ) s 15(3). Emphasis added.

<sup>1891</sup> *Ibid* s 29AA(2).

<sup>1892</sup> *Ibid* s 15(4).

<sup>1893</sup> *Ibid* s 15(5) and see ss 59–60.

- placement in the care of any appropriate person, persons, or agency approved by the chief executive, such as (without limitation) an iwi, hapu, or whanau, a marae, an ethnic or cultural group, or a religious group, such as a church or religious order; or members or particular members of any of these.<sup>1894</sup>

The NZ legislation prohibits the Board from directing, indicating or requiring an offender to undergo or submit to drug or alcohol testing or continuous monitoring, although it sets the relevant condition.<sup>1895</sup> Instead, this power is vested in an authorised person (a constable or authorised Department of Corrections employee),<sup>1896</sup> in their discretion.<sup>1897</sup> The purposes for which information obtained from such testing can be used are limited.<sup>1898</sup>

An offender subject to release conditions imposed by the Board, or probation officer, may apply to it at any time for variation or discharge of them, and a probation officer who has so applied can suspend the condition until the application is determined (except for indeterminate sentences).<sup>1899</sup>

It is an offence to breach any standard or special release conditions without reasonable excuse (penalty: 1 year or a \$2,000 fine).<sup>1900</sup> This does not affect the recall power. There are also offences for breaching a drug or alcohol condition (same maximum penalties)<sup>1901</sup> and refusing entry to a specified residence to a probation officer or authorised person (applies to any person)<sup>1902</sup> or to a residence for inspection etc. of a monitoring device for a drug and alcohol condition (3 months or \$5,000 maximum penalties for both).<sup>1903</sup>

### The Council's view

The Council does not have the advantage of stakeholder views other than those of QCS in assessing whether the current lawful instructions powers are sufficiently defined to allow corrective services officers to issue directions in the interests of reducing an offender's risk of reoffending. It notes that an acceptance of Recommendation 47 regarding the application of court ordered parole to sexual offences of 3 years or less, will amplify the issue, and court ordered parole generally lacks the safeguard of parole conditions being considered by an authority, other than a sentencing court, close to release.

The Council notes that the phrase 'lawful instructions' (which appears once in the CSA and is not defined) differs from 'reasonable direction' as used in the PSA.

The Council agrees with QCS's view that the current scope of its powers to issue lawful instructions is unclear, and there may be benefit in its powers being better defined.

An amendment might be as simple as placing examples underneath section 200(1)(b) of the CSA or adding a subsection regarding the parameters of what 'lawful instructions' and/or 'supervision' may entail.

The Council's recommendation regarding reasonable directions for community-based orders (Recommendation 33)<sup>1904</sup> encourages an emphasis on the specific types of directions necessary to properly administer individual conditions of those orders, rather than broad definitions. However, in the case of court ordered parole, 'it is clear that once the parole order is made by the court, supervision of the prisoner on parole is the province of the executive'.<sup>1905</sup> In these circumstances, the Council considers it is appropriate for broader powers to be conferred on the executive provided that these are exercised in a way that is consistent with meeting the purposes of parole. The challenge lies in determining where the proper balance lies between those powers that should be entrusted to

<sup>1894</sup> Ibid s 16.

<sup>1895</sup> Ibid s 16A.

<sup>1896</sup> Ibid s 16B(7).

<sup>1897</sup> Ibid s 16B.

<sup>1898</sup> Ibid s 16E.

<sup>1899</sup> Ibid s 56.

<sup>1900</sup> Ibid s 71.

<sup>1901</sup> Ibid s 71A.

<sup>1902</sup> Ibid s 72.

<sup>1903</sup> Ibid s 72A.

<sup>1904</sup> Recommendation 33 reads: The reasonable directions powers to be exercised by Queensland Corrective Services should be defined with reference to the specific types of directions necessary to properly administer individual conditions of the order, rather than be defined broadly (e.g. a requirement to comply with 'any reasonable directions' given by an authorised corrective services officer). Further consultation on the scope of these reasonable directions powers should occur with courts and criminal justice stakeholders, including those agencies that have contributed to the Council's review, prior to their introduction.

<sup>1905</sup> *R v SCZ* [2018] QCA 81, 10 [37] (Davis J, Morrison and Philippides JJA agreeing).

the Parole Board, and those provided to QCS in administering the order, given both fall within the definition of the 'executive'.

Analysis of limitations on QCS's powers flowing from the standard conditions in section 200(1) of the CSA necessarily involves analysis of the Parole Board's powers in sections 200(3) and 205, and whether and how QCS direction powers are tied to Board-imposed conditions. The Council notes that the recent amendment in the form of section 200A(4) of the CSA explicitly makes the new direction powers of corrective services officers subordinate to a parole order.

Potential risks or tensions include ensuring that the Parole Board Queensland's independence and powers and functions are not compromised, while maximising QCS's ability to supervise and respond to offender risks and needs in the community efficiently.

The Council notes, as a negative, the risk of potentially ousting the application of judicial review if decisions are effectively moved from the province of the Parole Board to QCS, leaving no oversight or review options (other than internal administrative review processes, if established) in respect of QCS directions or instructions.<sup>1906</sup>

The Council is concerned about the wide scope of powers available in the other Australian jurisdictions discussed in this section, and their placement in regulations rather than Acts. The ability of executive government to change the fundamental character of supervision under parole, through a relatively opaque statutory mechanism, is not supported. The Parole Board should have the broader powers and discretion in terms of parole administration, rather than the chief executive, and any powers of the executive to issue directions about particular matters should be housed in an Act of Parliament.

Furthermore, uncertainty might follow a specific power appearing in both a mandatory condition, or as an example of a 'lawful instruction' that might be given, and again as an option to be exercised by a Parole Board.<sup>1907</sup>

The Council endorses the NSWLRC's position that guidance should list the main matters subject to directions, make it clear that directions must always be reasonable, and allow officers the greatest flexibility possible in dealing with individual circumstances. However, the Council has concerns that the 'main matters' listed by NSW and the ACT, in particular, are too wide (and, again, are placed in regulations).

In addition, the Council is of the view that the broader the powers provided to QCS to issue directions or instructions, the more important it is that the exercise of these powers is made subject to Parole Board and/or court review, in addition to any internal review processes that may be provided for administratively.

The Council also notes that the principles of the CSA are relevant to this issue — that the 'purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders', that 'an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded' and the recognition of the need to respect an offender's dignity and the special needs of some offenders.<sup>1908</sup>

In terms of the breadth of any expansion of QCS power resulting from such amendment, the Council supports an emphasis on rehabilitation over any powers used purely for the sake of monitoring or compliance. The Council notes findings in this regard that: 'approaches which are predominantly surveillance-focused are less likely to result in behavioural change than those that adopt a therapeutic philosophy, emphasise support for offenders, and seek to address their underlying risks and needs'.<sup>1909</sup>

### Assessment and program conditions vs place/area restrictions

In its submission, QCS suggested a 'broad discretion is provided for QCS to direct a parolee to participate in assessments and programs relevant to their identified risks and needs, and that are available and accessible for the parolee, rather than it being mandatory to all parolees'.<sup>1910</sup> This submission recognises that while the ability to

<sup>1906</sup> See *A-G (Qld) v Brown* [2012] QSC 68, 30 [160] (Applegarth J), which involved a reasonable direction under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 16B: 'Counsel for the Chief Executive of Queensland Corrective Services challenged whether the decision made requiring the respondent to reside at the Wacol Precinct in November 2011 was a decision of an administrative character made under an enactment and thereby a decision to which the *Judicial Review Act 1991* (Qld) applied'. While the Court made no finding regarding this matter, it was noted that, even if an unreasonable direction could be challenged in court proceedings on the basis it was unauthorised by law, 'no simple procedure exists for such a decision to be reviewed on the merits. The course of instituting and pursuing judicial review proceedings is costly and complicated'. See also the discussion of the benefits of judicial review in *Queensland Parole System Review*, (n 10) 192–3 [969]–[971].

<sup>1907</sup> For instance, the NSW scheme regarding non-association and place restriction, and that of NZ regarding non-association.

<sup>1908</sup> *Corrective Services Act 2006* (Qld) s 3.

<sup>1909</sup> Bartels (n 720) iv.

<sup>1910</sup> Submission 11 (Queensland Corrective Services) 17.

make these types of directions could form part of a 'lawful instruction' power, equally an ability to direct a parolee to participate in programs could form a standard condition of parole.

In reviewing other models, the Council finds the NZ model attractive in the sense that rehabilitative and reintegrative needs *assessment* is captured by the standard conditions available to a supervising probation officer, but *participation* in a program can only be ordered by the Parole Board (and an offender cannot be forced to take medication). However, it acknowledges that this would not meet QCS's call for a power to direct programs as well.

Wider powers, such as directing an offender to stay away from a place or area (the example being a sex offender and places children gather), go beyond assessment and programs, which may present extra challenges.

Rather than reaching a definitive conclusion, the Council recommends that further work be led by QCS or another agency on the development of potential reforms, subject to detailed consultation with corrective services officers on current operational issues in managing offenders on parole orders (specifically court ordered parole), with the Parole Board, the QPS<sup>1911</sup> and key legal stakeholders to define (such as through the use of examples) the types of instructions that may be given and the need for any additional standard conditions of parole. This might be undertaken as part of the broader review of court ordered parole recommended by the Council (Recommendation 49) or as part of a separate inquiry.

The Council has reached this view taking into account that the main focus of the reference has been on reducing anomalies and increasing the flexibility of the legislative framework that supports sentencing, rather than on how orders, once made, should be administered.

To be clear, the Council does not support any breach offence regarding parole conditions.

---

<sup>1911</sup> The Council notes that the QPS has a relevant interest in this issue due to its role in the management of the Australian Child Protection Offender Reporting scheme. 'The Child Protection Offender Registry, which is part of Child Safety and Sexual Crime Group, State Crime Command, is the unit responsible for the management of reportable offenders in Queensland. This is supported at a local level by police officers who work in the community and are assigned as case managers for these persons: 'Child Protection Offender Registry' *Queensland Police Service* (Web Page, 4 July 2019) <<https://www.police.qld.gov.au/online/cpor/default.htm>>.

## Chapter 12 Use of custodial orders for sexual offences

In this chapter the Council explores issues discussed in earlier chapters of this report as they apply to the sentencing of offenders for sexual offences. It discusses the current legal framework that applies to the sentencing of sexual offences both in Queensland and other Australian and international jurisdictions, and Queensland sentencing trends.

The chapter considers the potential impacts should the recommendation made in the *Queensland Parole System Review: Final Report* (2016) (Parole System Review) that court ordered parole apply to a sentence imposed for a sexual offence be adopted.<sup>1912</sup>

The Council has not considered the impact or operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) or *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) on the basis that these are post-sentencing orders and are not matters taken into account by a court in sentencing.<sup>1913</sup>

### 12.1 The current legal framework for sentencing sexual offenders

The *Penalties and Sentences Act 1992* (Qld) (PSA) provides guidance and direction to courts on the principles to be applied when sentencing an offender for a sexual offence. A court can only set a parole eligibility date for sexual offences, as defined for the purposes of the Act.<sup>1914</sup>

In accordance with this definition,<sup>1915</sup> a ‘sexual offence’ is an offence listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (CSA). Those offences also form the basis of the analysis of penalties given to people convicted of a sexual offence in Queensland between 2005–06 and 2017–18, discussed below, to the extent this analysis has been possible.<sup>1916</sup>

#### 12.1.1 Imprisonment orders

The PSA provides separate sentencing regimes for the sentencing of offenders for a sexual offence depending on the age of the victim.

##### Where the victim is under 16 years

When sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the court must have regard primarily to considerations listed in section 9(6) of the PSA. These considerations include the need to protect the child, or other children, from the risk of the offender reoffending,<sup>1917</sup> and their prospects of rehabilitation including the availability of any medical or psychiatric treatment.<sup>1918</sup> In addition, the principle that imprisonment should only be imposed as a last resort does not apply,<sup>1919</sup> and the Act provides that the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.<sup>1920</sup> An ‘actual term of imprisonment’ is defined in section 9(12) as ‘a term of imprisonment served wholly or partially in a corrective services facility’.

<sup>1912</sup> Queensland Parole System Review (n 10) Recommendation 5.

<sup>1913</sup> Section 9(9)(b) of the *Penalties and Sentences Act 1992* (Qld) expressly prohibits a court from having regard to whether or not the offender may become, or is the subject of, a dangerous prisoners application, or may become subject to an order because of such an application.

<sup>1914</sup> *Penalties and Sentences Act 1992* (Qld) s 160D(3).

<sup>1915</sup> Ibid s 160 and *Corrective Services Act 2006* (Qld) sch 1, sch 4.

<sup>1916</sup> There are some limitations to the data collected. Not all of the offences in Appendix 7 are represented individually because the collection was based on the most serious offence (MSO). In addition, some data were collected by using the Australian and New Zealand Society of Criminology (ANZSOC) definition of ‘sexual assault’. It will be noted where this definition is used.

<sup>1917</sup> *Penalties and Sentences Act 1992* (Qld) s 9(6)(d).

<sup>1918</sup> Ibid s 9(6)(f).

<sup>1919</sup> Ibid s 9(4)(a).

<sup>1920</sup> Ibid s 9(4)(b) and see s 9(5) regarding closeness in age between the offender and the child being a factor in deciding whether there are exceptional circumstances. Exceptional circumstances were considered in *R v Quick; Ex parte A-G* (Qld) (2006) 166 A Crim R 588 and *R v Pham* [1996] QCA 3.

In *R v Tootell; Ex parte Attorney-General (Qld)*,<sup>1921</sup> the Court of Appeal found:

The intent of section 9(5)(b) [now s 9(4)(b)] is to make it the usual case that those who commit sexual offences against children will serve actual imprisonment. The intent should not be subverted, by for example, an over-readiness to regard as exceptional any circumstances peculiar to the prisoner's case.<sup>1922</sup>

Therefore, unless there are exceptional circumstances, all offenders convicted of an offence of a sexual nature against a child under 16 years must be sentenced to a custodial sentence comprising one or more of the following orders:

- a term of imprisonment (with a parole eligibility date);<sup>1923</sup>
- a partially suspended sentence;<sup>1924</sup>
- a combined prison and probation order.<sup>1925</sup>

However, the general principles in section 9(2) 'must' also be considered to the extent to which they apply.

Similar considerations must also be taken into account when sentencing offenders for offences related to child exploitation material, although there is no express requirement that the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.<sup>1926</sup>

An adult offender convicted of a 'repeat serious child offence' must be sentenced to life imprisonment.<sup>1927</sup> A 'serious child sex offence' for the purposes of this regime is defined as:

an offence against a provision mentioned in schedule 1A, or an offence that involved counselling or procuring the commission of an offence mentioned in schedule 1A, committed—

(a) in relation to a child under 16 years; and

(b) in circumstances in which an offender convicted of the offence would be liable to imprisonment for life.<sup>1928</sup>

The offences listed in Schedule 1A of the PSA include rape, incest, maintaining a sexual relationship with a child, and carnal knowledge with or of children under 16.<sup>1929</sup>

### Where the victim is 16 years and older

Where the victim is 16 years and older, the court must have regard to the general principles set out in section 9(2). In such cases, the court has more sentencing options available to it, which are available without the need to establish there are exceptional circumstances. In addition to the actual imprisonment orders noted above, a judge or magistrate can order:

- an intensive correction order (ICO);<sup>1930</sup>
- a wholly suspended term of imprisonment;<sup>1931</sup> or
- a non-custodial order such as probation,<sup>1932</sup> community service,<sup>1933</sup> fine<sup>1934</sup> or recognisance (good behaviour bond).<sup>1935</sup>

However, in cases that involve violence (or counselling or procuring the use of, or attempting or conspiring to use violence), or result in physical harm to another person, the principle that imprisonment should only be imposed as

<sup>1921</sup> [2012] QCA 273.

<sup>1922</sup> Ibid 8 [19] (Holmes and Fraser JJA and Henry J).

<sup>1923</sup> *Penalties and Sentences Act 1992* (Qld) s 160D.

<sup>1924</sup> Ibid s 144.

<sup>1925</sup> Ibid s 92(1)(b).

<sup>1926</sup> Ibid ss 9(6A), 9(7).

<sup>1927</sup> Ibid s 161E.

<sup>1928</sup> Ibid s 161D.

<sup>1929</sup> Ibid sch 1A.

<sup>1930</sup> Ibid pt 6.

<sup>1931</sup> Ibid s 144.

<sup>1932</sup> Ibid pt 5 div 1.

<sup>1933</sup> Ibid pt 5 div 2, subdiv 1.

<sup>1934</sup> Ibid pt 4 div 1.

<sup>1935</sup> Ibid pt 3 div 3.

a last resort does not apply.<sup>1936</sup> In those cases the sentencing court is required to have primary regard to section 9(3) of the PSA. Under this subsection the court must have regard to a number of considerations including the risk of harm to the community if a custodial sentence was not imposed<sup>1937</sup> and the need to protect any members of the community from that risk.<sup>1938</sup>

## 12.2 Exclusion of sexual offences from court ordered parole

Under section 160D of the PSA, offenders sentenced to a term of imprisonment for a serious violent offence or a sexual offence are excluded from being eligible for court ordered parole. For these offenders the court is required to set a parole eligibility date if it imposes an actual term of imprisonment that is not suspended, ordered to be served by way of an ICO or as part of a combined prison and probation order.

When court ordered parole was introduced in 2006 the reason for excluding sexual offences and serious violent offences from the scheme was explained by the then Minister for Police and Corrective Services in her Second Reading Speech as being their higher level of risk:

Those prisoners who are sentenced to three years or less and who are sex offenders or serious violent offenders will not have their parole date set by a court. These types of prisoners pose a serious risk to the community and no matter how long or short their sentence is they will either have to serve their full term in jail, or be deemed suitable by a parole board before being released. In short there will be two options available to prisoners: serve your entire sentence behind bars or be deemed suitable by a court or parole board to serve some of your sentence in the community under supervision on parole.<sup>1939</sup>

The 'provision of programs to sex offenders and violent offenders to address criminogenic needs and reduce recidivism risk' was identified by the Minister as of primary importance in the management of these offenders.<sup>1940</sup> As considered by the Queensland Court of Appeal, '[t]he evident intent [of excluding these offenders from the scheme] is that each offender would be considered individually with respect to suitability for early release into the community'.<sup>1941</sup>

## 12.3 The approach to court ordered parole for sexual offences in other jurisdictions

As part of its work on the review, the Council has undertaken a cross-jurisdictional analysis of parole and sentencing orders across Australia and internationally, with a focus on England and Wales, Canada, and NZ. As discussed in Chapter 11 regarding court ordered parole, while there are some similarities in terms of a court setting a parole date that then becomes a statutory release date, Queensland's parole system is not directly analogous to other Australian models (nor England and Wales, Canada, or NZ).

Of the jurisdictions reviewed, four have a similar (though not directly analogous) parole regime to court ordered parole in the sense of these schemes providing for a person to be released at a set date, without Board review. These jurisdictions are NSW, SA, England and Wales, and NZ. General details regarding these parole regimes are outlined in the document *Community-based Sentencing Orders, Imprisonment and Parole: Cross-jurisdictional Analysis*, which can be found on the Council's website.

Of the Australian jurisdictions with some form of automatic release on parole:

- NSW does not exclude any offences from its statutory parole scheme that applies to sentences of more than 6 months,<sup>1942</sup> up to 3 years;<sup>1943</sup>

<sup>1936</sup> Ibid s 9(2A).

<sup>1937</sup> Ibid s 9(3)(a).

<sup>1938</sup> Ibid s 9(3)(b).

<sup>1939</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Corrective Services Bill 2006', 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).

<sup>1940</sup> Ibid.

<sup>1941</sup> *R v Waszkiewicz* [2012] QCA 22, 7 [32] (White JA, de Jersey CJ and Atkinson J agreeing).

<sup>1942</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

<sup>1943</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 158.

- SA, which has a system of automatic parole release for sentences of 12 months or more, and less than 5 years where a non-parole period has been fixed,<sup>1944</sup> excludes a number of listed sexual offences from the scheme.<sup>1945</sup>

New Zealand allows an offender sentenced to a short-term sentence (a sentence of 2 years or less<sup>1946</sup>) to be released after serving half of their sentence on conditions set by the court.<sup>1947</sup> This also applies to a person sentenced to a short-term sentence for a 'serious violent offence', provided the person has not previously been convicted of a serious violent offence and has not received a formal court warning of the consequence of committing a further offence of this nature.<sup>1948</sup> The definition of a 'serious violent offence' includes a number of sexual offences.<sup>1949</sup>

## 12.4 How are sexual offences sentenced in Queensland?

### 12.4.1 Queensland trends

Data over a 13-year period from 1 July 2005 to 30 June 2018<sup>1950</sup> (the data period) have been analysed by the Council to identify offence and sentencing trends for adult offenders sentenced in the Supreme and District Courts (combined) and the Magistrates Courts.

Broadly, the data show that the number of sexual offences sentenced has increased over time (although as a proportion of all sentencing events it has decreased slightly). For sentences where a sexual offence was the most serious offence (MSO), the data show:

- the majority of offenders are non-Indigenous males;
- the majority of offenders plead guilty, and
- the majority of offenders receive a sentence of imprisonment (including wholly and partially suspended sentences).

These data are a useful tool when considering Recommendation 5 of the Parole System Review – that court ordered parole should apply to a sentence imposed for a sexual offence. The data have been analysed to show the custodial penalty type imposed for the top five sexual offences (MSO) receiving sentences of 3 years or less. The top five offences have been selected on the basis that they constitute the majority of the sentenced offences within the cohort (87.6% of all sexual offences (MSO) receiving a custodial sentence of 3 years or less, and 78.7% of those receiving a custodial sentence of any length).

The data have also been analysed by penalty type for sentences above 3 years and up to 5 years. Consideration of sentencing trends where the term of imprisonment is between 3 and 5 years has some application to Recommendation 3 from the Parole System Review, which, together with the extension of court ordered parole to sexual offences, recommended that a court have discretion to set a parole release date in circumstances where an offender has served a substantial period on remand and the court considers the appropriate further period to be served prior to release would be 12 months or less. As the maximum term of a suspended sentence is also 5 years, the data have been analysed to allow for some consideration of how the use of these orders might change if courts had the option to set either a parole release date or a parole eligibility date for sentences up to this length.

The data show that for sentences of 3 years or less, wholly and partially suspended sentences are the most common penalty imposed for sexual offences (MSO). For offences over 3 years and up to 5 years, imprisonment (with a parole eligibility date) is the most common penalty type used; however, partially suspended sentences are still a common sentencing outcome. While the legislative intention was that offenders sentenced for a sexual offence 'will either

<sup>1944</sup> *Sentencing Act 2017* (SA) s 47 (Duty of court to fix or extend non-parole periods); and *Correctional Services Act 1982* (SA) s 66 (Automatic release on parole for certain prisoners).

<sup>1945</sup> The sexual offences excluded from automatic release on parole include: rape, compelled sexual manipulation, indecent assault, an offence involving unlawful sexual intercourse, persistent sexual abuse of child, and an offence involving an act of gross indecency: *Correctional Services Act 1982* (SA) ss 4 (definition of 'sexual offence') and 66(2)(a).

<sup>1946</sup> *Parole Act 2002* (NZ) s 4 (definition of 'short-term sentence').

<sup>1947</sup> *Ibid* ss 14, 86(1); *Sentencing Act 2002* (NZ) s 93.

<sup>1948</sup> *Parole Act 2002* (NZ) s 86(1)–(1A). See also *Sentencing Act 2002* (NZ) s 86C.

<sup>1949</sup> *Sentencing Act 2002* (NZ) s 86A. Sexual offences included in this definition are: sexual violation (which encompasses rape), sexual connection with child, indecent act on child, and indecent assault.

<sup>1950</sup> Note Table 12-1 is an exception to this, covering 2005–06 to 2016–17.

have to serve their full term in jail, or be deemed suitable by a parole board before being released',<sup>1951</sup> the data illustrate that the unintended consequence of excluding sex offenders from court ordered parole is that it has resulted in many sex offenders being subject to sentences that do not involve supervision. This was highlighted in the Parole System Review.<sup>1952</sup> The data and findings are explored further below.

It is important to note that these data have limitations:

1. First, they are based on 'sentenced events'. If a different sentence has been substituted for the original sentence on appeal, or a conviction quashed on appeal (meaning there is no conviction, and therefore no sentence), this is not reflected in the data. The Council does not have information about how many matters relate to these circumstances.
2. Over the 13-year data period, and in the years prior to it, there were a number of changes to sexual offences that would have influenced sentencing practices, such as:
  - the introduction of new sexual offences<sup>1953</sup> and abolition of others (such as sodomy,<sup>1954</sup> which may impact on sentences for maintaining a sexual relationship with a child);<sup>1955</sup>
  - changes to the type of conduct captured within different offence categories<sup>1956</sup> and maximum penalties;<sup>1957</sup>
  - the introduction of new circumstances of aggravation;<sup>1958</sup>
  - the introduction of new sentencing principles that apply in sentencing offenders for certain types of sexual offences — for example, to require an actual term of imprisonment to be served for offences of a sexual nature committed against children under 16, unless there are exceptional circumstances.<sup>1959</sup>

Where data were analysed by offence type, the offences listed reflect the classifications assigned by the Queensland extension to the Australian Standard Offence Classification (QASOC), so offence categories do not necessarily align directly with how offences are classified under Queensland legislation.<sup>1960</sup> Under QASOC subgroups, 'aggravated sexual assault' are offences that involve:

- sexual intercourse;
- infliction of injury or violence;

<sup>1951</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Corrective Services Bill 2006', 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).

<sup>1952</sup> Queensland Parole System Review (n 10) 102–3 [507]–[508].

<sup>1953</sup> New offences introduced in 2005: wilful exposure in the *Summary Offences Act 2005* (Qld) s 9; Child exploitation offences *Criminal Code* (Qld) (ss 228A–228D); *Criminal Code (Child Pornography and Abuse) Amendment Act 2005* (Qld). Offences introduced in 2013 by amendments made to the *Criminal Code* (Qld) include: Grooming children under 16 (s 218B); Indecent treatment of children under 16 if the child is a person with an impairment of the mind (s 210(4A)); Carnal knowledge with or of children under 16 if the child is a person with an impairment of the mind (s 215(4A)); Using the Internet to procure children under 12 (s 218A); *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld). In 2016, three new child exploitation material offences were created under the *Criminal Code* (Qld): Administering child exploitation material website (s 228DA), Encouraging use of child exploitation material website (s 228DB), and Distributing information about avoiding detection (s 228DC); *Serious and Organised Crime Legislation Amendment Act 2016* (Qld).

<sup>1954</sup> *Health and Other Legislation Amendment Act 2016* (Qld) pt 2.

<sup>1955</sup> For example, the sentencing court re-opened the sentence on this basis in *CDE v The Queen* [2017] QDCPR 2. While the conviction was appealed in *R v PAZ* [2018] 3 Qd R 50, the re-opening of the sentence by the court at first instance was mentioned at 89 [175] (Morrison JA).

<sup>1956</sup> For example, the definition of rape was expanded to include penetration by the offender of the vagina, vulva and anus of the victim by any body part or object, and penetration of the mouth of the victim by the offender's penis (previously captured within the offences of sexual assault and indecent treatment of a child) and the offence of sexual assault was recast by the *Criminal Law Amendment Act 2000* (Qld).

<sup>1957</sup> For example, maximum penalties for Child Exploitation Material offences were increased by the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) ss 88–91.

<sup>1958</sup> This applies both to new aggravated forms of existing offences introduced carrying higher maximum penalties — for example, a new circumstance of aggravation of a person using an anonymising service or hidden network in committing a child exploitation material offence: *Criminal Code* (Qld) ss 228A–228DC — and general aggravating factors introduced for the purposes of sentencing, such as the introduction of a serious organised crime circumstance of aggravation under s 161Q *Penalties and Sentences Act 1992* (Qld) and amendments that require a sentencing court to consider whether an offence is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case: s 9(10A).

<sup>1959</sup> *Penalties and Sentences Act 1992* (Qld) ss 9(4)–(5) inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5.

<sup>1960</sup> Queensland Government, Office of Economic and Statistical Research (n 3).

- possession/use of a weapon;
- committed in company; or
- an offence where consent is proscribed/committed against a child.<sup>1961</sup>

Examples of 'aggravated sexual assault' are rape, incest, carnal knowledge and maintaining a sexual relationship with a child. 'Non-aggravated sexual assault' are offences of sexual assault that do not involve aggravating circumstances and offences involving a threat of sexual assault.<sup>1962</sup> This category primarily includes indecent assault.<sup>1963</sup>

Offences classified as 'non-assaultive sexual assault' are grooming offences and procuring a child for prostitution/pornography. This category does not include offences involving physical contact.<sup>1964</sup> 'Non-assaultive offences against a child' offences primarily include indecent treatment of a child under 16 (procure to commit) and using the Internet to procure children under 16.<sup>1965</sup>

#### 12.4.2 Sentencing events

Table 12-1 shows a breakdown of sexual offences sentenced in Queensland over the data period. It shows that from 2005–06 to 2016–17 there were 7,786 adult offenders sentenced for 29,273 sexual offences, of which 7,756 were classified as the MSO. A full list of offences that are classified as 'contact' and 'non-contact offences' is contained in Appendix 7. 'Contact offences' include sexual assault, indecent treatment of children under 16, rape, incest, maintaining a sexual relationship with a child and making child exploitation material. 'Non-contact offences' include offences such as grooming children under 16, possessing child exploitation material and other child pornography offences.

**Table 12-1: Sexual offences sentenced in Queensland, 2005–06 to 2016–17**

| Offence type                                | Adult offenders | Sentencing events | MSO events | Sentenced offences | Penalties given |
|---|-----------------|-------------------|------------|--------------------|-----------------|
| Sexual offences                             | 7,786           | 8,276             | 7,756      | 29,273             | 30,892          |
| Child-specific sexual offences <sup>^</sup> | 5,790           | 6,124             | 5,234      | 22,468             | 23,819          |
| Contact offences <sup>#</sup>               | 5,980           | 6,295             | 5,907      | 20,463             | 21,485          |
| Non-contact sexual offences <sup>#</sup>    | 2,936           | 3,080             | 1,849      | 8,810              | 9,407           |

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

Notes:

This table is limited to the period 2005–06 to 2016–17 only, as unique adult offender data are not available for the second half of 2017–18.

The sub-categories presented are not mutually exclusive and cases/offenders may be counted in more than one.

<sup>^</sup> Child-specific sexual offences include only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences.

<sup>#</sup> 'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).

Table 12-2 shows the number of sentencing events involving a sexual offence has increased 19.1 per cent, from 706 events in 2005–06 to 841 events in 2017–18. However, as a proportion of all sentenced offences, sexual offences have decreased slightly from 1.1 per cent to 0.8 per cent.

<sup>1961</sup> Ibid 24 (Division 03 'sexual assault and related offences', Subdivision 031 'sexual assault', Group 0311).

<sup>1962</sup> Ibid 26 (Division 03 'sexual assault and related offences', Subdivision 031 'sexual assault', Group 0312).

<sup>1963</sup> *Criminal Code* (Qld) s 352.

<sup>1964</sup> Queensland Government, Office of Economic and Statistical Research (n 3) 27 (Subdivision 032 'non-assaultive sexual offences').

<sup>1965</sup> *Criminal Code* (Qld) ss 210(1)(b); 218A(1).

**Table 12-2: Change in sentenced sexual offences over time, 2005–06 to 2017–18**

| Offence type                         | Number of sentencing events involving a sentenced sexual offence |         |          | Proportion of all sentenced offences (%) |         |
|--------------------------------------|--|---------|----------|--|---------|
|                                      | 2005–06  | 2017–18 | % change | 2005–06                                  | 2017–18 |
| Sexual offences                      | 706  | 841     | ▲ 19.1   | 1.1                                      | 0.8     |
| Child-specific offences <sup>^</sup> | 527  | 590     | ▲ 12.0   | 0.9                                      | 0.6     |
| Contact offences <sup>#</sup>        | 577  | 604     | ▲ 4.7    | 0.7                                      | 0.6     |
| Non-contact offences <sup>#</sup>    | 203  | 376     | ▲ 85.2   | 0.4                                      | 0.2     |

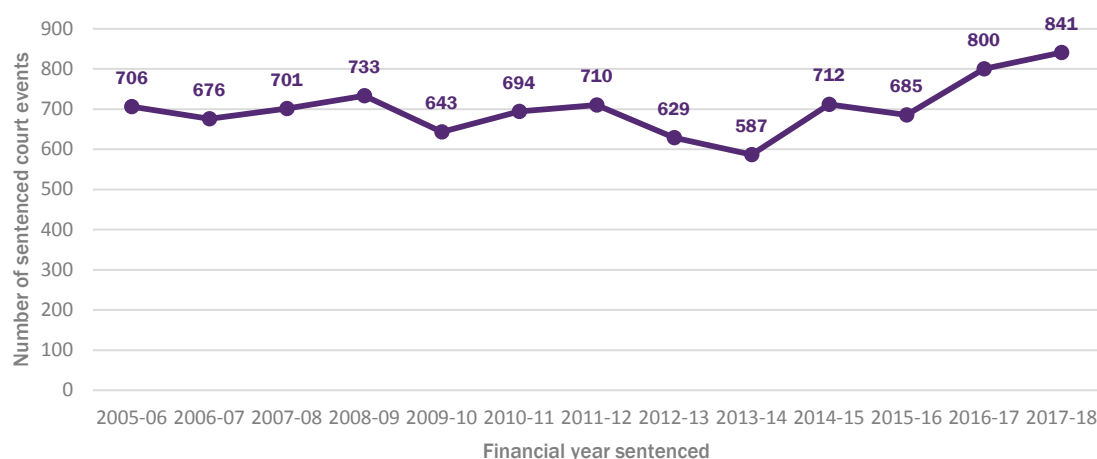
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Notes: The sub-categories presented are not mutually exclusive and cases/offenders may be counted in more than one.

<sup>^</sup> Child-specific sexual offences include only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences.

<sup>#</sup> 'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).

Figure 12-1 below, shows that the number of sexual offences sentenced by Queensland courts has remained fairly consistent, but has increased in recent years. The lowest point was in 2013–14, with 587 sentencing events. In the most recent financial year, 2017–18, there were 841 sentencing events involving a sexual offence.

**Figure 12-1: Number of sentencing events involving sexual offence, 2005–06 to 2017–18**

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

## 12.5 Offenders with a sexual offence as the MSO

### 12.5.1 Gender and Aboriginal and Torres Strait Islander status

The overwhelming majority of offenders sentenced for a sexual offence (MSO) were male (97.7%), and the majority of offenders were non-Indigenous (85.0%).

Table 12-3 shows little difference in offence type (MSO) by gender, with male offenders overwhelmingly committing the majority of offences.

**Table 12-3: Offence type for sentenced sexual offences by gender (MSO), 2005–06 to 2017–18**

| Offence type                         | N     | Male (%) | Female (%) |
|--------------------------------------|-------|----------|------------|
| Sexual offences (all)                | 8,552 | 97.7     | 2.3        |
| Child-specific offences <sup>^</sup> | 5,740 | 97.5     | 2.5        |
| Contact offences <sup>#</sup>        | 6,457 | 97.8     | 2.2        |
| Non-contact offences <sup>#</sup>    | 2,090 | 97.7     | 2.3        |

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018

Notes:

<sup>^</sup> Child-specific sexual offences include only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences.

<sup>#</sup> 'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).

Table 12-4 shows that non-Indigenous offenders represent the vast majority of offenders (85.0%) sentenced for sexual offences (MSO). The proportion of offences committed by Aboriginal and Torres Strait Islander offenders was slightly higher for contact offences, and lower for non-contact offences.

**Table 12-4: Offence type for Aboriginal and Torres Strait Islander people sentenced for sexual offences (MSO), 2005–06 to 2017–18**

| Offence type                                | N     | Aboriginal and Torres Strait Islander (%) | Non-Indigenous (%) |
|---|-------|---|--------------------|
| Sexual offences (all)*                      | 8,288 | 15.0                                      | 85.0               |
| Child-specific sexual offences <sup>^</sup> | 8,840 | 11.1                                      | 88.9               |
| Contact offences <sup>#</sup>               | 6,294 | 17.8                                      | 82.2               |
| Non-contact offences <sup>#</sup>           | 1,989 | 6.4                                       | 93.6               |

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Notes:

<sup>^</sup> Child-specific sexual offences include only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences.

\* Where the Indigenous status of an offender was not known they have been excluded from the data (n=264).

<sup>#</sup> 'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).

### 12.5.2 Historical sexual offences

For the purpose of this chapter, historical offences are classified as sentences that were imposed 10 years or more after the offence date. A review of the 8,552 offenders sentenced for a sexual offence (MSO) in comparison to the offence date showed that 795 (9.3%) offenders were sentenced more than 10 years after the offence date. Of the 795 offenders in this cohort:

- 287 were sentenced 10 to 15 years after the offence;
- 145 offenders were sentenced 15 to 20 years after the offence; and
- 363 offenders were sentenced more than 20 years after the offence.

Historical offences can affect the data in a number of ways, taking into account that some types of conduct may have fallen within a different offence category at the time of the offending (for example, indecent treatment of a child under 16, rather than rape), and that some offences at the time of the offending (the relevant period for the purposes of sentencing) would have carried a lower maximum penalty. As an example, the current maximum penalty for indecent treatment of a child under 12 years is 20 years, and 14 years if the child is 12 years or older, but under 16,<sup>1966</sup> whereas in 1997, the maximum penalties for this offence were 14 years for an offence involving a child under 12, and 10 years for an offence involving a child aged 12 years or older. Offences occurring even earlier than this carried an even lower maximum penalty (e.g. in 1995, the same conduct carried a maximum penalty of 10

<sup>1966</sup> *Criminal Code* (Qld) ss 210(2)–(3). The higher maximum penalty of 20 years' imprisonment also applies if the child is, to the knowledge of the offender, his or her lineal descendant, the offender is the guardian of the child or the child is in the offender's care, or where the child has a mental impairment: ss 210(4)–(5). The last-mentioned sub-category is a relatively recent addition, being inserted in 2013 by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld) s 15.

years if committed against a child under 12 years, and 5 years if committed against a child 12 years or older). Because all sentencing data for a given year include historical offences, this can affect reported average sentences.

Table 12-5 shows that of the 795 offenders sentenced 10 years or more after the offence, nearly half (49.2%, n=391) were sentenced for indecent treatment of a child as the MSO.

**Table 12-5: Historical offences sentenced by offence type (MSO) 2005–06 to 2017–18**

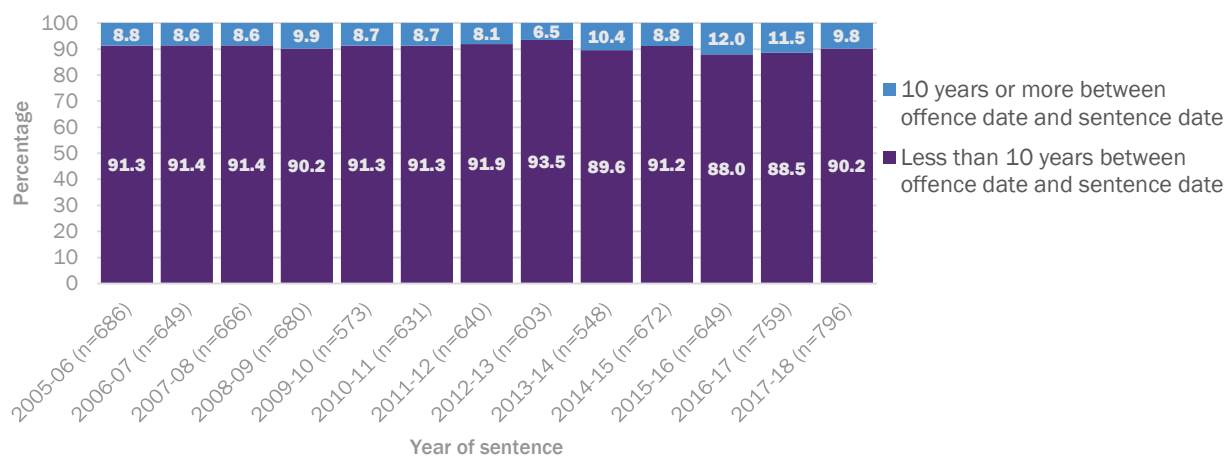
| Offence type (QASOC subgroup)                  | N          | Percent      |
|--|------------|--------------|
| Indecent treatment of a child                  | 391        | 49.2         |
| Maintaining a sexual relationship with a child | 172        | 21.6         |
| Rape   | 113        | 14.2         |
| Carnal knowledge of children                   | 42         | 5.3          |
| Aggravated sexual assault                      | 21         | 2.6          |
| Incest   | 17         | 2.1          |
| Non-assaultive sexual offences against a child | 13         | 1.6          |
| Attempted rape                                 | 9          | 1.1          |
| Child pornography offences                     | 9          | 1.1          |
| Non-aggravated sexual assault                  | 5          | 0.6          |
| Administer harmful substances                  | 1          | 0.1          |
| Indecent treatment (consent proscribed)        | 1          | 0.1          |
| Non-assaultive sexual offences                 | 1          | 0.1          |
| <b>TOTAL</b>                                   | <b>795</b> | <b>100.0</b> |

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.

Note: For definitions of QASOC subgroups ‘aggravated sexual assault’, ‘non-assaultive sexual offences against a child’ and ‘non-assaulting offences’, see above explanation under ‘Queensland trends’ – section 12.4.1.

Figure 12-2 shows the proportion of historical offences sentenced each year. The proportions have ranged between 6.5 per cent and 12 per cent of all sexual offences (MSO) sentenced.

**Figure 12-2: The proportion of historical sexual offences sentenced 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.

**Table 12-6: Type of penalties given for sexual offences (MSO), 2005-06 to 2017-18**

|                                 | Custodial penalty (79.6%) |              |      |                             |     |                              |      |                           |      |                            |     | Non-custodial penalty (20.4%) |      |                   |     |      |     |                      |     |                         |     |  |
|---------------------------------|---------------------------|--------------|------|-----------------------------|-----|------------------------------|------|---------------------------|------|----------------------------|-----|-------------------------------|------|-------------------|-----|------|-----|----------------------|-----|-------------------------|-----|--|
|                                 | TOTAL                     | Imprisonment |      | Imprisonment with probation |     | Partially suspended sentence |      | Wholly suspended sentence |      | Intensive correction order |     | Probation                     |      | Community service |     | Fine |     | Good behaviour order |     | Convicted, not punished |     |  |
|                                 |                           | N            | N    | %                           | N   | %                            | N    | %                         | N    | %                          | N   | %                             | N    | %                 | N   | %    | N   | %                    | N   | %                       |     |  |
|                                 |                           |              |      |                             |     |                              |      |                           |      |                            |     |                               |      |                   |     |      |     |                      |     |                         |     |  |
| Sexual offences (all)           | 8,547                     | 2,340        | 27.4 | 217                         | 2.5 | 2,324                        | 27.2 | 1,642                     | 19.2 | 282                        | 3.3 | 927                           | 10.9 | 286               | 3.4 | 307  | 3.6 | 192                  | 2.3 | 25                      | 0.3 |  |
| Child-specific sexual offences^ | 5,738                     | 1,141        | 19.9 | 184                         | 3.2 | 1,727                        | 30.1 | 1,233                     | 21.5 | 215                        | 3.8 | 726                           | 12.7 | 212               | 3.7 | 143  | 2.5 | 138                  | 2.4 | 18                      | 0.3 |  |
| Contact sexual offences#        | 6,457                     | 2,153        | 33.3 | 135                         | 2.1 | 1,806                        | 28.0 | 998                       | 15.5 | 185                        | 2.9 | 612                           | 9.5  | 195               | 3.0 | 196  | 3.0 | 159                  | 2.5 | 13                      | 0.2 |  |
| Non-contact sexual offences#    | 2,090                     | 187          | 8.9  | 82                          | 3.9 | 518                          | 24.8 | 644                       | 30.8 | 97                         | 4.6 | 315                           | 15.1 | 91                | 4.4 | 111  | 5.3 | 33                   | 1.6 | 12                      | 0.6 |  |

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Notes:

- 1) Rising of the court has been excluded (n=5);
- 2) The sub-categories presented are not mutually exclusive and cases/offenders may be counted in more than one.
- 3) <sup>^</sup> Child-specific sexual offences include only offences where the offence, by definition, can only be committed against a child. Offences that can be committed against either an adult or child victim, such as rape, are excluded meaning this is an undercount of these offences;
- 4) <sup>#</sup> 'Contact' and 'non-contact' offences have been identified by the Council based on the behaviour captured within the offences listed in Schedule 1 of the *Corrective Services Act 2006* (Qld) (see further Appendix 7).
- 5) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 12.5.3 Types of penalties imposed for sexual offences

Table 12-6 (above) shows that 79.6 per cent of all offenders sentenced for a sexual offence (MSO) received a custodial penalty (imprisonment with parole eligibility, a partially suspended sentence of imprisonment or a wholly suspended sentence).

Imprisonment was the most common custodial penalty, accounting for 27.4 per cent of all penalties given, followed closely by partially suspended and wholly suspended terms of imprisonment (27.2% and 19.2%, respectively). Imprisonment was highest for contact sexual offences (MSO) and lowest for non-contact sexual offences. Probation was the most common non-custodial penalty (10.9% of all penalties given).

### 12.5.4 Plea type and court level

An analysis of the data period showed that of cases where the final plea type was known, a large majority of offenders sentenced for a sexual offence (MSO) pleaded guilty (87.9%; n=7,376).

A plea of guilty is particularly important in offences of this nature, especially those involving children as victims. First, there is a utilitarian value, in the sense that by an early plea, the cost to the State of maintaining the criminal justice system is greatly reduced. Even if a small number of the offenders over the data period had pleaded not guilty and their case had proceeded to trial, it would have resulted in substantial court backlogs and major delays in having cases finalised, at increased cost. Secondly, there is the possibility that the plea may be evidence of remorse, which is in the community interest because an offender with insight into the causes of his behaviour is more likely to be rehabilitated and less likely to reoffend. Thirdly, and perhaps most importantly, a plea of guilty obviates the need for the victim to be compelled to re-live the events, thereby avoiding the likely trauma caused by their involvement in the trial process and assisting with their recovery.<sup>1967</sup>

Reflecting the jurisdiction of these courts and their ability to deal with sexual offence matters, most offenders sentenced for a sexual offence were sentenced in a higher court (86.9%; n=7,428), with only 13.1 per cent of offenders (n=1,124) being sentenced in the Magistrates Courts for a sexual offence over the data period.<sup>1968</sup> Of sexual offences dealt with by the higher courts, the overwhelming majority were sentenced in the District Court.

### 12.5.5 Custodial penalties

#### Court level

Over the data period, 6,805 offenders received a custodial penalty for a sexual offence (MSO), and 93.6 per cent were sentenced in a higher court (most usually, the District Court). The high proportion of custodial orders imposed for sexual offences by the higher courts is to be expected, given that most sexual offences are dealt with in these courts and these offences are more serious in nature than those sentenced in the Magistrates Courts.<sup>1969</sup>

#### Penalty type and sentence length

Figure 12-3 shows that of the 6,805 offenders who received a custodial penalty in any court for a sexual offence (MSO), 71.8 per cent received a sentence involving actual imprisonment – 34.4 per cent a term of imprisonment, 3.2 per cent a term of imprisonment with probation, and a further 34.2 per cent a partially suspended sentence.

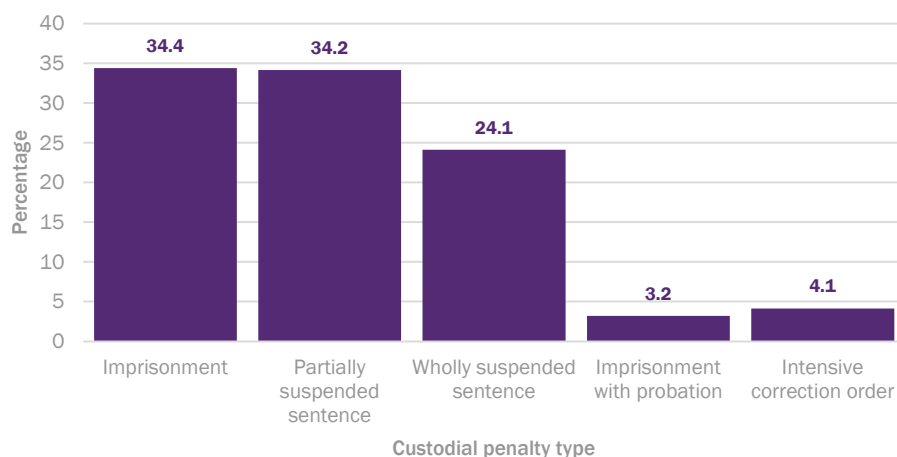
Almost one-quarter of offenders (24.1%) who received a custodial penalty for a sexual offence (MSO) received a wholly suspended sentence. Only 4.1 per cent of offenders were given an ICO.

<sup>1967</sup> These principles are captured in many cases including *R v Byrnes; Ex parte A-G (Qld)* [2011] QCA 40, 7 [27] (Muir JA, de Jersey CJ and White JA agreeing) citing *AB v The Queen* (1999) 198 CLR 111, 155 [113] (Hayne J).

<sup>1968</sup> Prior to the reforms introduced by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld), Magistrates Courts did not have jurisdiction to deal with sexual offending.

<sup>1969</sup> See also s 552B(1)(a) of the *Criminal Code* (Qld) where an offender can elect trial by jury for a sexual assault.

**Figure 12-3: Type of custodial penalty for sexual offences (MSO), 2005–06 to 2017–18**



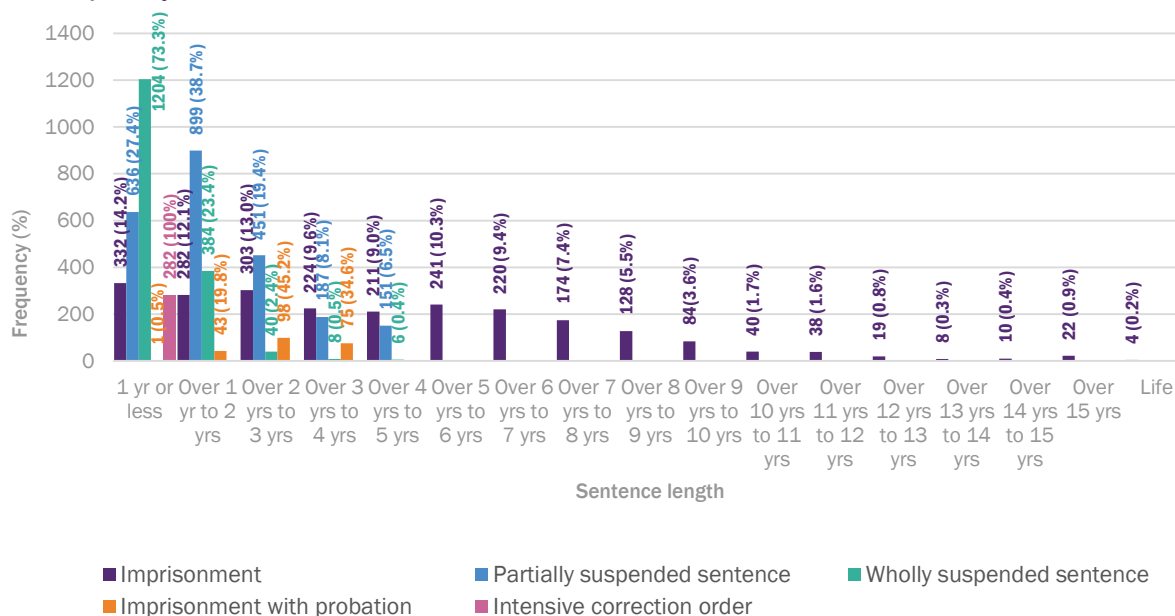
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Figure 12-4 shows that of offenders who received a partially suspended sentence for a sexual offence (MSO) (N=2,324), two-thirds (66.1%) received a sentence equal to or less than two years, while nearly three-quarters (73.3%) of offenders sentenced to a wholly suspended sentence had a head sentence of one year or less. This means the majority of offenders sentenced to a suspended sentence for a sexual offence (MSO) received a sentence that would fall within the 3-year cap for court ordered parole.

Almost half (48.1%) of offenders sentenced to imprisonment were sentenced to four years' imprisonment or less. Only 5.9 per cent received a sentence of 10 years or longer, although four offenders given a life sentence were not included in this count.

**Figure 12-4: Sentence length as a proportion of penalty type for sexual offenders (MSO) who received a custodial penalty, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Notes:

- 1) The sentence length for imprisonment with probation is the sum of the imprisonment length and the probation period.
- 2) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Of all offenders sentenced to a custodial sentence for a sexual offence as their MSO (N=6,805), 85.5 per cent received a custodial sentence equal to or less than 5 years – 68.0% of all offenders sentenced for a sexual offence (MSO).

Sentence lengths for sexual offences differ by the type of custodial penalty, as show in Table 12-7. Excluding four offenders who received a life sentence,<sup>1970</sup> the average length of imprisonment imposed was 4.9 years. For those sentenced to a partially suspended sentence, the average sentence length was 2 years, suspended after the offender had served 7.2 months in custody (being just under one-third of the average partially suspended sentence length).

The median term of imprisonment for all sexual offences is 4.5 years, compared to 1.5 years for a partially suspended sentence, and 1.0 year for both wholly suspended sentences and ICOs.

**Table 12-7: Custodial penalty sentence length for all sexual offences (MSO), 2005–06 to 2017–18**

| Custodial penalty type              | N     | Average | Median | Minimum       | Maximum |
|-------------------------------------|-------|---------|--------|---------------|---------|
| Imprisonment (years)                | 2,336 | 4.9     | 4.5    | 0.0 (3 days)  | 25.0    |
| Partially suspended sentence        |       |         |        |               |         |
| Sentence length (years)             | 2,324 | 2.0     | 1.5    | 0.1 (42 days) | 5.0     |
| Time before suspension (months)     | 2,324 | 7.2     | 6.0    | 0.0 (1 day)   | 36.0    |
| Wholly suspended sentence (years)   | 1,642 | 1.0     | 1.0    | 0.1 (28 days) | 5.0     |
| Imprisonment with probation (years) | 217   | 2.6     | 2.5    | 1.0           | 4.0     |
| Intensive correction order (months) | 282   | 10.3    | 12.0   | 3.0           | 12.0    |

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.

Notes:

- 1) Four offenders who received a life sentence are not included in these calculations.
- 2) The sentence length for imprisonment with probation is the sum of the imprisonment length and the probation period.
- 3) Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

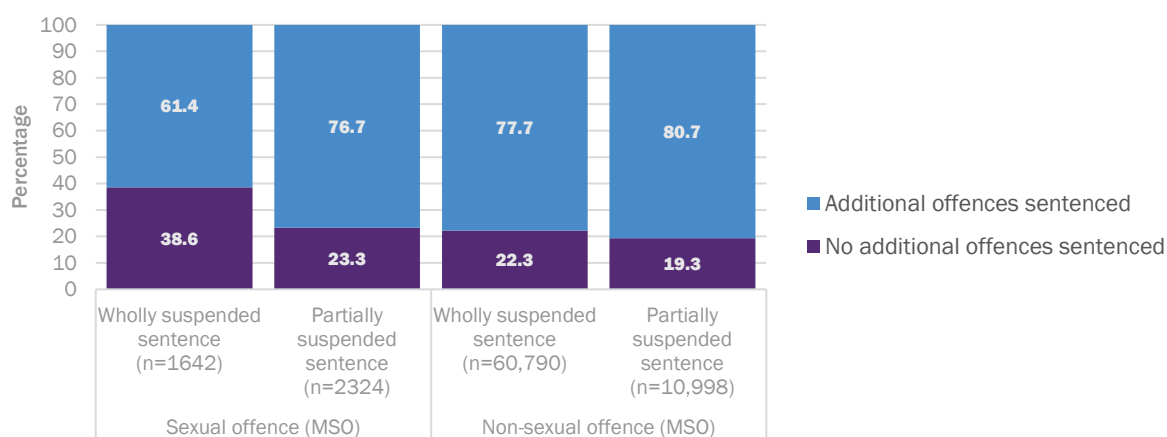
## 12.6 Multiple offences and penalties combined with probation

An analysis of court data for suspended sentences was conducted to explore whether courts are combining probation with a custodial sentence in circumstances where the person is being sentenced for multiple offences. Although suspended sentences in Queensland are not subject to conditions (other than that the person must not commit an offence punishable by imprisonment during the operational period of the order), suspended sentences ordered alongside probation for a separate offence can be used to achieve supervision of the offender in the community. For this sentencing option to be available to a court, the court must be sentencing the person for more than one offence.

Figure 12-5 shows that where a suspended sentence was imposed, the person was mostly being sentenced for more than one offence (between 61.4 per cent and 80.7 per cent of cases). Overall, sexual offences (MSO) were less likely to be sentenced for an additional offence than for non-sexual offences, particularly where a wholly suspended sentence was imposed.

<sup>1970</sup> Offenders who received life imprisonment were excluded as there is no known numerical value that can be placed on 'life imprisonment'.

**Figure 12-5: Proportion of cases that received additional penalties within a court event as a suspended sentence (MSO) of 5 years or less, by offence type, 2005–06 to 2017–18**

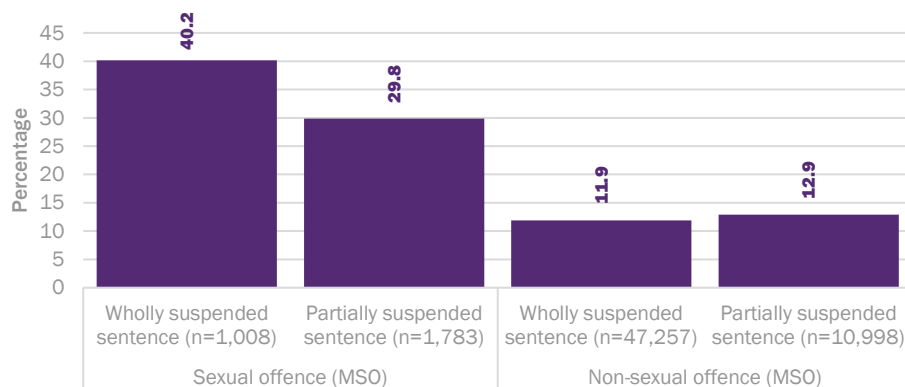


Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

Of sentencing events involving a person being sentenced for multiple offences, Figure 12-6 shows that combining probation orders with suspended sentences is more common where the MSO is a sexual offence compared to a non-sexual offence. When the MSO was sentenced with other offences and received a wholly suspended sentence, 40.2 per cent also received a probation order. This combination was observed in 11.9 per cent of court events with a non-sexual offence MSO. Similar proportions are seen when the MSO penalty was a partially suspended sentence, with 29.8 per cent of sexual offences (MSO) and 12.9 per cent of non-sexual offences (MSO) having a probation order ordered together with the partially suspended sentence.

**Figure 12-6: Proportion of cases that received a probation order within the same court event as a suspended sentence of 5 years or less, by offence type (MSO), 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

There are limitations to the use of a suspended sentence with probation in achieving a supervised form of imprisonment order with a set release date that can offer an effective form of supervision. First, an offender must be sentenced for multiple offences (see Figure 12-5 above). Second, if a partially suspended sentence is ordered alongside probation for a different offence, the term of imprisonment to be served prior to suspension must be no more than 12 months.<sup>1971</sup> Finally, while this approach is similar to court ordered parole, probation conditions can only be amended, or the order cancelled, by a court (rather than, in the case of parole, by the Parole Board). This issue is discussed further below.

<sup>1971</sup> See *R v Hood* [2005] 2 Qd R 54, 67 [48] (Jerrard JA, McPherson JA and Helman J agreeing).

## 12.7 Sentencing outcomes for certain sexual offences

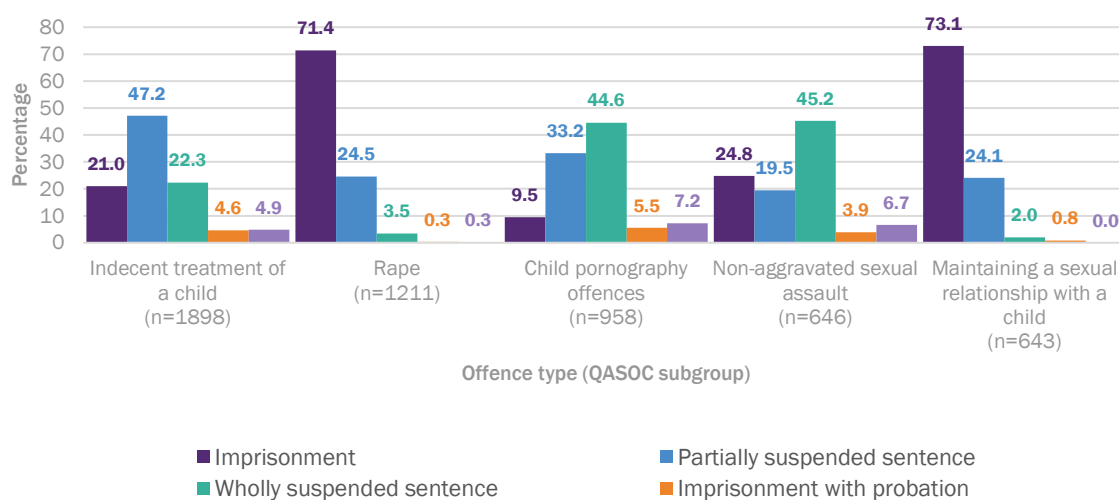
Sentences for the top five sexual offences to receive a custodial penalty (MSO) varied by offence type. Two offence categories used in Figure 12-7 and Figure 12-8 below are unique to QASOC<sup>1972</sup> subgroups and are explained here.

The category of ‘non-aggravated sexual assault’ consists of offences of sexual assault that do not involve aggravating circumstances and offences involving a threat of sexual assault.<sup>1973</sup> ‘Non-aggravated sexual assaults’ primarily include indecent assault offences.<sup>1974</sup> They exclude ‘aggravated sexual assaults’, which are offences that involve: sexual intercourse; infliction of injury or violence; possession/use of a weapon; committed in company; or an offence where consent is proscribed/committed against a child.<sup>1975</sup> Examples of ‘aggravated sexual assault’ are rape, incest, carnal knowledge, and maintaining a sexual relationship with a child.

Offences classified in the category of ‘non-assaultive sexual assault’ are offences such as grooming and procuring a child for prostitution/pornography. This offence category does not include offences involving physical contact.<sup>1976</sup> ‘Non-assaultive offences against a child’ offences primarily include indecent treatment of a child under 16 (procure to commit) and using the Internet to procure children under 16.<sup>1977</sup>

Figure 12-7 shows that rape and maintaining a relationship with a child under 16 years were the offences most likely to receive an imprisonment sentence (71.4% and 73.1%, respectively). Comparatively, a wholly suspended sentence was the most common penalty for non-aggravated sexual assault (45.2%), followed closely by child pornography offences (44.6%). Close to half of the offenders (47.2%) sentenced to a custodial penalty for indecent treatment of a child (MSO) received a partially suspended sentence – the most common penalty outcome for this offence.

**Figure 12-7: Penalty type for top five sexual offences that received a custodial sentence (MSO), 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury – Courts Database, extracted November 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

<sup>1972</sup> Queensland Government, Office of Economic and Statistical Research (n 3). The classifications are assigned by the Queensland extension to the Australian Standard Offence Classification (QASOC) and do not necessarily align directly with how offences are classified under Queensland legislation.

<sup>1973</sup> Ibid 26.

<sup>1974</sup> *Criminal Code* (Qld) s 352.

<sup>1975</sup> Queensland Government, Office of Economic and Statistical Research (n 3) 24–6.

<sup>1976</sup> Ibid 27.

<sup>1977</sup> *Criminal Code* (Qld) ss 210(1)(b); 218A(1).

### 12.7.1 Sexual offenders (MSO) who received a custodial penalty of 5 years or less

As a result of recommendations made by the Parole System Review, the Council has been asked to consider whether court ordered parole should be made available to courts in sentencing for sexual offences, and also if changes should be made to allow courts to set a parole release date in cases where they consider the appropriate further period to be served in custody before parole should be no more than 12 months, but the sentence exceeds 3 years (the current cap for court ordered parole). This is discussed further in Chapter 11.

To test the likely impact of these changes, the Council has considered how many sexual offenders might be captured should courts have a discretion to set either a parole release date or a parole eligibility date for sentences of up to 3 years, as well as for sentences of over 3, up to 5 years. The 5-year limit has been adopted because it is more straightforward to model than the proposal made by the Parole System Review, which takes into account time spent on remand, and that 5 years aligns with the maximum term of a suspended sentence.

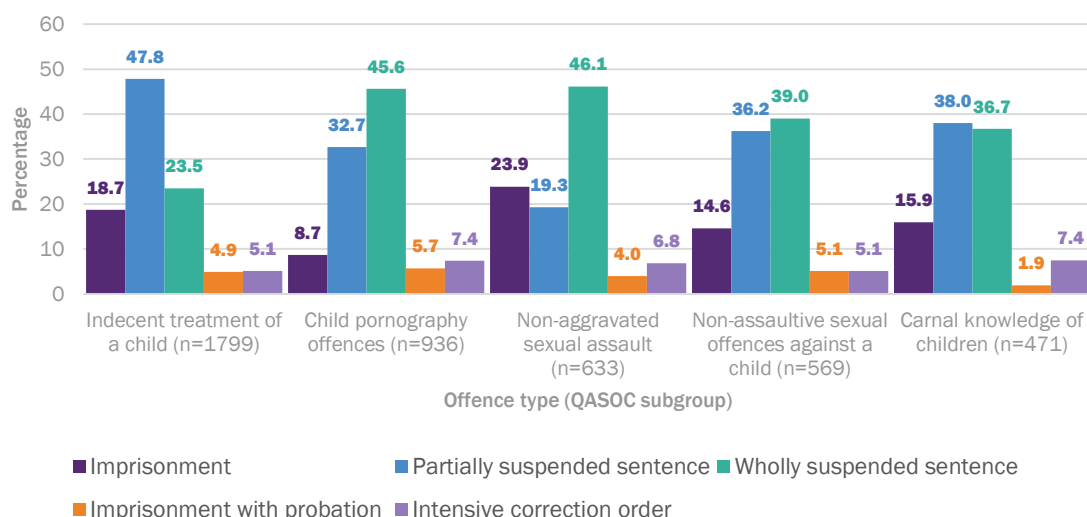
Of the 8,552 offenders sentenced for a sexual offence (MSO) over the 13-year data period, 5,817 offenders were sentenced to a custodial penalty of 5 years or less for a sexual offence (MSO) (68.0%). The majority of those offenders, (n=5,030; 86.5%) received a sentence of 3 years or less. A further 787 offenders (13.5%) received a sentence of more than 3 years, but less than 5 years.

### 12.7.2 Sexual offenders (MSO) who received a custodial penalty of 3 years or less

To explore penalties imposed for sexual offences in more detail, the Council examined custodial penalty types of 5 years or less for the top five sexual offences sentenced in Queensland. As shown in Figure 12-8, suspended sentences were the most common custodial penalty imposed among the five most common sexual offences that attracted a custodial penalty of 3 years or less (MSO), comprising between 65.4 and 78.3 per cent of custodial penalties. Wholly suspended sentences were the most common custodial penalty imposed for the top five sexual offences, with the exception of indecent treatment of a child, for which the use of partially suspended sentences was most common.

The offence category with the highest rate of imprisonment was non-aggravated sexual offences against a child, at 27.9 per cent, followed by indecent treatment of a child at 23.6 per cent.

**Figure 12-8: Custodial penalty type for top five sexual offences that received 3 years or less (MSO), 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

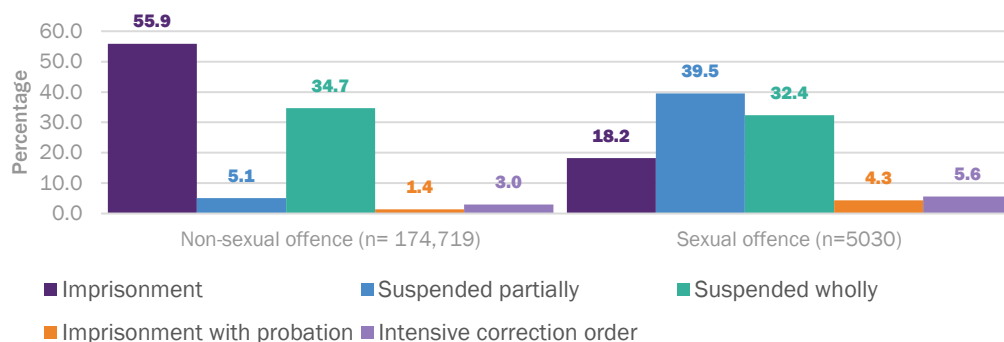
Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 12.7.3 Use of suspended sentences (3 years or less) for sexual offences and non-sexual offences

Figure 12-9 shows that for custodial penalties of 3 years or less, a term of imprisonment was significantly more common for non-sexual offences at 55.9 per cent, compared to 18.2 per cent for sexual offences. Sexual offences were more likely to receive a partially suspended sentence (39.5%) than non-sexual offences (5.1%). These findings correlate with the Parole System Review finding that courts are using suspended sentences for sexual offences because court ordered parole is not available.<sup>1978</sup>

However, no significant difference is seen in the proportion of wholly suspended sentences given for non-sexual and sexual offences.

**Figure 12-9: Custodial penalty type sentenced to 3 years or less for sexual offence (MSO) and non-sexual offences (MSO), 2005–06 to 2017–18**



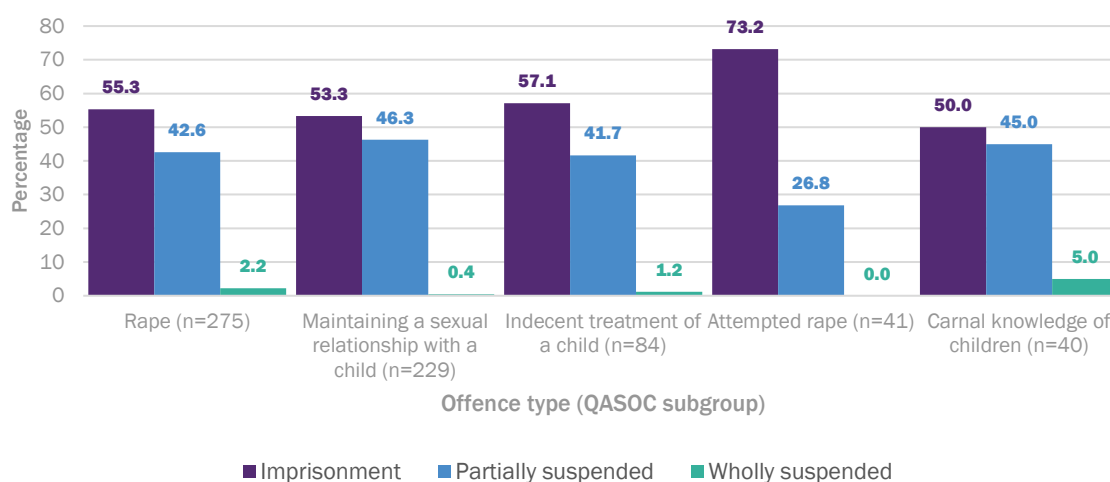
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 12.7.4 Sexual offenders (MSO) who received a custodial penalty of more than 3 years, up to 5 years

As shown by Figure 12-10, imprisonment was the most common custodial penalty for the top five sexual offences sentenced to between 3 and 5 years (MSO), comprising between 50.0 and 73.2 per cent of custodial penalties. Partially suspended sentences were imposed for 26.8 to 46.3 per cent of custodial penalties, illustrating that it is a common outcome.

**Figure 12-10: Top five sexual offences (MSO) that received a custodial sentence greater than 3 years and up to 5 years, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

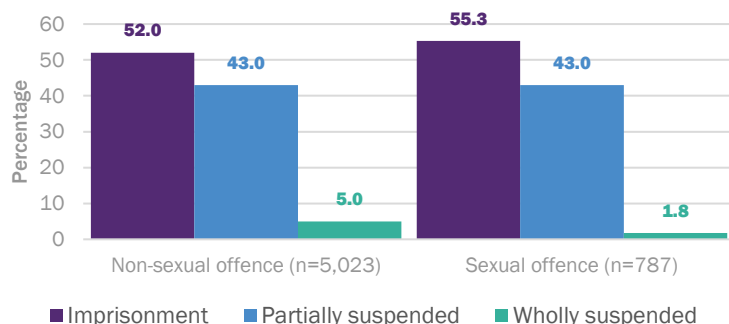
<sup>1978</sup> Queensland Parole System Review (n 10) 101–2 [500]–[503].

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

### 12.7.5 Use of suspended sentences (over 3 years and up to 5 years) for sexual offences and non-sexual offences

Of the 787 sexual offence cases that fall within the category of sentences of imprisonment between 3 and 5 years, 55.3 per cent (n=435) were sentenced to imprisonment, 43.0 per cent (n=338) were partially suspended, and 1.8 per cent (n=14) were wholly suspended. Similar proportions were seen for non-sexual offences with the same penalty criteria, as shown in Figure 12-11.

**Figure 12-11: Custodial penalty type sentence greater than 3 years and up to 5 years for sexual offences (MSO) and non-sexual offences (MSO), 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Note: Due to data recording practices, some sentences recorded as wholly suspended may be partially suspended. See further section 14.6.

## 12.8 Sentencing trends and the Parole System Review

The sentencing trends presented in this chapter highlight that suspended sentences (whether wholly or partially suspended) are a common outcome for sexual offences (MSO). Suspended sentences are more likely to be imposed for sentences less than 3 years but are still a common outcome for sentences over 3 years and up to 5 years. Where there are multiple offences, less than half of suspended sentences are accompanied by probation.

The data illustrate the unintended consequence of excluding sex offenders from court ordered parole, which has resulted in many sex offenders being subject to sentences that do not involve supervision. The Parole System Review observed that:

It may be that a short period of imprisonment for a sex offence for the purposes of retribution and deterrence would be considered appropriate by a Court if it could be confident as to the length of time that the offender would serve in custody. However, because the court ordered parole regime does not apply to sex offences, the Court cannot be confident as to the length of that period in custody and is, as a consequence, deprived of an option that might best serve the community. In other words, it may be that the effect of not allowing the court ordered parole regime to apply to sex offences is to make it less likely that an offender who commits a sex offence is sentenced to a period of imprisonment with subsequent effective supervision and rehabilitation on parole.<sup>1979</sup>

The Parole System Review considered the exclusion of sex offenders from parole and noted that:

Perhaps it was because it was believed that only a parole board could adequately determine the suitability of a sex offender for parole. But there is nothing different about sex offenders in this respect. And sex offenders and sex offences are not all the same. The community would benefit from the prisoner being subjected to a period of supervision in some cases but this means to reduce risk is denied by ill-thought-through legislation.<sup>1980</sup>

<sup>1979</sup> Ibid 102–3 [507].

<sup>1980</sup> Ibid 6 [41].

The Parole System Review further highlighted that this anomaly — the absence of a power to order a parole release date for sex offenders, even where the sentence is under 3 years — is inconsistent with the option to wholly suspend their imprisonment. Where imprisonment with release before the full term is served is warranted, the likely outcome is a suspended sentence even though ‘court-ordered parole, if available, would instead have been ordered’.<sup>1981</sup>

The basis for the Parole System Review recommending that court ordered parole be extended for sexual offences included:

- ‘proper supervision of sexual offenders after release from prison has been found to decrease their risk of offending’;<sup>1982</sup>
- ‘probation orders are not nearly as effective in terms of supervision as parole orders’;<sup>1983</sup>
- additional conditions can be immediately imposed on a parole order;<sup>1984</sup> and
- offenders who cannot be managed safely in the community can have a parole order suspended and be returned to custody.<sup>1985</sup>

It is desirable that sexual offenders are supervised in the community. A 2010 evaluation of QCS sexual offender treatment programs examined recidivism outcomes as ‘a function of discharge status, by comparing those offenders who were discharged from prison:

- a) without supervision;
- b) with standard supervision (e.g. parole); and
- c) under the more stringent supervision and monitoring provisions of the *Dangerous Prisoners (Sexual Offenders) Act*.<sup>1986</sup>

Researchers found that overall, offenders receiving no supervision had significantly higher rates of recidivism (34.7%) compared to those under standard supervision (21.9%). In relation to sexual recidivism, offenders who received no post-discharge supervision were ‘somewhat more likely to reoffend sexually’.<sup>1987</sup> This effect was independent of whether or not the offender had participated in sexual offending treatment in custody. The evaluation recommended that standard post-release supervision should be more accessible for both treated and untreated sexual offenders, as the combination of treatment and post-release supervision was the most effective in reducing reoffending.<sup>1988</sup>

The Parole System Review referred to two subsequent evaluations undertaken by QCS in 2013 and 2015 on its sexual offending programs and both reported reduced sexual recidivism rates.<sup>1989</sup> These reports indicate that an offender who completed a sexual offending program reoffended at a lower rate than one who did not complete a program.

---

<sup>1981</sup> Ibid 6 [39].

<sup>1982</sup> Ibid 102 [504] citing Stephen Smallbone and Meredith McHugh, *Outcomes of Queensland Corrective Services Sexual Offender Treatment Programs* (2010).

<sup>1983</sup> Ibid 102 [505].

<sup>1984</sup> Ibid 102 [506].

<sup>1985</sup> Ibid.

<sup>1986</sup> Smallbone and McHugh (n 1982) 46.

<sup>1987</sup> Ibid 47.

<sup>1988</sup> Ibid Recommendation 5, xii.

<sup>1989</sup> Queensland Parole System Review (n 10) 136 [687]–[688].

## 12.9 If court ordered parole were extended to sexual offences

To consider the number of offenders that would be affected if court ordered parole were extended to sexual offences receiving a sentence of 3 years or less, the Council analysed data over a two-year period (2015–16 to 2016–17).

Over this two-year period, 22,365 offenders were sentenced to imprisonment or a partially suspended sentence for their MSO.<sup>1990</sup> Of these offenders, 20,462 were sentenced to imprisonment and could receive a parole release date. For the remaining 1,903 offenders, court ordered parole was not an available sentencing option because:

- In 696 cases, the sentence imposed was for a sexual offence MSO (comprising 441 offenders receiving a sentence of 3 years or less, and 121 offenders receiving a sentence of over 3 and up to 5 years).
- In 771 cases, offenders were sentenced to over 3 years' imprisonment but less than 5 for an offence (as the MSO) other than a sexual offence.
- In 493 cases, offenders were sentenced to over 5 years' imprisonment (sexual or non-sexual offence as the MSO).
- In 77 cases, an SVO declaration was made, meaning the person was not eligible for court ordered parole.

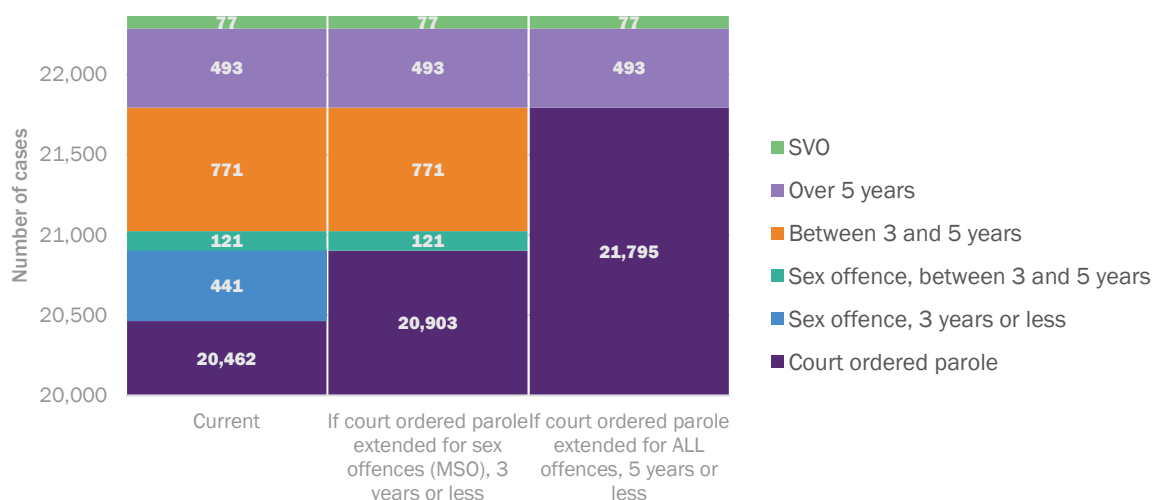
Figure 12-12 compares hypothetical scenarios if court ordered parole were extended. It reflects the number of offenders for whom court ordered parole may be an available sentencing option at the time of sentence. The figure does not propose to show the actual number of offenders on court ordered parole as a court would still have the discretion to suspend a sentence or order prison/probation.

Figure 12-12 shows that if court ordered parole were made available to courts in sentencing an offender to a period of 3 years or less for a sexual offence, 441 offenders could potentially receive court ordered parole. This would be a 2.2 per cent increase in offenders for which court ordered parole is available.

If court ordered parole were extended to any offence of 5 years or less, an additional 892 offenders would be affected, of which 121 would be offenders with a sexual offence as their MSO. In total, there would be a 6.5 per cent increase in offenders who could receive court ordered parole, with 2.6 per cent of these offenders being sex offenders.

<sup>1990</sup> Only cases where the most serious offence (MSO) resulted in a term of immediate imprisonment to be served post-sentence were analysed (22,366 cases). Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases).

**Figure 12-12: Offenders who could receive court ordered parole if extended to sexual offences, 2015–16 to 2016–17**



Source: QGSO, Queensland Treasury — Courts Database, extracted November 2018.

Notes:

- 1) For the benefit of readability, the vertical axis begins at 20,000. This may visually overstate the differences between categories. The following image illustrates how the chart would look if the vertical axis were to start at zero:



- 2) This analysis includes cases finalised between 2015–16 and 2016–17 that involve adult offenders.
- 3) Only cases where the MSO resulted in a term of immediate imprisonment were analysed (22,366 cases).
- 4) Offenders who fully served their sentence on remand and served no time post-custody were excluded from this analysis (1,635 cases). Therefore, offenders who were sentenced to parole with immediate release on the date of sentence are excluded from this analysis.
- 5) It has not been possible for the Council to analyse what proportion of offenders analysed in this figure might be ineligible for court ordered parole on the basis of having a parole order cancelled under sections 205 and 209 of the *Corrective Services Act 2006* (Qld). For this reason, the numbers of those identified as eligible in this figure will be an overcount of eligible offenders.
- 6) Note that if considering offences that were not the MSO, there were 19 offences that involved a sexual offence, resulted in a penalty of 3 years or less, and did not fall into one of the categories in the chart above.
- 7) Of the 441 cases where a sentence of 3 years or less was imposed for a sexual offence (MSO), 282 received a partially suspended sentence (63.9%) and 159 received imprisonment (36.1%) which was either with a parole eligibility date or as part of a prison/probation order.

## 12.10 Challenges with managing sexual offenders in custody and in the community

### 12.10.1 Lack of access to treatment programs

QCS currently delivers a range of sexual offending programs ‘that aim to reduce sexual reoffending and ensure all eligible sexual offenders in prison are offered a place in their recommended sexual offending programs’.<sup>1991</sup> In 2017–18, there were 410 completions of sexual offending programs.<sup>1992</sup> The sexual offending programs delivered in custody (set out in greater detail in Appendix 8) include:

- a nine-month high-intensity sexual offender treatment program;
- a three-to-five month moderate intensity sexual offender treatment program;
- a five-month adapted inclusion sexual offender treatment program for prisoners with a cognitive impairment;
- a culturally adapted Aboriginal and Torres Strait Islander sexual offender treatment program;
- a preparatory program; and
- a maintenance program.

Sexual offenders under community supervision can be referred to preparatory programs, medium intensity programs, and sexual offender maintenance programs.<sup>1993</sup> All sexual offending programs delivered in custody are delivered by QCS staff. Some of these programs are also delivered in the community.<sup>1994</sup>

QCS operates a mixed model whereby the delivery of programs remains the responsibility of QCS, with external providers contracted to provide individual interventions. The delivery of individual sexual offender interventions (primarily psychological intervention) in community settings is undertaken through appropriately skilled health practitioners engaged under a standing offer arrangement. Psychological intervention can be used to address responsivity or behavioural barriers to participating in a QCS-delivered group program. Where these barriers cannot be removed, such as where there are safety concerns, geographical constraints or behavioural problems, individual intervention can be accessed as an alternative treatment pathway for moderate to high risk offenders.

In respect of the availability of programs in the community, QCS commented that:

Only a very small number of programs (sexual offending programs, substance abuse programs and, in some locations, general offending programs) are offered by QCS staff in the community. Where possible, QCS brokers supportive relationships with non-government organisations and external stakeholders to ensure a range of treatment and support options are available to offenders in the community. Some of these services experience more demand for support than can be provided, particularly if they are the only available service in the local area.<sup>1995</sup>

An issue identified in the Parole System Review was that ‘prisoners on sentences under 12 months and those assessed as low risk do not engage in rehabilitation programs in Queensland prisons’.<sup>1996</sup> This relates to intensive offending behaviour programs targeting higher-risk offenders (noting lower-risk offenders can still access a range of programs that address substance misuse, psychological wellbeing, parenting and other needs). It can also be difficult for an offender to access treatment or programs when in prison for a term over 12 months, as well as complete a program by a parole eligibility date. QCS operates a centralised waiting list process designed to identify sexual offenders eligible for treatment, make offers to participate

<sup>1991</sup> Queensland Corrective Service (n 310) 33.

<sup>1992</sup> Ibid.

<sup>1993</sup> Queensland Parole System Review (n 10) 136 [686].

<sup>1994</sup> In *A-G (Qld) v FJA* [2018] QSC 291, 15–16 [99], the court discussed an affidavit from the Principal Advisor, Offender Intervention Unit that the Medium Intensity Sexual Offending Program (MISOP) ‘is offered in both custodial environment and community settings in both rolling and closed formats. The MISOP is delivered in a continuous rolling format at both Wolston Correctional Centre and Townsville Correctional Centre. The MISOP is also delivered in a continuous rolling format in the community in the Brisbane and Southern and South Coast regions’.

<sup>1995</sup> Submission 11 (Queensland Corrective Services) 6.

<sup>1996</sup> Queensland Parole System Review (n 10) 90 [430].

and, where necessary, transfer prisoners between locations to access intervention. The lack of access to programs can be for several reasons including:

- the offender is ineligible for a program;
- the offender declines the offer of placement on a program;
- the offender is not in a prison where suitable sexual offending programs are available;
- there are long waiting lists for some programs;
- offenders who continue to deny guilt or responsibility for their offences are not allowed to participate; and
- the offender is on remand or has an appeal against their conviction pending.<sup>1997</sup>

### 12.10.2 Prisoner risk assessments

To inform treatment and rehabilitation of prisoners, QCS undertakes a number of assessments when a person is imprisoned, including an Immediate Risk Needs Assessment and a Risk of Reoffending (RoR) assessment. Prisoners serving terms longer than 12 months receive a Rehabilitation Needs Assessment, which is used to develop the prisoner's Progression Plan. There is also a similar range of assessments completed when a prisoner is entering probation or parole, such as the Immediate Risks Assessment.<sup>1998</sup>

The Parole System Review made recommendations in relation to risk and need assessments used by QCS, which are currently being implemented. QCS has partnered with consultants at KPMG and Swinburne University to review and replace existing risk and need assessments with validated assessment tools suitable for prisoners in custody and offenders under supervision in the community.<sup>1999</sup>

### 12.10.3 Lack of supervision under some orders

The Parole System Review observed that sexual offenders 'are released without the supervision that they might have otherwise receive. Obviously this can have serious consequences'.<sup>2000</sup> The data obtained for this analysis supported the finding that suspended sentences are a common outcome. The data also showed that even where there are multiple offences, a suspended sentence is not always combined with probation.<sup>2001</sup>

The Parole System Review expressed concern about the effectiveness of probation in providing adequate supervision for sexual offenders or being able to respond to escalating risk due to the structure of these orders:

Probation orders are not nearly as effective in terms of supervision as parole orders. To prevent an offender on a probation order from having contact with a person or a child, living at a certain residence or attending certain areas or places, the probation order must be returned to Court for amendment. If the probation officers witness an escalation in risk behaviours of the offender, they are unable to act to prevent reoffending. When an offender breaches a probation order, the matter is returned to Court, which may take months.

Under a parole order, the parole officer may immediately impose additional conditions restricting where the offender can live or who they can have contact with or impose exclusions zones. These conditions can be imposed swiftly and for up to 28 days before the Parole Board must consider whether to impose them more permanently. Moreover, if the parole officer believes the risk that the offender presents cannot be safely managed in the community, they can suspend the order and return the offender to custody.<sup>2002</sup>

<sup>1997</sup> Offenders appealing a sentence can still access programs.

<sup>1998</sup> Queensland Parole System Review (n 10) 114 [568].

<sup>1999</sup> Queensland Corrective Service (n 310) 31.

<sup>2000</sup> Queensland Parole System Review (n 10) 6 [40].

<sup>2001</sup> See Figure 12-6: Proportion of cases that received a probation order within the same court event as a suspended sentence equal to or less than 5 years for a sexual offence (MSO) and non-sexual offence (MSO), 2005–06 to 2017–18.

<sup>2002</sup> Queensland Parole System Review (n 10) 102 [505]–[506].

The Parole System Review noted that it is important to ensure ‘that only offenders who are appropriate for parole orders receive terms of imprisonment with a parole release or parole eligibility date’.<sup>2003</sup> It was in this context that consideration was given to whether a court should have a discretion to order a parole release date or a parole eligibility date for sexual offences with a sentence of 5 years or less, to coincide with the length of suspended sentences.

#### 12.10.4 Queensland Court of Appeal decisions regarding sentencing sexual offenders

There have been a number of Court of Appeal cases involving sexual offenders appealing their sentence on the basis that the sentence structure and treatment options render the sentence manifestly excessive.<sup>2004</sup> When the court determines a parole eligibility date in sentencing an offender it can often be reflective of relevant mitigating factors such as an early guilty plea and cooperation. The main argument on appeal is that there is an incompatibility between the delivery of required sexual offender programs necessary for parole compared to the parole eligibility date set by the sentencing court.

In a 2008 decision, the Court of Appeal made the following observation in relation to sentencing and the availability of sexual offence programs:

The courts cannot frame sentence terms taking into account the availability of offender programmes unless there is some evidence going to these matters and in this case there is none. The presumption must be that the authorities will give effect to the court’s orders. It is the executive government that bears the responsibility to ensure that there are sufficient resources to permit the timely undertaking of programmes which determine eligibility for parole. An alternative might be to condition eligibility for parole upon the undertaking of an offender course outside the gaol setting.<sup>2005</sup>

In a recent case, *R v Wells*,<sup>2006</sup> the Court of Appeal considered whether a sentence was manifestly excessive because programs were unavailable:

According to a recent email from a Corrective Services employee, the applicant has not been recommended for any prison programs. The applicant’s argument is not supported by any evidence. The applicant has not established that if he had promptly applied for parole, his failure to complete any prison program that was not made available to him rendered it impractical for him to obtain release on parole by the parole eligibility date and that this would thwart the intended effect of the sentence. The case is, therefore, unlike *R v Daly* [2004] QCA 385 at [8] or *R v Lloyd* [2011] QCA 12 at [20], in which a demonstrated practical inability of a prisoner to obtain release on parole meant that effect could not be given to what was intended by the sentencing judge.<sup>2007</sup>

In *R v Lloyd*<sup>2008</sup> the Court observed that while community safety is important, consideration must also be given to situations where an offender is unlikely to receive parole before serving a substantial or, indeed, all of the sentence imposed, ‘such a result would not give requisite credit to his pleas of guilty to an ex-officio indictment. It would be unjust and is not what was intended by the primary judge’.<sup>2009</sup> The Court varied the sentence by deleting each of 10 concurrent orders of imprisonment with a parole eligibility date and substituting immediately suspended sentences for an operational period of 3 years and substituting probation for the imprisonment imposed on an eleventh count.

Similarly, in *R v Goodall*<sup>2010</sup> the Court of Appeal varied the sentence of 2-years’ imprisonment with a parole eligibility date at one-third to a sentence suspended after 6 months and an operational period of 3 years. The Court also imposed a probation order for 12 months on a separate count. The Court noted that:

it was significant that we were not able to be assured on the hearing of the application that the applicant would be in a position to receive any psychological or psychiatric treatment while in prison during the

<sup>2003</sup> Ibid 101 [498].

<sup>2004</sup> *R v Wells* [2018] QCA 236; *R v Goodall* [2013] QCA 72; *R v Waszkiewicz* [2012] QCA 22; *R v Lloyd* [2011] QCA 12; *R v Tracey* [2010] QCA 97; *R v Daly* [2004] QCA 385.

<sup>2005</sup> *R v Cunningham* [2008] QCA 289, 6 [19] (Jones J, Cullinane J agreeing).

<sup>2006</sup> *R v Wells* [2018] QCA 236.

<sup>2007</sup> Ibid 5 (Fraser JA, Sofronoff P and Philippides JA agreeing).

<sup>2008</sup> [2011] QCA 12.

<sup>2009</sup> Ibid 5 [20] (Chesterman JA, de Jersey CJ and White JA agreeing).

<sup>2010</sup> *R v Goodall* [2013] QCA 72.

balance of his term in actual custody ... it is desirable that he should receive some supervision to assist him refrain from similar conduct ... the probation order will also provide further protection for the community and assist the applicant to address his offending behaviour.<sup>2011</sup>

An alternative approach taken by the Court of Appeal has been to reduce a head sentence but retain the parole eligibility date to ensure the offender would not be required to serve ‘all or a substantial part of ... five year terms of imprisonment in actual custody’.<sup>2012</sup>

In contrast, in *R v Wano; Ex parte Attorney-General (Qld)*<sup>2013</sup> a partially suspended sentence was substituted with a sentence of imprisonment and a parole eligibility date. The Court of Appeal observed:

A curious feature of the sentence proceeding is that no-one identified any basis at all as to why a partly suspended sentence was preferable to one which would involve at least some ongoing supervision on the respondent’s release, as for example occurs when a prisoner is released on parole. The respondent was a long remanded teenager, without tangible rehabilitative progress or family support, whose continued burglary offending had disturbingly escalated to accompanying sex offending. The need for him to be under supervision when released back into the community was compelling.<sup>2014</sup>

The Court of Appeal decisions illustrate the competing considerations a court has when sentencing a sexual offender under the current regime to a sentence of 5 years or less. The decisions show there can be instances where the intention of the sentencing court is not given practical effect and in cases such as *Lloyd, Goodall and Tracey*, the structure of the sentence has been varied to accommodate this. In other cases such as *Wano*, the desirability of ongoing supervision can outweigh the consequences of being detained beyond the sentence date for a parole determination.

## 12.11 Issues and proposed reforms

In Chapter 4 on the fundamental principles guiding the review, the Council set out its position that court ordered parole should be retained and that sexual offenders serving sentences in the community should have appropriate supervision.

There has been no indication from stakeholders of any need to remove court ordered parole, and strong agreement that sexual offenders often have a need for supervision and treatment.

There are important considerations that apply to sentencing for sexual offences, as identified in this chapter. These are:

- difficulties in assessing issues of prospective risk months or years in advance of an offender’s potential release from custody;
- access to appropriate treatment programs and ensuring there are proper incentives for offenders to complete these programs – whether provided in custody or in the community;
- the ability to quickly amend conditions of an order, or to cancel or suspend an order, in situations of escalating risk, which is particularly important in the case of sexual offences where the individual and community impacts of reoffending are particularly high.

In the Council’s view, safety considerations in the sentencing and post-sentence management of sexual offenders is paramount. The sentencing framework should be structured, as far as possible, in a way that encourages the use of orders that ensure those convicted of sexual offences are subject to appropriate supervision and are appropriately managed – including in a way that can respond to changes in dynamic risk.

The Council’s concerns are, as the Parole System Review before it, that the exclusion of sexual offences from the court ordered parole scheme has resulted in unintended and undesirable impacts – in particular, the greater use of partially suspended sentences that, where ordered on their own, do not provide for offenders

<sup>2011</sup> Ibid 5 [18]–[19] (Douglas J).

<sup>2012</sup> *R v Tracey* [2010] QCA 97, 6 [25] (Muir JA).

<sup>2013</sup> *R v Wano; Ex parte A-G (Qld)* [2018] QCA 117.

<sup>2014</sup> Ibid 8 [44] (Henry J, Fraser JA and North J agreeing).

to be supervised in the community. Analysis of sentencing data has confirmed these concerns are well founded.

As the data illustrate, suspended sentences are the most commonly imposed sentencing outcome for sexual offenders who receive a custodial penalty of 3 years or less.<sup>2015</sup> The discretion of the court to impose supervision with a suspended sentence is limited by the requirement that there must be multiple offences, and that probation must begin on the day of sentence.

The Council has made recommendations that it considers should have an immediate impact in ensuring that people sentenced for a sexual offence are subject to supervision as a condition of their sentence. These recommendations would:

- enable a court to make both a community-based order (including an order involving supervision, such as probation) in combination with a suspended sentence when sentencing a person for a single offence (Recommendations 17 and 37); and
- provide courts with discretion to set either a parole release date or a parole eligibility date in sentencing for a sexual offence in circumstances where the term of imprisonment imposed is 3 years or less (Recommendations 47 and 48).

These reforms will expand the options available to courts, while retaining discretion to determine an appropriate sentence in the individual circumstances of the case.

Retaining the current 3-year cap for court ordered parole will also ensure that in the case of longer prison sentences imposed for more serious forms of sexual offending, release on parole is not automatic but is subject to the Parole Board's determination of whether the person poses an unacceptable risk of reoffending, including based on their willingness to engage with programs while in custody.

Encouraging courts to make greater use of imprisonment through the ability to set either a parole release date or a parole eligibility date, in the Council's view, is preferable to the current approach, which provides courts with the stark choice of imposing a term of imprisonment with a parole eligibility date on the one hand, or ordering that the term of imprisonment be partially or wholly suspended on the other, meaning the offender may not be under any form of supervision in the community.<sup>2016</sup> Even where a suspended sentence can be combined with a community-based order, such as probation, in many cases a sentence of immediate imprisonment with parole, in the Council's view, may be preferable, as while the Parole Board has the ability to amend, suspend or cancel orders relatively quickly, probation and other forms of community-based sentencing orders can only be amended or revoked on application to a court. This will also be the case should a CCO be introduced in Queensland, and changes made to enable it to be combined with a suspended sentence.

The Council suggests that the use of the new sentencing options and imprisonment should be monitored following introduction of the Council's proposed reforms to ensure they are having their desired impact, including as they apply to sexual offences.

<sup>2015</sup> Figure 12-4: Sentence length as a proportion of penalty type for sexual offenders (MSO) who received a custodial penalty, 2005–06 to 2017–18.

<sup>2016</sup> Although ICOs are technically available to offenders convicted of a sexual offence, they make up only a very small proportion of offenders subject to these orders (see further, Chapter 7). This may be partly due to the limited duration of these orders (12 months).

## Chapter 13 Summary of findings from place-based case studies

This chapter summarises the findings from the place-based case studies conducted by the Council. These case studies were conducted to illustrate the accessibility and availability of services to support community-based sentencing and parole across Queensland, and to explore how this may impact upon the sentencing practices of the courts. The case studies, which took place during April and May 2019, were intended to highlight possible implications of changing the current framework of community-based orders, and to identify barriers to encouraging increased use of these orders.

### 13.1 Methodology

Case studies were conducted at three locations in Queensland to gather sufficient illustrative information that could identify and reflect any differences that might exist across Queensland. These locations included:

- an urban centre – with a high density population and a Queensland Corrective Services (QCS) district office;
- a regional centre – with a QCS district office servicing more than five reporting locations; and
- a remote area – with a QCS district office in a remote area that supports a number of very remote reporting locations.

Employing a qualitative research methodology, the following stakeholders were consulted in each location using structured interviews and focus groups:

- QCS frontline staff and managers/supervisors (via separate focus groups);
- magistrates and judges (interviews);
- police prosecutors and local officers-in-charge (interviews);
- service providers such as re-entry services, health, drug and alcohol, disability, housing, and legal (interviews or small focus groups).

Across the three sites, 50 interviews were conducted in total, involving 102 participants (see Table 13-1).

**Table 13-1: Consultation as part of the place-based case studies**

|                                      | Urban | Regional | Remote | Total |
|--------------------------------------|-------|----------|--------|-------|
| Number of interviews conducted       | 21    | 17       | 12     | 50    |
| Number of participants in interviews | 40    | 46       | 16     | 102   |

Due to time restrictions, the research did not involve speaking with offenders on community-based sentence. Other limitations include being illustrative only due to the case study approach and that the information gathered was qualitative – based on individual stakeholder perceptions. No independent verification of participant comments and observations has been conducted. Furthermore, the views expressed were those of individuals and not necessarily the official views of their organisation or government agency.

### 13.2 Research objectives

Specific research questions for the place-based case studies were:

1. Are services available to support sentence management? Does this change by location?
2. Are services accessible to offenders on a wide range of sentencing orders? Does this change by location?
3. What factors impact on offenders' ability to access services?
4. How does availability of services impact on the types and/or combination of orders used?

### 13.3 Summary of findings

The findings from the Council's place-based case studies demonstrated both positive and negative features of the current service system and infrastructure to support people on community-based orders or parole at the study locations.

Many of these factors were consistent with those identified by QCS officers in the research on order outcomes conducted by the Queensland Government Statistician's Office.<sup>2017</sup>

Across the study locations, there were numerous QCS officers and other stakeholders interviewed who spoke passionately about working within a therapeutic model and supporting rehabilitation outcomes.

Various examples were provided where services had functioned well to support people on community-based sentences, especially when multiple agencies collaborated at an opportune time and services were able to be wrapped-around in a way that was appropriate and effective for the individual offender.

However, there was also frustration expressed about resourcing constraints. Gaps were identified with regard to the availability and accessibility of specific local services and programs to support community-based sentence management.

#### 13.3.1 Positive client stories

Many of the people consulted as part of the place-based case studies shared client stories that highlighted the role service availability and accessibility play in the effectiveness of community sentence management.

Positive client stories provided by participants were frequently characterised by enabling factors such as:

- coordinated support from multiple services;
- links to disability services and support (especially for offenders with intellectual disabilities);
- availability of services and supports at the point of motivation;
- change of environment;
- flexible service provision; and
- strong social or cultural supports (particularly in the remote case study site).

The following are some selected examples of the client stories shared:

#### Coordinated support from multiple agencies

I've had some really great success with the work that they've put in with certainly one of my fellows [...]. He really struggled to get himself into intervention to address his childhood trauma, to admit that he had ongoing issues with maladaptive coping drugs, has health problems. [...] He just couldn't and wouldn't go to a health service because he was so scared, and he wouldn't go to psych counselling because he was so scared that you know he's a manly man and he doesn't want to admit that to anyone. [SERVICE PROVIDER A] came on board for him. He's seen a psych, he's had a health check, he went back and got the results for his health check, he's spoken to us about what his coping looked like, they've linked him in with [SERVICE PROVIDER B] on our behalf. [SERVICE PROVIDER B] have gone and done home visits with him because he does have some transportation issues as well, so that's been great. He's certainly been a lot more open and responsive to the whole supervision process since all of those other things have started ticking away with him in the background. So [SERVICE PROVIDER B] in that instance and [SERVICE PROVIDER A] men's program has really been big support for him.

**QCS staff member, regional**

<sup>2017</sup> Queensland Government Statistician's Office (n 4).

### Linking to disability services and supports

I've got a guy he came out of custody and went into [HOUSING PROVIDER] and super unhappy, using drugs, really high mental health issues and through NDIS [NATIONAL DISABILITY INSURANCE SCHEME] we linked him up with [SERVICE PROVIDER] and his day-to-day package is he goes there. They totally filled his day up with programs and support and helped him with transport and he hasn't reoffended in over six months.

**QCS staff member, regional**

### Availability of services and supports at the point of motivation

We've got a drug addict we're working with at the moment over the road. He's a very nice person underneath everything. He's very sensitive, very vulnerable, hence with drug addiction. But he really, really wants to be better. So at the moment, we're throwing as much as we can at him. He's got a job. He's gone and got a job. I nearly fell over ... He wouldn't have achieved that on his own because of mental health issues, and it's not just substance abuse, it's the underpinning — he wouldn't have achieved that himself.

**Service provider, urban**

### Change of environment

So it was, 'Well okay, I need to get away from where my friends are. If I was going to go into Townsville or Cairns where I've got a family member that I can, you know my brother lives up there and he can try and assist me to stay off the drug. [...] He's not a rough sleeper so he could maybe help me'. So it was all right, well, let's try and get you a bus ticket. Let's go talk to this agency. Yes, we can sort that out for you. We'll get you on a bus, get you to Cairns. We'll even link you in with some accommodation up there where we'll be able to provide you that support. But again our program was us trying to liaise, coordinate do all of that. And again we had probably about two or three in the entire time that we've run it where we actually did exactly that which, you know, is probably not a huge number, but it was still three people you take from the park to a very different environment, which is no easy thing.

**Legal stakeholder, regional**

### Flexible support and individualised service provision

This was a young fellow, subjected to probation for sexual offending against children. We could work together to look at age of consent, and to sort of work around those sort of issues, but he was able to catch trains by himself, his mother — bless her — was trying to ensure that he didn't reoffend, by just keeping him in the house, which wasn't beneficial. So the in-house psychologist actually spent her sessions teaching him life skills. So she would go out to his residence, they would catch a bus into [LOCATION], and then show him how to purchase a [train] card, how to use a [train] card, how to sit on the train. So that was really beneficial. Definitely doesn't fit within the scope of what she was required to do, via a mental health care plan; but that was really beneficial.

**QCS staff member, urban**

### Strong social or cultural supports

Mediation's been a blinder for us; it's been fantastic, especially if we really offer cultural mediation, which is the same as the mediation process down south, but we tailor it to each community. They take ownership of how they want to conduct it. They follow set guidelines, but each community's got a different language, different lifestyle and different cultural values. But I think, it was a blessing for us to say to them, shape it into what you want, how it will provide for your community in a positive way. And it usually works because there are more eyes in community; there are more people that are aware of what's happening, what's the issue, why they're in court in the first place, whereas if you go to court, get charged, slap on the wrist turns into a big smack, and then goes and ends up in prison, simple.

**Service provider, remote**

### 13.3.2 Availability of services to support sentence management

It was demonstrated in the place-based research that:

- QCS supervision and case management was resourced by personnel at each of the three sites (urban, regional and remote).
- Additional programs directly funded or provided by QCS at the sites were limited.
- Offenders are primarily referred to local services and programs delivered by other government agencies, the community sector and/or private providers.

Limitations in coverage were noted in the delivery of sex offender and re-entry programs (both funded by QCS), particularly in the remote location.

Broader issues were also highlighted regarding the availability of services to offenders in the following areas:

- affordable and appropriate housing;
- family violence perpetrator programs;
- drug and alcohol rehabilitation; and
- disability services.

#### QCS supervision, case management and programs

While QCS supervision and case management to support community-based sentencing and parole management was in place across the case study sites, for very remote locations within the remote QCS office's coverage area, it was reported that QCS staff visits to these sites were limited to about once every three months. This was explained as being due to resourcing constraints and the high cost of related travel.

Several legal stakeholders expressed views that community-based sentence management in remote locations was focused primarily on reporting:

“ From experience [...] some people they get placed on probation orders [...] ended up just reporting, [...] through the whole period of intervention on some occasions [...] And it's the usual question when someone breaches their probation, I'm asking them "Well, what interventions had you been receiving?" And they go, "Well, just reporting".  
**Legal stakeholder, remote**

“ It's very poor, the available services. Obviously you can't compare a centre like [CLOSEST REGIONAL CITY] for instance, or Brisbane that has plenty of services available to address offending behaviour.  
**Legal stakeholder, remote**

“ What's the point of probation when there's no one supervising you? It's supposed to be someone, you know, supervising you. You're supposed to have that assistance. And sometimes I suppose it's just a phone call, and even the phone calls cut out. And if the community, the liaison officers aren't, you know, keeping track of the offenders it's, I mean, to my mind, it just defeats the purpose.  
**Legal stakeholder, remote**

#### Sex offender programs

One type of program that was indicated as not being widely available across Queensland was the one focused on sex offenders. Sex offender programs are discussed in section 12.10.1.

When asked about availability of sex offender programs in the remote location, stakeholders advised:

“ [There are] no sex offender programs whatsoever. And they're the hardest people to meet their needs sometimes. They'll do the acute, but in terms of service delivery, there's nothing.  
**QCS staff member, remote**

“ I've never had a sex offender program run.  
**QCS staff member, remote**

One member of the judiciary (in the regional location) also commented that:

“ The story I continually hear from counsel, that it's very difficult in the regions to get onto sex offenders' programs. They don't have a sex offenders' program at [REGIONAL LOCATION]. I'm told commonly they have to be sent to [OTHER LOCATION] or into Brisbane. And so given that we're dealing with so much crime that involves sex offences, I just wonder that there's some better way, or there's some other way they can facilitate sex offenders' programs in the regions.  
**Judicial stakeholder, regional** ”

### Re-entry programs

Re-entry programs were further identified by participants as being available in the urban location and the regional centre, but not having a presence in the remote location.

In the remote site, QCS and service providers reported there were no on-the-ground providers of re-entry services. These services, which were based in the nearest regional city, were occasionally accessed, though, to assist with transport costs to return the offender to their home community.

“ We don't have the re-entry team here in any capacity. It operates out of the [CLOSEST REGIONAL CITY] office, is my understanding, so that doesn't include here.  
**QCS staff member, remote** ”

“ And we have had one-offs where people have been brought in, for example, by police to go before the magistrate via link-up [...] And then they receive bail and there's no way of getting that person home [...]. So, we have made representation and we have been supported on a one-off basis, through the [CLOSEST REGIONAL CITY] third-party organisation that provides services.  
**QCS staff member, remote** ”

As one remote service provider commented:

“ Well, they should come back and be integrated in community. There should be a program that's set up to accommodate that, you know? But we don't have that. And that's the issue, the biggest issue. They walk straight back into the community. They haven't been ... you know, like properly groomed to come into the community and stuff. They haven't been counselled in any way. They just come in and life goes on. They commit something again, back they go again.  
**Service provider, remote** ”

### Gaps in community-based services and programs

In addition to these observations about QCS support and QCS-funded programs, specific gaps were identified in each of the locations in the availability of:

- appropriate and affordable housing;
- family violence perpetrator programs;
- drug and alcohol rehabilitation; and
- disability services.

#### Appropriate and affordable housing

The lack of availability of appropriate and affordable housing featured strongly in all the study locations and was reported as an issue that significantly affected people on community-based sentences and parole.

Comments from numerous participants emphasised the lack of availability of affordable housing:

“ Definitely housing, far and away housing is the biggest lacking area.  
**Service provider, urban** ”

“ There's one hostel, because they need an address when they leave. They all get pushed to the hostel, and again, there's no urgency. There's no follow-up, and they come — like, present to us homeless within two weeks, because either that's too expensive [...] they don't like it ...  
**Service provider, regional** ”

“ It can be too expensive for someone that's on Newstart or no payment at all. And it's just, like, there's nowhere else but there. There's the hostels, they're a day-to-day basis [...]. You can stay there for three months or so. That's great, but what happens after that three months?  
**Service provider, regional**

“ There's a couple of different services, but they are always full and there's a waiting list.  
**Service provider, urban**

“ Accommodation is a massive one. I'm sure this is a record you've heard. We have lots of clients who are homeless.  
**Service provider, urban**

“ The waiting list for priority housing is phenomenal.  
**Service provider, urban**

“ Some of the places that people are living in are really unhelpful. There's a boarding house in [LOCATION] that's terrible and there's just other places, they're not helpful for recovery.  
**Service provider, urban**

“ Housing is the biggest by far, because there just isn't really anything.  
**Service provider, urban**

The need for specific housing options for female offenders was also highlighted by several participants:

“ Housing is a big issue, especially for women, you can never get them into the women's shelter at all. Never, ever.  
**Service provider, regional**

“ It seems to be more for, kind of the single men, have got four boarding houses in the area. Women don't have that, so it's very divided. Men are over there and women and kids if you've got them. If you're a single woman — no.  
**Service provider, urban**

Many participants also identified a need for more appropriate accommodation options:

“ There's no supported accommodation whatsoever, for people that need the high-level care.  
**Service provider, regional**

“ It's some support accommodation model for when they're first released when they haven't got anybody to go to.  
 Housing and accommodation for people coming out of custody, unless they've got family to go to in this area is terrible. We're putting them into boarding houses and stuff like that, that are full of other people with ongoing issues. That's a nice way to say it. In [URBAN LOCATION], it's a real issue because people can come out really quite motivated [...] They come out, they're lonely, they're on their own and they're put into a place where they're surrounded by people that have got the same issues that they had before they went into custody, can't get employment and just add it all up and you're just pushing them back to where they were before really.  
**Service provider, urban**

In the remote site, similar issues about availability of affordable and appropriate housing were discussed by participants, with affordable housing again identified as a problem. As a consequence, it was reported that offenders are finding accommodation with family or connections, leading to overcrowding in local housing.

Participants in the remote location highlighted how the housing challenges and impacts were somewhat different from those in the urban and regional area:

“ Our kinship structure tells us that we can't leave anyone homeless or we take them in. Other families take them in, and they pay the cost for it. That's coming out of other family members' pocket. That's our kinship structure. We never leave anyone homeless.  
**Service provider, remote**

“ At the moment, the issues we have are overcrowding, but we’re not capturing the true stats or picture because people don’t want to report who’s staying in the house. Because they’re afraid the rent might go up, they might get kicked out. But housing wants them to report it, so they can show the need. It’s a catch-22. There’s also some private rental, but they’re just too expensive anyway.  
**QCS staff member, remote**

“ They bunk up at one house, waiting for the next available funding to come, and they’re on a waiting list. So, you’ve got to wait.  
**Service provider, remote**

One participant explained that in a remote or very remote community, limited housing options meant that the physical situation, including proximity to victims, was not always ideal for people on a community-based sentence:

“ Sometimes it’s like with their DV [DOMESTIC VIOLENCE] order, they can’t go within so many metres of the aggrieved’s house. But the aggrieved could live next door.  
**QCS staff member, remote**

### Family violence perpetrator programs

In terms of services focused on family violence perpetrators more broadly, while services providing perpetrator programs existed in all the locations studied, often these programs were not operational, or otherwise had not been practically available to offenders. This was reported as most commonly due to staffing issues and/or capacity demands.

In the remote area, lack of suitable staff had meant the male perpetrator program hadn’t been offered for about a year. Wait times were noted as at least six months in the regional area. In the urban area, waiting times to commence on a program were advised to have been up to 10 months on average.

This was seen as a significant gap to support community-based sentence management by numerous stakeholders:

“ In the time I’ve been here, so September 2017, there has been no perpetrator programs until the end of March. I think, one kicked off with [SERVICE PROVIDER] so, that’s obviously a big gap for us ... the flow-on effects from that is, you know, we’re sending a lot of people, and people aren’t getting treatment or addressing their offending behaviour.  
**QCS staff member, regional**

“ And there’s just been ongoing issues with them maintaining staff. It really has been ... it’s just been a Band-Aid effect, pretty much, for the last two years, and it’s become that there’s nowhere to send these guys to get any education. So while they’ve been trying really hard to fill positions and keep staff and keep the program flowing, it just ... for case managers in Corrections referring people, it’s just they keep coming back saying, no, we’ve done an intake but we’re waiting. Like, there’s just nothing happening for them.  
**Legal stakeholder, regional**

“ So, I think there’s a program running now where [SERVICE PROVIDER] are flying in facilitators [...] So, there’s something running. It’s the first one in, like I said, in 18 months or more, so that’s a big issue.  
**QCS staff member, regional**

“ And I mean, one, you’re fighting against people who don’t particularly want to go anyway. And then when they do go and, well, nothing happened.  
**Legal stakeholder, regional**

“ It’s coming back on our frontline staff to try and have these conversations, which we’re not equipped for.  
**QCS staff member, regional**

As one of the service providers in the regional centre stated, it is not just the lack of availability of the group-format perpetrator programs, but the range and formats of interventions, as well specific perpetrator programs for women:

“ For those who do want to, we’ve got a 16-week program and that’s it. What else is available for them? What after this? Or what before this if they’re not ready for this?  
**Service provider, regional**

“ I would love to see a comprehensive service for men. I'd love to see a perpetrator program for women and program funding for male aggrieved.  
**Service provider, regional**

#### Drug and alcohol residential rehabilitation:

The lack of availability of local drug and alcohol residential rehabilitation or detox facilities was also an issue frequently raised by the research participants in the urban and regional case study locations:

“ We don't have any in-house drug rehabilitation facilities ... We've got nothing here. That's a big gap.  
**Legal stakeholder, urban**

“ There is significant demand for residential rehabs and they usually have a waitlist. It can be anything from two weeks to two months. Six weeks seems to be about the average and there's very little obviously in this district. So most people have to leave their area of residence to attend.  
**Service provider, urban**

“ The rehab facilities is definitely one of the biggest problems we have. We don't have any in-house.  
**QCS staff member, urban**

“ And I guess that dry-out facilities are very limited here too, so basically, I know [SERVICE PROVIDER] is trialling dry out, but predominantly a detox, but it's predominantly the hospital, which then creates its own issues with Queensland Health.  
**QCS staff member, regional**

“ Would say drug rehab is definitely a big one.  
**Legal stakeholder, regional**

“ And you see [...] it's quite sad in court, they're screaming out and putting on a turn and just being obnoxious. And yet sometimes, on the video, after they've been there a few weeks, you see, you know, a person really making a change. And that's just a removal from drugs. And that could be achieved, no doubt, by having a residents' centre where people can remove themselves from it.  
**Judicial officer, regional**

#### Disability services

While the number of disability services and supports was a positive feature of the urban location, in the remote and regional areas, lack of disability services was cited as an issue by numerous participants, including supported accommodation for people with disabilities:

“ Well, we already know there's a lack of NGO [NON-GOVERNMENT ORGANISATION] support for people with intellectual disability. There's a lack of combination options, respite houses, support workers.  
**Service provider, regional**

“ The thing I'd like to see — New South Wales and Victoria have it and it works so well — is specific disability support accommodation which is a drop-down model from custody into the community.  
**QCS staff member, remote**

“ There's a big gap because there's no support for these particular people who are let out on orders. Because they can't comprehend, so they continue doing the same thing over and over again [...] And they become homeless too. So, they're down on the beaches everywhere.  
**QCS staff member, remote**

“ The gap, I think, is people with a disability and impairment. I think there's less services for them.  
**Legal stakeholder, regional**

“ There's just some charges you see, like blokes with intellectual disabilities that should be on NDIS that we're trying to do a lot of work with now. They'll just pick him up off the street, what are you doing, public nuisance, whatever, just rubbish, and you think my God and the magistrate gives him probation and we've got him again.  
**QCS staff member, regional**

Several corrections personnel saw opportunities to enhance support for offenders with disabilities by increased leveraging of the individual supports and services offered by the National Disability Insurance Scheme (NDIS), and that this was a developing focus area for them (one of the QCS staff has also been appointed the office's 'NDIS champion'):

“ I'm just thinking around that NDIS [NATIONAL DISABILITY INSURANCE SCHEME] space, so we know it's there, but understanding that disabilities sphere and how that fits with us, we're trying to understand what that looks like and how that impacts on some of our offender population.  
**QCS staff member, regional** ”

### 13.3.3 Range of services available to support various community-based sentences

Apart from these gaps, most participants reported they felt an appropriate range of services was present in their location to support offenders on a wide variety of sentencing orders. However, specific issues were identified with regard to supporting orders that included community service or drug and alcohol testing conditions.

When asked whether the range of services was sufficient, participants' comments included such sentiments as:

“ I think it's actually quite good. The Indigenous services seem to be quite active and engaging. In fact, everything, as far as that's concerned, is quite good.  
**Judicial officer, regional** ”

“ The thing is that the services are here.  
**Service provider, remote** ”

“ Yeah, there's so many people to choose to talk to in [LOCATION] as well. You've got so many services it's just — it's excellent.  
**Service provider, urban** ”

However, even when it was considered there was a good range of services available locally to support community-based sentences, barriers to access were highlighted by stakeholders:

“ I think the range of services is sufficient, it's the question of whether the regularity of those services and whether there's long delays in getting people into them. I know that in some of the perpetrator programs, I can say that I know that there are lots of delays. I have been told anecdotally that some of the substance abuse programs are also difficult to get involved in.  
**Judicial officer, urban** ”

“ ... is probably fairly well serviced in terms of the facilities available. The problem is, whether or not there's enough at those services. In the sense of enough people to be dealing with the number of offenders that are coming through. So that's the only difficulty I see with accessibility.  
**Judicial officer, urban** ”

“ It depends. When you ask that question, yes, there's enough to cover our order conditions; but no, there's not enough to support them and to improve their quality of life. [...] I believe if there were more services to support just that, then from like an advocacy perspective, and just like a family in-house support, that would put them in a better position to then get through their order successfully, and it would keep their stress down, and it would improve their mental health.  
**QCS staff member, urban** ”

“ I think that there are services, it's whether they access them or not. I mean, definitely we cater for the Indigenous. We did have an Indigenous health worker until recently but a lot of them don't want to see an Indigenous worker because communities are very integrated in the Indigenous space. So I think there are services available. It's whether or not they'll access them tends to be more of the issue, or whether it's just that they're unaware of where they are.  
**Service provider, urban** ”

“ I think that depends on wait lists. I think there is a good range of services in [LOCATION], but they are sometimes so bogged down.  
**Service provider, urban** ”

“ So I think there is a good spread of services as long as people know where to access them and how to access them. I think that can be a barrier as well sometimes, and then wait lists. If somebody needs help right now and they can't get into a service that can be a barrier to them re-engaging with a service, or if they've had a negative experience with one and there's a limited amount of resources they could not access other services.

**Service provider, urban**

“ There seems to be delays with substance and drug matters. It's very difficult to know whether that's partly due to probation, the services themselves, that there's waiting times, or the defendants themselves. [...] What we have noticed is in recent times [...] an order might have been made nine months ago for a 12-month probation order, and in that time, they're to do drug counselling, and they're back before us in that 12-month period. And you say, well, look, you were supposed to go to ... you were on probation at the time; was part of your order drug counselling? Yes. Well, what have you done about that? Oh, they haven't told me as yet where; I'm on a list, waiting. That is [...] a regular complaint. Once again, not sure whose fault that is. Is that services or the defendant's?

**Judiciary, regional**

### Community service work conditions

Sentences involving community service work conditions were reported to be challenging to implement at times due to limitations in available options for certain offenders, along with the availability of related resources.

Regional legal stakeholders raised concerns about the availability of meaningful community service work options in regional Queensland locations.

“ Are we coming up with some solutions when there's a difficulty – where if it's not really offered – are we better off to say, look, we don't have anything in this location?

**Legal stakeholder, regional**

“ Having a bigger, wider range of community service projects like getting council on board or something, there's so much they could do, but getting those other organisations on board to funnel those people out; like, we'd clear the debt from SPER [STATE PENALTIES AND ENFORCEMENT REGISTER] by thousands if we could have more projects and get people doing stuff that was [...] especially mums on orders with kids and things like that. We were trying to think out of the box for things they could do at home.

**Legal stakeholder, regional**

Suitability for community service options was also an issue for corrective services officers in managing certain offenders:

“ It's just the tricky clients that can't be placed at certain locations due to the nature of their offence or health issues or whatnot, so sometimes we have to get a bit creative with in-house projects, which can be costly for us, because we're supplying the materials. So ... if health concerns and nature of offence were taken into consideration at sentencing, that would alleviate a lot of our concerns.

**QCS staff member, urban**

In the remote site (inclusive of very remote locations), some practical difficulties were identified, including lack of equipment:

“ I find that in order for UCS [UNPAID COMMUNITY SERVICE] to be done properly, they need the means to do it properly. They don't seem to have the means or the tools to undertake the UCS ... Like uniforms, [whipper] snipper, little things that count.

**Service provider, remote**

### Drug and alcohol testing conditions

Limitations in the availability of drug and alcohol testing facilities were an issue further indicated by multiple stakeholders:

“ I get told by counsel that despite the fact that I'm ordering these people to be drug-tested, the drug testing doesn't happen. And I think maybe these people know better than me, they deal with it all the time, but just seems to me that if you direct someone to be randomly tested for drugs at least once a month, they're going to try, you hope, a little bit to keep off the drugs.

**Judiciary, regional**

“ I’ve actually had — and a couple recently, one this week — where, people have almost expressed disappointment that they haven’t been drug tested, because they’ve been clear.  
**Judiciary, urban**

“ Urinalysis, we can’t do that here ... Breath testing is too dangerous ... The police, if someone is on a curfew and if they have an order, the police are very good here. They’ll do a curfew check for us and do breath testing as well if we ask them to.  
**QCS staff member, regional**

### 13.3.4 Accessibility of services to offenders

In addition to the availability of services, a number of factors were identified as negatively affecting offenders’ ability to access services while on community-based sentences or parole.

The most common issues mentioned across the locations were related to:

- distance;
- transport;
- fees and program costs;
- waiting periods;
- eligibility criteria;
- lack of ID and supporting documentation;
- limited motivation;
- timing of release;
- cultural appropriateness,
- opening hours/program schedules;
- communication approaches.

#### Distance

Distance from services was mentioned as an issue outside of major urban or regional centres:

“ The further out west you go, and the smaller towns, there’s less and less and less. And I think judges probably wouldn’t be seeking information. Magistrates would know, in their own towns, what’s available [...] if I put someone in [REGIONAL LOCATION] on a probation order, he lives an hour out of [REGIONAL LOCATION] on a station, what are you actually going to do? Probably a phone call once a month, just because there is no access. Yes, I suppose it’s like all services, people in regional areas have less access than people in the south-east corner. There’s no doubt about that.  
**Legal stakeholder, regional**

“ The regional, the rural is screaming for support in any way, shape or form. And unfortunately, your type of client is moving out regionally ‘cause of housing affordability.  
**Service provider, urban**

One service provider suggested that some offenders may choose to live in such locations because of the distance from services:

“ The offenders have started to learn that heading out to areas like that will provide an excuse for them, for stuff like that.  
**QCS staff member, urban**

#### Transport

Transport was frequently raised as an obstacle for offenders in regional and urban locations. This was a barrier to accessing services and support even when services were close to public transport (like train stations and bus routes).

“ I think transport’s a huge problem. So lots of people that we work with have lost their licence or they don’t have access to a car, or they don’t have money for fuel or that kind of thing. So some of them will jump the train to get to their appointments, which is a terrible thing to have to do. We don’t want them to have to do that.  
**Service provider, urban**

“ There’s some people that are willing and motivated but no way to get there ... If you look at somewhere like [NAME OF LOCATION], they have a bus in the morning and a bus in the afternoon.  
**Service provider, urban**

“ I certainly think our public transport system leaves a lot to be desired [...] It doesn’t run very frequently from some areas. So realistically if you don’t live in the [REGIONAL CENTRE] CBD then you need to come down from say [NEARBY TOWN]. That’s a great example, there’s no public transport from there. [ANOTHER TOWN]’s fairly similar. To catch a bus you have to get it in the morning, and you go home at night.  
**QCS staff member, regional**

“ A lot of outlying rural areas ... there is just no public transport, there’s no Uber, taxis are prohibitive. They can’t afford it, so ... We will get people who come to court being in breach because they haven’t reported, and they say, well, I just couldn’t get there.  
**Legal stakeholder, regional**

For the remote location, most of the local services were identified as easily accessed by walking. However, accessing any services outside the immediate vicinity involved long and costly travel, particularly when involving air travel. For very remote locations, only basic services (such as a community health facility) was present at the site.

### Fees and program costs

In addition to transport costs, the costs of housing, private counselling and residential rehabilitation services were often identified as inhibitive for access by offenders.

“ I think the biggest problem is money. These are people earning ... on welfare — they’re not employed. They’re earning ... well, not earning, they’re being paid 225 bucks a week. You know, to catch a bus and spend \$2 or \$3 means something [...] It may not to us, but it is to them, having to pay out bus fares all the time.  
**Judicial officer, regional**

“ There’s not as many services like set up that are cost neutral. So even though you could say, oh yes, we’ve got 20 private psychologists in town, and we’ve got X amount, they’re not — it’s not a viable opportunity. Like in terms of cost neutral I don’t think there is enough set up. [...] Certainly when you’re looking at community health or medical, like, how do people get to a GP if they can’t get to a bulk-billing GP, and then who are they? Like there’s only a certain amount of bulk-billing GPs. And one after-hours one, in the whole town, that’s [SERVICE PROVIDER]. So I’ve seen so many people neglect their health, their physical health. And then of course, ‘cause of the nature of the beast of the lifestyle that people have led for 20 years, they’ve got significant physical health things. But if they can’t [find] a decent reliable GP, ‘cause they can’t, they don’t have the money. So it is that whole bulk billing and emergency and after-hours medical I think really is a contributing factor. I’ve seen people go score ‘cause they’re in pain.  
**Service provider, urban**

“ I actually think, at some point, we have to start ... my view, is to start paying people to actually go to programs. You get, you know, for instance, \$20 every time you attend. That’s to cover your bus fare, to cover some incidentals. And actually, it would be an incentive. Of course, it would have to be ... it would have to be at the right level because you wouldn’t want people committing offences to try and get ... just to get money out of the system.  
**Judiciary, regional**

Some interviewees reported that people who are non-citizens are not able to afford fees and costs related to accessing services:

“ There’s also an issue about non-citizens. They can’t get Centrelink. They can’t get any housing assistance or anything. When I first started with the service, we had a New Zealander. What we did was we arranged a ticket to fly him back to New Zealand, which was the cheapest, safest and best option for him at the time. So, like, even like that came out of the [SERVICE PROVIDER] budget too because the funder didn’t feel it fell within their sphere, but it was an out-of-the-box thought about how to resolve an issue with a non-citizen that couldn’t get any support in Australia.  
**Service provider, regional**

Despite these concerns, it was also noted that most of the services and programs offenders are referred to are free to them — either covered by Medicare, offered as a free program (usually due to government funding) or could be encompassed under NDIS package funding.

### Waiting periods

Another access issue identified was lengthy waiting periods for certain services. Participants indicated this was particularly the case for:

- drug and alcohol treatment, with:
  - intake periods being approximately a month to six weeks in the urban and regional locations; and
  - residential rehabilitation being between two and three months to access;
- family violence perpetrator programs — between 6 to 18 months after initial referral at all the sites;
- housing — several months (although the Rent Connect program was observed as being effective in providing earlier access to affordable housing in the private housing market, especially in the regional area).

### Eligibility criteria

Eligibility criteria were also noted as restricting offenders' access to certain programs, most notably in the urban and regional locations for:

- family violence perpetrator programs — especially due to inclusion of a criterion about readiness to change;
- housing and accommodation — including not being able to apply for housing while in prison and being excluded/banned due to prior behaviour or type of criminal offences;
- mental health services — requiring an offender to access a GP first to obtain a mental health plan. Offenders with a co-existing condition of drug and alcohol dependency were reported as having been required to address their substance abuse before acceptance into mental health services. This was also the case with some family violence perpetrator programs.

### Lack of ID and supporting documentation

Lack of photo identification and other supporting documents was raised numerous times by participants:

“ Some of our clients even have trouble getting Centrelink because they don't have ID, or they've lost their ID so they can't get Centrelink payments and therefore they find themselves homeless or getting on trains without [a ticket].  
**Legal stakeholder, urban** ”

“ ID and Medicare cards have been a big issue, and now that's nearly become [RE-ENTRY SERVICE PROVIDER'S] full-time job. You know, over time they lose their cards ... And it's expensive. [RE-ENTRY SERVICE PROVIDER] has basically spent most of their brokerage on helping them to get some of these basic cards back. We almost need to just scan their ID when they come to us, in custody, and put it as an attachment, and when they apply for houses, send them that. We almost need to start doing something like that.  
**QCS staff member, urban** ”

“ Identification is something as well. It would be lovely upon their discharge from the custodial centre they get a pack with ID, birth certificate, a bank account. There's no reason why we can't be doing that in custody either. Like sending out about this and that. It should be done while they're there wasting time, instead of coming out and then they can't go to get on the study program, they don't have a Medicare card.  
**QCS staff member, regional** ”

### Limited motivation

Absence of motivation, including due to a perceived lack of consequences for non-attendance, was also highlighted as a common barrier to offenders' accessing services. As one of the judicial stakeholders mentioned:

“ They’re given encouragement, and told to go and do something, but it’s really left to them. And so some of them are more motivated than others. Some aren’t motivated at all. And some of them just have very chaotic lives. I mean, that’s why they’re offenders. I mean, they’re drug-affected people whose lives have fallen apart, their capacity to organise those things for themselves is just not there. And in many respects, to require them to do so is really to set them up to fail, because they’re just not going to have the wherewithal to do it.  
**Judiciary, urban** ”

Other stakeholder comments that highlighted lack of motivation as an issue included:

“ Some of them are mandated to attend and they don’t think they’ve got a problem thank you very much and they quite enjoy their drug use and they’ll tell you that.  
**Service provider, urban** ”

“ To be honest with you, certainly working with [CORRECTIONS] across the road, the biggest problem I find is them being motivated to access anything. It really is a huge issue, them wanting to be motivated because, you know, the guys across there are referring them to places all the time and trying to hook them up and they never go, and they never turn up, and they do the same thing with recommendations I make. They just aren’t really motivated and it’s a huge issue. The ones who are motivated, we do get them into assistance and they usually can do really quite well.  
**Service provider, urban** ”

“ The trouble is the clients themselves, honestly. They don’t want to engage. They think they’ve got this, and they disappear, it all falls apart, but by the time they come back it’s too late.  
**Service provider, regional** ”

It was further noted that in very remote locations, offenders will not have as much support to help them with making contact with service providers:

“ They need counselling, but they won’t get off their backsides. And they probably don’t have any skills to get off their backsides and go and seek out a counsellor themselves. So somebody in [REMOTE LOCATION] might say counselling, I know [COUNSELLOR], I’ll go down, I’ll talk to [COUNSELLOR]. But out here, there’s not that option.  
**Judicial officer, remote** ”

There was also a perception among some participants that there seemed to be little consequence if they failed to adhere with conditions requiring treatment or accessing services:

“ That’s a big issue we have, right across, is that non-compliance with their orders. And our frustration is that, well, there’s seemingly no consequences.  
**Service provider, regional** ”

### Timing of release

The timing of an offender’s release from custody was raised as problematic by several participants, including QCS staff.

“ On a Friday I believe Centrelink close early, so if someone’s getting discharged on a Friday afternoon with no access to money [...] they can’t pay for accommodation.  
**Service provider, regional** ”

“ What about those guys who are on the buses at seven o’clock at night-time? So, they get released at nine o’clock in the morning and then pretty much have got to entertain themselves for 12 hours and sometimes get themselves into trouble before they even get on the bus. Because of the lack of transport locally, so ... They’ll take them to Centrelink, get their money, take them to get some clean clothes and get them sorted with everything that they possibly can. But often they’ll be leaving them, and they’ve still got hours to kill. [...] It’s a massive risk time for them. I often find that they actually don’t get to their location, where they’re supposed to be.  
**Service provider, regional** ”

### Cultural appropriateness

Opportunities to expand the availability — inclusive of choice — in culturally appropriate service options was emphasised by participants across the case study sites.

“ I think the biggest barrier is when we are looking at First Nations. We are looking at the engagement style and the preferred scheduling of appointments and things for First Nations. So an example of that would be – I identified quite early on that if I was to make a lot of scheduled appointments and routine appointments and things, a lot of them weren't kept because there's other priorities that come up for people. Obviously, First Nations approach to what's important to them in life is not always going to be an official appointment with a practitioner [...] So, having that flexible approach towards that cultural understanding, I think, has been key.

**Service provider, urban**

“ We have quite a few refugees who have issues both with the language, with the cultural aspects and with understanding their obligations if they're placed on community-based orders. The one thing I will say, is a lot of them do seem to understand is community service. They seem to understand the concept of going and working off something. But I'm not sure if the concept of probation and parole necessarily gets through.

**Judicial officer, urban**

“ The only thing that I can think of would be the Indigenous groups that they are not wanting to link with Indigenous services in [LOCATION] because their family might know them, or word gets around because it's a small town. So that's probably one of the struggles that we have in that they don't want that support but then they don't want to go to a white service either.

**Service provider, urban**

“ Some Indigenous clients prefer to work with us. They don't want to go to an Indigenous service and that's cool. And some prefer to go to an Indigenous service.

**Service provider, regional**

“ I think because the majority of them are from here, and because a lot of us go out of our way anyway to help our own community, our own people, I think that works better. But again, I still think it needs the balance of non-Indigenous workers and having more [OF THEM].

**QCS staff member, remote**

“ But because [MAGISTRATE] knows [REMOTE LOCATION], that makes a big difference. And because [MAGISTRATE] knows some of the cultural protocols, tradition and practices, it makes a big difference.

**QCS staff member, remote**

### Opening hours/program schedules

When asked about limitations to service accessibility, business operating hours and program schedules were often raised by participants, with several suggesting expanded operating times:

“ Nine to five. I guess that's been something that's been a bit of a restriction for us and we've fed back to our funding body that we want people to go back to work and we want them to engage in civic life and it's really hard for them when they are attending all these appointments and it's the only time we're available. It would be nice if we could see people afterwards.

**Service provider, urban**

“ I think our primary consideration would probably be after hours to capture workers or even probably early starts, maybe 7 o'clock or something.

**Service provider, urban**

“ I guess it's more about lack of family support, no one to mind the kids, especially if they're DV victims as well, the father's obviously not in the picture, they're quite isolated.

**QCS staff member, urban**

“ Sometimes the nine to five, [...] There are some where their risk is high, so we have to ask them to take time off work, and say that this is their priority, otherwise we try and find them an out-of-hours or a weekend psych, but it's very limited, and especially if you want to specialise in a certain area. And then there are some where there is no way around it, and they just don't get to interventions, because we want them to keep their employment, so it just depends on the circumstance.

**QCS staff member, urban**

“ Another support service that's just outside of the hours – most of the problems don't occur between nine to five, Monday to Friday.

**Service provider, urban**

“ One of the big limitations we really had was service providers providing any sort of assistance on a weekend or after hours [...] Most of our high-risk stuff isn't Monday to Friday eight to four.  
**Legal stakeholder, regional**

“ We've a really good referral service where we put our supporting referrals in, but then it'll then happen Friday night they don't get a call until Monday morning and they don't want assistance then because it's not fresh in their mind.  
**Legal stakeholder, regional**

### Communication approaches

The types of communication methods and approaches used for service delivery was also seen as a barrier by many participants, with many also noting the benefits of face-to-face communication for rapport as well as potential opportunities to use technology more effectively.

“ You can't really do these supervision meetings on the phone for Aboriginal people, it just doesn't work at all.  
**QCS staff member, regional**

“ There's no mail service here so the mail doesn't get delivered to their homes, so they have to go to the post office to pick up their mail. So sending letters is not ... You can't guarantee that they're actually going to get a letter unless they go to the post office and pick it up.  
**QCS staff member, regional**

“ So there used to be a phone in the interview room here [...] they let our offenders in to phone a report. Then that was disconnected, but probation and parole is in the process of having one reconnected. We're hoping that's soon.  
**QCS staff member, regional**

“ It seems to me that technology presents a bit of a challenge and maybe there can be more, maybe more connectivity via Skype or something like that might be available. They all seem to have mobile telephones, none of them seem to have [...] like a desktop computer. So I'm wondering whether again, looking at other ways of communicating with these people, perhaps using their smart phones to talk to them.  
**Judiciary, regional**

“ They don't have a level of literacy where they can understand all this stuff, you know. A lot of our fellows can't read and write — or can barely bloody well spell their names and they're supposed to understand an order. They're supposed to — okay, I'm going to go here, organise my life to do this. If they were so well organised, they wouldn't be in the situation that they're in, so there's an element of case management that needs to go with fellows on orders, just to help them navigate the system.  
**Service provider, regional**

As one participant explained, when communicating with their clients they felt they were effective because they gave consideration to how to make them comfortable and feel supported:

“ For men, it's putting their arm out the window and having that, you know, breeze coming through. And next, you know, the lips will start to loosen up and [...] they start talking, you know. So getting them out of [REGIONAL CENTRE] or getting around town for a drive and coming back is the best therapeutic [approach] for me. It's just, okay, what's happening? And not counselling — we're just talking. And that's what it is, you know; it's the art of counselling and picking up these little stories and, you know, putting them together, saying, what's going on in your life? When we're having a yarn, it's not counselling; it's just two guys talking. And then when ... see, for Aboriginal men, it's I'm not womba, I'm not mad. [...] that's what counselling is about — just talking and seeing what your issues are.  
**Legal stakeholder, regional**

### 13.3.5 Impact on sentencing

The accessibility or availability of services and programs was not a consideration in determining the types or combination of orders used by judicial officers in the urban and regional sites. In contrast, at the remote location, lack of service availability was clearly noted as a factor in judicial decision-making regarding sentencing for offenders.

### Considering service availability and accessibility as part of sentencing

The magistrates and judges interviewed in the urban and regional locations all reported that when making community-based orders they assume that QCS will work with the offender to identify and organise appropriate services and support, and that these services will be available and accessible. One magistrate did mention though that:

“ Probation at one stage asked us not to include certain specific conditions because sometimes of the unavailability of certain programs and things like that. So we tended to mostly only include generalised conditions such as the psychological psychiatric assessment and treatment and also obviously the drug-related one.

Other comments from judiciary included:

“ I’m actually almost sort of embarrassed now to say, well, no, I don’t think of that level. Whether or not it’s just that the thinking is that there will be something ... I’ve just never descended down to saying, well, okay, well, how is this going to be provided? But no – and I think that I should, I should be more inquisitive about what’s available.

“ I don’t necessarily think of what specific programs are going to be offered to this person that I’ve just put on probation, I just assume that, well, I’ve identified in my sentencing remarks that it’s the drug problem, that there’s educational deficits ... And I’ve identified them, and I’m going to put you on probation because you can get assistance with all of these things, without knowing the specifics of exactly what assistance there is ...

In contrast, for magistrates and judges operating in the remote location studied, there was a distinct reference to considering the limitations of local services and supports available for the offender on a community-based order and parole in their decision.

Comments from judiciary operating in the remote context included:

“ Sometimes I’ve changed the sentence I would have imposed.

“ I do, like, community service orders ... fine is a last resort. A fine really is not a penalty to Indigenous people. ... This bloke’s got a \$7,000 SPER [STATE PENALTIES AND ENFORCEMENT REGISTER] debt. It’ll never be paid ... Instead of money going down south, away from the community, away from the kids, it’s getting put back in the community, and the money stays in people’s pockets.

“ I really get stuck about what’s the appropriate sentence. I mean, sending a man to jail from here really [is] a higher penalty to sending somebody to jail from Brisbane. They’ve got no family support. They can’t get to see their family. They’re away from their natural environment.

Examples were given where a period of imprisonment with parole was considered, but a suspended sentence was imposed instead due to limited services for reporting to probation or parole officers in very remote areas.

Several judiciary expressed frustration regarding services and supports for offenders in remote communities, with comments such as:

“ Parole sets them up to fail.

“ They are sent back to ... un-structured boredom.

“ I said, what are you going to do? I’ll put this bloke on probation [...] They say, ‘well, we’ll come out here once every three months, and have to report [...] may have to report by telephone, we’ll try and get an [...] bloke out to you, we’ll try and get a grief counsellor out to you, we’ll try and get a domestic violence counsellor to you’. And hopefully, we can do that. I mean, you’re never overly optimistic about it.

“ This is the consequences of it, whether it be community service or ... intensive corrective orders. They don’t work because you don’t have the [...] it’s not intensive, you only come out and see them in three months [...] well, maybe we’ll get somebody here in three months, maybe we won’t.

### Pre-sentence advice

In all locations, the judiciary saw value in QCS personnel having input and/or being present during sentencing to advise about support options and if there were likely to be any issues with availability of services.

“ The person might be pleading guilty, they might already be on a probation order and you could just turn and say — probation officer, can you tell me how they’re going on their probation at present? Yes, he’s been attending so-and-so, he’s been attending. So, and that becomes a real sentencing tool then. You say, well, look, you know, you seem to be going well, you’re making progress; I’m going to put you on a concurrent probation order.

“ So we haven’t got that anymore, which is a real shame, you know, because, you know, you really do rely on that.

“ We always ask, ‘If I make such and such an order, how will that work in practice?’ We get almost nothing.

Another member of the judiciary, recognising the specific expertise and knowledge of QCS staff, emphasised:

“ I’m not an expert in that stuff, I’m a lawyer. I rely upon these people as being experts in their particular field, knowing, having worked out what the issues are with the particular defendant they’re dealing with. Then determining which courses are the best courses for them and recognising that some courses might be more demanding than others.

Formal, written pre-sentence reports were not seen as usually necessary, and as being too resource intensive:

“ Well, that’s over-kill ... And once again, we come back to this thing of them then having to go to be assessed for the pre-sentence report, then come back. They won’t come back the first time. Have to issue a warrant. Warrant postponed [...] a notice goes out to them. You’ve really got to move on them when they’re there and not adjourn stuff, because I think that assists their involvement, is by having matters quickly go through the system quickly.

One member of the judiciary raised that in their experience they didn’t receive submissions on the topic:

“ Well, it’s interesting that we don’t ever get submissions from the, from the barristers identifying particular services, this is available, and this ... is really what my client needs ... that’s what you should be focusing on. They say, oh yeah, give him probation or give him parole ...

Another commented similarly:

“ It does strike me as being a deficiency, and it might be the fault of the bar, the barristers who are appearing ... I’d be prepared to wager if you went down to the barristers’ chambers and interviewed all of the barristers and said what services are available ... they wouldn’t know ... they’d sit around scratching their head.

### The importance of services to support community-based sentence management

The importance of services and programs to support orders on community-based sentences was recognised by all judicial stakeholders interviewed, with many also emphasising that delays or inability to access such supports could reduce the effectiveness of the sentence.

As one judicial participant commented — telling about a time when they had been told that orders made for an offender to undertake specific treatment or activities were often not adhered to:

“ That was the surprise. I think the horror was that it was not considered by those administering the order to be an order of the court ... it seemed to be just a shrug of the shoulders and, oh well, if we don’t have the money we don’t do it ... I think all of us sort of had the same reaction, which was — we’ve made an order that it happen ... And you’ve made the order that it happen because that seems to be an essential and integral part of the sentencing. If you’re not putting someone into jail because you have formed a view that that’s not the appropriate way to deal with them, because they can be dealt with in this particular way, they are not going to get that support. It actually doesn’t serve any purpose.

### 13.4 Conclusions regarding the future service and support infrastructure for community-based sentence management in Queensland

The place-based case studies conducted by the Council have illustrated gaps and barriers in service availability and accessibility to support community-based sentencing in Queensland. These have the potential to negatively impact on the effectiveness of community-based sentences – both in the current legislative context and if changes are made to the framework in the future (such as via potential implementation of the recommendations in this report).

Some types of services were noted as not available in the remote location (in particular, sex offender and re-entry programs). Consistent feedback was also received from stakeholders across all sites regarding lack of local availability of specific community-based services or support – particularly, affordable housing, drug and alcohol rehabilitation, disability services (remote and regional), and family violence perpetrator programs.

Key themes from the place-based case studies about the barriers and enablers for offenders' access to services and support while on community-based sentences and parole are summarised in Table 13-2 below.

**Table 13-2: Key themes about barriers and enablers to access to services and support for offenders on supervised orders**

| Enablers   | Barriers   |
|--|--|
| <ul style="list-style-type: none"> <li>• Access to affordable and appropriate housing</li> <li>• Change of environment (social or physical)</li> <li>• Positive social role models and networks</li> <li>• Individualised approaches</li> <li>• Choice of culturally appropriate services</li> <li>• Practical supports and life-skills improvement</li> <li>• Wrap-around services</li> </ul> | <ul style="list-style-type: none"> <li>• Drug and alcohol addiction</li> <li>• Intellectual disability, learning difficulties, literacy</li> <li>• Travel costs</li> <li>• Time effort</li> <li>• Lack of motivation</li> <li>• Lack of consequences for failure to access services and supports</li> <li>• Lack of supporting documentation (e.g. no photo ID, no Medicare card)</li> </ul> |

In terms of the impact of service availability and accessibility on current sentencing practices, the place-based case studies showed that judges and magistrates largely assume that these are available when they impose a community-based order. The exception was judicial stakeholders operating in remote areas, who were cognisant of local service limitations and reported that this did limit the sentencing options they used. The interviewees identified their reliance on the prior advice from QCS regarding whether the sentencing option being considered was realistic in the local service context.

It is not within the scope of the Terms of Reference for the Council to provide detailed recommendations relating to QCS's activities or resourcing, or for the community service system in Queensland more broadly. However, given the findings from the place-based case studies and the relevance to the recommendations made by the Council for the future sentencing framework, it is suggested that consideration be given with some urgency to the funding and resourcing of the service system to support community-based sentence management.

The Council acknowledges that improving the services and support to ensure effectiveness of community-based sentencing will undoubtedly require investment and a strategic, outcome-focused approach. Based on the findings from the place-based case studies, Council suggests that future resourcing for community-based sentence management could potentially have regard to the following principles:

- Prioritising the investment in services and supports for community-based sentence management – acknowledging these as a critical supporting component of corrections and rehabilitation outcomes.
- Encouragement of specific and coordinated case management between corrective services officers, disability, health, housing and employment services.
- Incorporating particular resourcing of QCS and other service providers to allow for greater interfacing between corrective service officers and service providers.
- Introducing stronger performance and accountability of service providers, including QCS, with regards to contributing to specific measures on an individual basis (such as reduced offending, health and other social outcomes for offenders).

- Fostering more flexibility in programs, including web-based and other innovative delivery formats, as well as a range of group and individual delivery models; and
- Providing access to brokerage, practical and financial supports to reduce barriers for offenders to access services (e.g. considering appropriate travel and service fee subsidies).

Improvements to services to support community-based sentencing management could potentially be further considered in terms of ensuring the right services are delivered to the right people in the right way, time and place. For example:

- *Right services* — particularly improving availability to housing, drug and alcohol rehabilitation options, meaningful community service work options, family violence perpetrator interventions, life skills, disability services, and social support programs.
- *Programs to the right people* — targeting interventions and service supports for offenders not just on a risk basis, but also with regard to their broader social and health needs as a way to prioritise investment of resources and effort.
- *Delivered the right way* — while ensuring positive features in current service models (including cultural appropriateness, face-to-face delivery availability, trauma-informed services, and wrap-around services) more flexibility and choice in service offerings could be facilitated, including considering more innovative delivery methods and use of digital technology. This could also consider health-led interventions (e.g. starting with a general health check) as an initial funnel for this cohort to access services and support in a coordinated case management model.
- *In the right place* — facilitating services delivered at convenient locations for offenders to reduce potential barriers relating to travel costs, time and effort. This could include bringing the services to where the offender is at key times (e.g. at the courthouse following sentencing)
- *At the right time* — which could have three key elements:
  1. considering opportunities for multi-agency intakes immediately following sentencing — to ensure understanding of conditions and requirements, and immediate referrals (such as initial housing, mental health and drug/alcohol support) — recognising that the first two to three days can be a critical period;
  2. ability to scale up intensive support and wrap-around services at the point when an offender is motivated; and
  3. ensuring services and program options are available out of hours for those offenders who cannot easily access them during work hours.

These supporting elements to effective community-based sentence management have been referenced in the implementation challenges and approaches discussed in Chapter 15.

Other specific opportunities that the Council suggests should be examined are ways in which to:

- improve the availability and accessibility of family violence perpetrator interventions, including programs aimed to support an offender to reach a readiness-for-change stage and increasing availability of programs that are shown to be effective;
- explore opportunities to use private sector resources (such as private health professionals like GPs and psychologists) to support and provide services to offenders — this could, for example, include a financial incentive for service of this cohort;
- recognise and leverage the potential value of environmental interventions, including in some circumstances requesting or providing incentives for offenders to move location during their community-based sentence to reside closer to social or service supports to maximise their chance of success. This could be particularly relevant for offenders who require residential drug and alcohol treatment, or other intensive health interventions, and for offenders in very remote locations where services and programs are less likely to be available.

## Chapter 14 Other issues

The Council identified further issues relevant to the reference and raised by stakeholders over the course of consultation. These issues, including the use and availability of pre-sentence reports and cultural reports, the powers of courts to deal with breaches of community-based orders, and data quality issues, are discussed in this chapter.

### 14.1 Pre-sentence reports (PSRs) and court advisory service

#### 14.1.1 The current situation in Queensland

Pre-sentence reports (PSRs) have been described as documents prepared for a court, normally at the court's request, with a view to providing information about an offender and to assist the court in determining the most appropriate manner in which to deal with an offender.<sup>2018</sup> They may be either mandatory or discretionary, but are generally sought to supplement information otherwise before the court.<sup>2019</sup> They are additional to any reports that may be obtained by the defence in support of a plea in mitigation.<sup>2020</sup>

The purpose of PSRs in Queensland is to assist courts in sentencing, including to assess the suitability of a person to be placed on a community-based order.

Section 344 of the *Corrective Services Act 2006* (Qld) (CSA) and section 151 of the *Youth Justice Act 1992* (Qld) (YJA) provide that a court may request a PSR to inform sentencing. Section 15 of the *Penalties and Sentences Act 1992* (Qld) (PSA), which governs the sentencing of adult offenders, provides that a court may receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a PSR.

In the case of reports requested by a court for the sentencing of adult offenders, Queensland Corrective Services (QCS) is required to give the report to the court within 28 days and provide copies that the court must then provide to the prosecution and the person's lawyers.<sup>2021</sup> A PSR is taken to be evidence of the matters contained in it, and cannot be objected to on the basis that the evidence contained in it is hearsay.<sup>2022</sup>

There are two kinds of PSRs: written and oral. Both forms of PSR make recommendations about appropriate penalties.

Written PSRs are formally requested by judicial officers and are prepared by community corrections officers. A judge may request the PSR include a psychiatric or psychological report and/or focus on a specific issue.

A written report, which will typically take a few hours to complete, will involve an interview with the prisoner or offender in the community and screening of the offender's history with QCS, along with reviewing relevant criminal history and the police court brief (known as a 'QP9') prior to the interview and write up.<sup>2023</sup>

Oral PSRs are commonly used in the Magistrates Courts, primarily to determine an offender's suitability for a program or penalty. There is currently a limited dedicated court advisory service operating out of the Brisbane Magistrates Court.

<sup>2018</sup> Arie Freiberg (n 127) 173 [2.190].

<sup>2019</sup> Ibid.

<sup>2020</sup> Ibid.

<sup>2021</sup> *Corrective Services Act 2006* (Qld) ss 344(4)–(5).

<sup>2022</sup> Ibid s 344(10).

<sup>2023</sup> Personal communication, Queensland Corrective Services.

Most Australian jurisdictions legislate what is, or can be, included in a PSR;<sup>2024</sup> however, Queensland legislation does not outline this level of detail, providing only that a PSR ‘may, for example, state the person’s criminal or traffic history’.<sup>2025</sup>

The *Standard Guidelines for Corrections in Australia* provide that reports, should be ‘concise, objective, factual, and timely’<sup>2026</sup> and ‘should, where appropriate ... canvass the appropriateness of non-custodial sentencing options’.<sup>2027</sup> In addition to ensuring information is confirmed wherever possible, the guidelines provide that ‘any expression of opinion should be clearly identified as such’.<sup>2028</sup> In addition, the guidelines provide that:

Assessment of offenders should draw upon and identify:

- the widest practicable range of information sources regarding offenders and their offences;
- relevant issues in their social and cultural background, including health, education and family and community supports where relevant; and
- knowledge of available correctional services, programmes, and other avenues of information and support.

Where there is insufficient information regarding an offender to permit a responsible assessment and recommendation to be made to a court ... advice and reasons to this effect should be provided.<sup>2029</sup>

The guidelines include a suggestion that: ‘Interpreters or elders from Indigenous communities and other ethnic groups should be utilised, where possible and appropriate, to assist in communicating with offenders of their own cultural background’.<sup>2030</sup>

While obtaining a PSR is discretionary in the case of adult offenders, even where the court is considering imposing a term of imprisonment, in the case of a young person sentenced under the YJA, a judge or magistrate must obtain a PSR before sentencing a child to a detention order<sup>2031</sup> or an intensive supervision order.<sup>2032</sup> There are detailed provisions under the YJA relating to the preparation, use and disclosure of PSRs as they relate to youth justice matters.<sup>2033</sup>

Under the provisions of the *Evidence Act 1977* (Qld), a ‘sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged’.<sup>2034</sup> If not admitted or challenged, ‘the sentencing judge or magistrate may only act on it if satisfied on the balance of probabilities that the allegation is true’.<sup>2035</sup> The degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.<sup>2036</sup> An ‘allegation of fact’ for the purposes of this section includes information provided under section 15 of the PSA.<sup>2037</sup>

<sup>2024</sup> *Sentencing Act 1995* (NT) s 106(1); *Sentencing Act 1997* (Tas) s 83; *Sentencing Act 1991* (Vic) s 8B. The only Australian jurisdiction where this legislative provision refers to the offender’s ‘cultural background’ is the ACT: *Crimes (Sentencing) Act 2005* (ACT) s 40A, although the other legislative provisions on content refer more broadly to ‘social history’ and ‘background’.

<sup>2025</sup> *Corrective Services Act 2006* (Qld) s 344(2).

<sup>2026</sup> Corrective Services Ministers’ Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (Revised 2012) ‘Standard Guidelines for Community Corrections’ 8 [1.2].

<sup>2027</sup> *Ibid* 9 [1.8].

<sup>2028</sup> *Ibid* 8 [1.2].

<sup>2029</sup> *Ibid* 8 [1.3] and [1.5].

<sup>2030</sup> *Ibid* 8 [1.6].

<sup>2031</sup> *Youth Justice Act 1992* (Qld) s 207.

<sup>2032</sup> *Ibid* s 203.

<sup>2033</sup> *Ibid* ss 151–153A.

<sup>2034</sup> *Evidence Act 1977* (Qld) s 132C(2).

<sup>2035</sup> *Ibid* s 132C(3).

<sup>2036</sup> *Ibid* s 132C(4).

<sup>2037</sup> *Ibid* s 132C(5).

### 14.1.2 Queensland Productivity Commission proposals

In its draft report on imprisonment in recidivism released in February 2019, the QPC recommended:

To ensure sentencing options support community safety and rehabilitation, the Queensland Government should introduce pre-sentence assessment of offenders who may be facing prisons terms.<sup>2038</sup>

While noting the risk of court delays, the QPC suggests:

A process where relevant information is assembled and the broad parameters of the most therapeutic treatment approach is considered at sentencing would help ensure that the sentence is consistent with the most appropriate post-sentence treatment of the offender.<sup>2039</sup>

The QPC further suggests that health and psychological tests usually carried out on an offender's reception into a prison could be conducted at the pre-sentence stage 'so that the judicial officer has all the relevant information to help ensure the sentence fits the offence and the offender's circumstances'.

'If necessary to reduce undesirable delays', the Commission suggests, 'this pre-sentence assessment of offenders could prioritise offenders facing prison sentences'.<sup>2040</sup> The QPC is due to report with its final recommendations on 1 August 2019.

Even if limited as suggested by the QPC, based on 2017–18 data, this would require assessments (limiting this to sentences that, in the case of these data, resulted in a sentence of actual imprisonment being imposed) in over 12,000 cases per annum — 3,793 matters in the higher courts, and 8,862 in the Magistrates Courts.<sup>2041</sup> Making some allowance for those likely to be released straight to parole and who have not served any time in custody (about 40% of those on court ordered parole, or approximately 3,400<sup>2042</sup>) — assuming that priority will be given to those likely to be sentenced to serve time post-sentence in custody — this would still leave a large number of offenders to be assessed for their suitability for alternative forms of orders.

The Commission referred to the Victorian PSR model of reports prepared by Corrections Victoria staff, as a potential model for Queensland.<sup>2043</sup> Citing the Parole System Review, the Commission observed such reports 'usually can be prepared on the same day they are ordered'.<sup>2044</sup>

The Victorian *Sentencing Act 1991* provides that a PSR can include information about a range of matters, such as:

- the offender's age, social history and background, medical and psychiatric history and any alcohol, drug and any other substance history disclosed by the offender;
- the offender's educational background and employment history, and financial circumstances;
- the circumstances of any other offences of which the offender has been found guilty and which are known to the court;
- the extent to which the offender is complying with any sentence currently in force in respect of him or her;
- the ability of the offender to pay a bond;
- any special needs of the offender;
- any other services that address the risk of recidivism from which the offender may benefit;

<sup>2038</sup> Queensland Productivity Commission (n 12) 161, Draft Recommendation 4.

<sup>2039</sup> Ibid 157.

<sup>2040</sup> Ibid 150.

<sup>2041</sup> Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18* (Catalogue No. 4513.0, 28 February 2019) Table 25 (Summary outcomes by principal offence, Higher Courts — Queensland, 2016–17 to 2017–18) and Table 26 (Summary outcomes by principal offence, Magistrates' Courts — Queensland, 2016–17 to 2017–18).

<sup>2042</sup> Queensland Corrective Services, unpublished data on direct from court commencements (provided to Council on 29 March 2019).

<sup>2043</sup> Queensland Productivity Commission (n 12) 156.

<sup>2044</sup> Ibid 157.

- any courses, programs, treatment, therapy or other assistance that could be available to the offender and from which he or she may benefit;
- the relevance and appropriateness of any proposed condition;
- the capacity of the offender to perform unpaid community work for any proposed unpaid community work condition;
- the recommended duration of any intensive compliance period fixed under a CCO;
- if an electronic monitoring condition is proposed in relation to a CCO: (i) the suitability of the offender to be electronically monitored; (ii) the availability of appropriate resources or facilities, including but not limited to devices or equipment, for the offender to be electronically monitored; and (iii) the appropriateness of the offender being electronically monitored in all the circumstances;
- the appropriateness of confirming an existing order that applies to the offender; and
- any other information that the author believes is relevant and appropriate.<sup>2045</sup>

The preparation of these reports is mandatory in some cases, including where the court is considering making a CCO, unless the court is considering making an unpaid community work condition of no more than 300 hours as the sole condition of the order.<sup>2046</sup>

The Victorian Department of Justice and Regulation reported as at 30 June 2018 that there were nearly 14,000 offenders being managed by Corrective Services on a CCO,<sup>2047</sup> although the number of admissions to these orders in a given year would be below this level taking into account the maximum term of the order is 5 years. In 2017–18, there were 9,021 matters in the Magistrates' Court of Victoria and 220 in the higher courts that resulted in a 'community supervision/work order' being imposed (constituting the majority of CCOs imposed).<sup>2048</sup> A monitoring report produced in 2014 by the Victorian Sentencing Advisory Council (VSAC) found that about 70 per cent of CCOs included an unpaid community work condition, although in three-quarters of cases, the order had some other additional condition<sup>2049</sup> (meaning the preparation of a PSR in these cases would have been required under the *Victorian Sentencing Act 1991*).

'Between July 2016 and June 2018', QCS advised it 'conducted 1,446 PSRs (oral and written reports) across the State. Over the same period 50,036 admissions for new community-based orders were received by QCS, indicating only a small percentage of offenders (2.9%) have PSRs requested by the courts prior to sentencing to community-based orders'.<sup>2050</sup>

### 14.1.3 Evidence on effectiveness of PSRs

The international evidence relating to the impact and effectiveness of PSRs is somewhat mixed. One study has investigated the views of report writers and compared these with judicial officers, finding that perceptions of the utility of these reports differ between groups.<sup>2051</sup> One of the key issues raised by the study was the issue of report quality:

in terms of its usefulness to judicial sentencing, report quality is not an objective, fixed entity that can be universally calibrated, regardless of case context and courtroom personnel. The dominant judicial control of the assessment of evaluative criteria such as 'relevance', 'neutrality' and 'realism' means that judicial perceptions of 'quality' are a constantly shifting target.<sup>2052</sup>

<sup>2045</sup> *Sentencing Act 1991* (Vic) s 8B.

<sup>2046</sup> *Ibid* ss 8A(2)–(3).

<sup>2047</sup> Victoria, Department of Justice and Regulation (n 686) 35.

<sup>2048</sup> Australian Bureau of Statistics (n 2041) Tables 21 and 22. For a description of the counting rules adopted for reporting purposes based on the conditions of a CCO, see *ibid* 'Explanatory Notes', para 88.

<sup>2049</sup> Sentencing Advisory Council (Victoria) (n 615) 16.

<sup>2050</sup> Submission 11 (Queensland Corrective Services) 10.

<sup>2051</sup> Cyrus Tata et al, 'Assisting and Advising the Sentencing Decision Process: The Pursuit of 'Quality' in Pre-Sentence Reports' (2008) 48 *British Journal of Criminology* 835.

<sup>2052</sup> *Ibid* 849–50.

A study of PSRs in Ireland,<sup>2053</sup> where there is no obligation on the court to request a PSR, but where there is an assumption that a PSR will be ordered where a period of imprisonment is being considered, found that judicial officers acknowledged the professionalism of probation officers and their recommendations about sentence offered in these reports. However, the study found considerable variation in the extent to which they are requested, indicating the need for clarity about the circumstances within which a PSR should be ordered and for what purpose.

A paper on user perceptions of the quality and effectiveness of PSRs in Utah concluded that nearly half of those surveyed (227 judges, prosecuting attorneys, public defenders, and probation/parole officers) had not read the reports in their entirety, instead using them to identify only those sections they decided were important for their purposes.<sup>2054</sup> This study also documented a large number of report users who were concerned about the accuracy of the reports, which was in some part attributed to the high volume of PSRs required and the short time available to report writers.

A recent UK study<sup>2055</sup> has noted the rapid increase in the use of ‘fast delivery’ PSRs (written or oral), which have largely replaced the traditional, and more thorough, approach to PSR compilation, which typically requires adjournment to give the time required to prepare these. Probation staff interviewed as part of the study spoke about a more target-driven approach to their work, which sees fast delivery oral reports (which can be prepared within 20 minutes) now comprise 42 per cent of PSRs in the Magistrates Court. Inevitably, the study comments on the compromise to quality and suitability of sentence recommendations this has led to, which the authors argue may be a significant contributing factor to the reduction in community sentences being ordered by the courts.

A more rigorous approach was used by a group in the Netherlands, who adopted propensity score matching to investigate the sentencing outcomes for two groups of offenders — one group where a structured, risk-based PSR had been ordered and another where there had been no PSR.<sup>2056</sup> The study used 10 matching criteria including offence, defendant, case-processing and risk characteristics. The study determined that there were clear outcomes for low-risk offenders, where the presence of a PSR led to less punitive sentencing outcomes and more diverting outcomes than cases where there was no PSR. However, for high-risk offenders this did not bear out. Instead, the presence of a PSR did not make this level of difference for high-risk offenders, where the two groups were more evenly matched in relation to their sentencing outcomes (and therefore indicating the PSR made no difference). The authors go on to conclude that a welfare-based approach to sentencing in the Netherlands is present in judicial decision-making and urges that ‘future research could also benefit from studying the effects of pre-sentence reports in other national contexts’.<sup>2057</sup>

The Council was not able to identify any recent research that could shed light on this issue from an Australian context. However, a study of judicial views was undertaken in 1995 by the Judicial Commission of NSW and the NSW Probation Service.<sup>2058</sup> The majority of judicial officers who took part in this study by responding to a survey indicated PSRs generally assist in sentencing by having an impact on the type of penalty imposed but did not influence the quantum.<sup>2059</sup>

### Stakeholder views

During the review, a number of legal stakeholders expressed support for the broader availability of PSRs or, in the alternative, a model that allows pre-sentence advice to be provided in court by QCS officers. The Childrens Court approach for PSRs was referenced as a potential model for adoption in the adult jurisdiction.

<sup>2053</sup> Nicola Carr and Niamh Maguire, ‘Pre-sentence Reports and Individualised Justice: Consistency, Temporality and Contingency’ (2017) 14 *Irish Probation Journal* 52.

<sup>2054</sup> Michael Norman and Robert Wadman, ‘Utah Presentence Investigation Reports: User Group Perceptions of Quality and Effectiveness’ (2000), 64(1) *Federal Probation* 7, 8.

<sup>2055</sup> Du Mont and Redgrave (n 665).

<sup>2056</sup> Sigrid van Wingerden, Johan van Wilsem and Martin Moerings, ‘Pre-sentence Reports and Punishment: A Quasi-experiment Assessing the Effects of Risk-Based Pre-sentence Reports on Sentencing’ (2014) 11 *European Journal of Criminology* 723.

<sup>2057</sup> Ibid 741.

<sup>2058</sup> Jennifer Hickey and Christopher Spangaro, *Judicial Views About Pre-Sentence Reports* (Research Monograph No. 12, Judicial Commission of NSW, 1995). This also referred to earlier reviews in Victoria and Western Australia.

<sup>2059</sup> Ibid 28.

A concern of some with the current limited availability of this advice is that sentencing judges and magistrates may be making decisions without adequate information being provided, relying solely on reports provided by the defence, which may lead to orders being made that are not appropriate and therefore more likely to be breached.

QCS has noted that the provision of pre-sentencing advice can provide certain benefits including:

- reducing the administrative burden on the community corrections service seeking amendments to an offender's conditions – either on application to a court for community-based orders, or to the Parole Board for offenders subject to parole;
- better supporting courts in making informed sentencing decisions, and encouraging the use of community-based orders rather than imprisonment, where appropriate;
- the opportunity to better tailor an order to the specific risks and needs of individuals – with the tailoring of orders and additional requirements under the proposed new community correction order (CCO) framework identified as 'pivotal to the success and rehabilitation of offenders';
- by avoiding orders being made that are incompatible with the needs of the offender and community, and that do not take into account current resource or service restrictions, reducing the risks of breach and the impact of this on prisoner numbers.<sup>2060</sup>

In the absence of making PSRs mandatory for certain orders or conditions, QCS noted the need for conditions to remain broad enough to enable interventions, treatment and program requirements to be individualised post-sentence and following assessments.

The problem raised with the Council of making PSRs mandatory, or creating a presumption in favour of their adoption, was how much time would be required to allow for their preparation. Ensuring reports are of a consistently high quality to inform the court was also viewed as particularly important as otherwise there is a risk they will provide judicial officers with little or no assistance in sentencing. To undertake this process well and ensure these reports are accurate, it was submitted, would require proper resourcing to allow time for rapport to be established and for appropriate checks to be undertaken to ensure the information provided by an offender is accurate (for example, checks of a proposed residential address).

A key concern is that as the situation currently stands, with very limited availability of PSRs, there is a risk of a two-tiered system of reports developing, as people on low incomes or benefits cannot afford urine tests, mental health assessments and medical reports. This risk has been noted by the Court of Appeal in *R v Clark*.<sup>2061</sup>

In this context, some stakeholders pointed to the potential advantages of pre-sentence orders and programs as these programs enable judicial officers to have more information about the person's circumstances at the time of sentence. Two current examples in Queensland are the Court Link and Queensland Magistrates Early Referral into Treatment (QMERIT) programs.

Court Link is 'a single, generic integrated court assessment, referral and support program', which can be accessed by any person appearing before a Magistrates Court charged with a criminal offence.<sup>2062</sup> The program is aimed at responding to issues contributing to offending including drug and alcohol dependency, mental health problems, impaired decision-making capacity, or being homeless or at risk of homelessness.<sup>2063</sup> The level of service is based on a person's assessed risks and need.<sup>2064</sup> Clients with lower levels of risk or need who are not already linked in with treatment or support services, are referred to community support services.<sup>2065</sup> A bail-based case management service is provided to clients with moderate

<sup>2060</sup> Submission 11 (Queensland Corrective Services) 10. The final point was framed in the negative, rather than as presented above.

<sup>2061</sup> *R v Clark* [2016] QCA 173, 3–4 [6] (McMurdo P). See also comments made at 16–17 [70]–[72] (Morrison JA, North J agreeing). This was in the context of the since-repealed 80 per cent drug trafficking sentencing rule which had been in the *Drugs Misuse Act 1986* (Qld) s 5.

<sup>2062</sup> Magistrates Courts of Queensland, *Annual Report 2017–18* (2018) 28.

<sup>2063</sup> 'Court Link', *Queensland Courts* (Web Page) < <https://www.courts.qld.gov.au/services/court-programs/court-link> >.

<sup>2064</sup> *Ibid*.

<sup>2065</sup> *Ibid*.

to high risk and needs with ongoing judicial monitoring.<sup>2066</sup> Participation in the case management stream is for approximately 12 weeks and is voluntary.<sup>2067</sup> In addition to progress reports documenting the defendant's participation in Court Link, the court is provided with a final report at the conclusion of their engagement providing information to the court about the person's response to Court Link, and any recommendations for the sentencing court to take into account in sentencing.<sup>2068</sup> Court Link currently operates in Brisbane, Cairns, Ipswich and Southport. The Queensland Government announced increased funding for Court Link of \$6.6 million over four years as part of the 2019–20 State Budget to expand the program to Maroochydore, Redcliffe and Caboolture, and to integrate it with the Queensland Magistrates Early Referral into Treatment Program.<sup>2069</sup> As this program only commenced in late November 2017, it is yet to be evaluated.

QMERIT operates out of the Maroochydore and Redcliffe Magistrates Courts as a pre-plea program. Eligible adult offenders who consent to participate are required to complete a 12- to 16-week rehabilitation and treatment program, as a condition of bail.<sup>2070</sup> Successful engagement with the program can be taken into account at sentencing.<sup>2071</sup> The program allows for court reviews at appropriate intervals to monitor progress, at which the QMERIT Health Team appears before the court and provides written progress reports.<sup>2072</sup> A final court report is provided at the conclusion of the program reporting on progress, with a relapse-prevention plan and after-care plan, but must not make any sentencing recommendation.<sup>2073</sup> However, the magistrate may seek a further report from the QMERIT Health Team, if necessary, commenting on drug treatment sentencing options.<sup>2074</sup>

While both Court Link and QMERIT offer an opportunity for more detailed information to be presented to the court to inform sentencing, the numbers of defendants engaged in these programs is comparatively small when considered in the context of the overall number of adult offenders sentenced in the Magistrates Courts each year. In 2017–18, 59 defendants participated in the Court Link case management program in Brisbane during the initial seven months of its operation, while over 200 defendants participated in the QMERIT program.<sup>2075</sup> Over this same one-year period, 107,004 sentencing matters were dealt with by the Magistrates Courts, of which 13,851 resulted in a custodial sentence, and 8,862 in actual custody.<sup>2076</sup>

The Queensland Law Society (QLS) suggested that 'the focus should be on improving the quality of reports to ensure they achieve their purpose when required'<sup>2077</sup> rather than mandating reports for all matters:

Clearly, reports containing the level of detail as those produced following an offender's participation in bail programs like Court Link and QMERIT would be ideal. However, such detailed reports present the obvious obstacle of practicality. It may be more beneficial to enhance the legislative framework by including what information is, or can be, included in a pre-sentence report.

Amending section 344 of the *Corrective Services Act* to include similar guidance as is contained within the Victorian *Sentencing Act 1991* [s 8B, summarised above at 14.1.2 and discussed at 8.11.7] would serve to focus the attention of the report writer on gathering the information of most utility to a sentencing court. Such an amendment could have a three-pronged effect. It may:

- Go some way to addressing the issue of a 'two tiered system of reports' for defendants with limited means by ensuring the court is presented with the most relevant information;

<sup>2066</sup> Ibid.

<sup>2067</sup> Ibid.

<sup>2068</sup> Magistrates Courts of Queensland, *Practice Direction No. 8 of 2017 – Court Link*, 29 November 2017, para 14.

<sup>2069</sup> Attorney-General and Minister for Justice, Yvette D'Ath, 'Budget Rules in Favour of Justice for All Queenslanders' (Media Statement, 11 June 2019).

<sup>2070</sup> Magistrates Courts of Queensland (n 2062) 29.

<sup>2071</sup> Magistrates Courts of Queensland, *Practice Direction No. 1 of 2016 (Amended) – Queensland Magistrates Early Referral into Treatment (QMERIT) Program*, issued 27 January 2016, amended 19 March 2018, para 7.

<sup>2072</sup> Ibid, paras 25–6.

<sup>2073</sup> Ibid, para 31.

<sup>2074</sup> Ibid, para 32.

<sup>2075</sup> Magistrates Courts of Queensland (n 2062) 29.

<sup>2076</sup> Australian Bureau of Statistics (2019) (n 56) Table 26 (Defendants finalised – Summary outcomes by principal offence, Magistrates' Courts – Queensland, 2016–17 to 2017–18).

<sup>2077</sup> Submission 15 (Queensland Law Society) 24.

- Serve to create some consistency in terms of the content and quality of pre-sentence reports by encouraging Queensland Corrective Services to adopt a uniform approach; and
- Ensure that the limited time and resources of Queensland Corrective Services staff are used most effectively and efficiently to produce the desired result.

While outside the topic of legislative reform, the extension of availability of dedicated court advisory services at a Magistrates Court level would be complementary to the inclusion of guidance in the content of pre-sentence reports. Courts desirous of short, oral reports from Queensland Corrective Services may utilise such services to obtain specific information in a short time frame, thereby avoiding the cost and delay associated with written reports. Accessibility issues in regional courts may be overcome by utilising telephone and video link facilities to increase the availability of such services.<sup>2078</sup>

#### 14.1.4 The Council's view

The Council considered three options for reform regarding the availability and use of PSRs.

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

The Council did not consider the option of making PSRs mandatory in all cases, or for particular order types. The Council discounted this option as viable on the basis that in a jurisdiction such as Queensland, with limited resources and a geographically dispersed population, such a requirement would effectively make some forms of community-based sentencing orders unavailable in some court locations purely on the basis of a report not being able to be prepared.

The option preferred by the Council was to retain the current approach to PSRs, which allows a PSR to be ordered, but does not require it. Under this approach, there would be no requirement for a court to order a PSR before making a community-based sentence order or deciding to attach specific conditions to that order.

The Council continues to support this option on the basis that even a presumption in favour of ordering of a PSR may act as a barrier to courts making community-based sentencing orders for offenders who might otherwise benefit from the making of such orders.

There is some risk with the introduction of new types of community-based sentencing orders, such as a CCO, that in the absence of good pre-sentence advice, courts will not be able to sufficiently tailor and target conditions to address the underlying causes of offending. However, the Council considers it should be possible to cast many of the conditions a court may be able to impose in broad enough terms to enable the individualisation of interventions, treatment and program requirements to occur post-sentence once the offender has been assessed by QCS.

The Council's views and stakeholder submissions regarding the need for PSRs prior to the making of a CCO are discussed at section 8.11.7 of this report.

Retention of the current legislative approach still provides scope for expansion of the availability of PSRs and a court advisory service, as supported by many legal stakeholders. This was considered a worthwhile investment by many on the basis it would enhance the information available to a court to better inform sentencing and result in better targeted orders and conditions. This, in turn, may support greater compliance by offenders with orders that take into account their individual circumstances and the underlying factors associated with their offending.

The provision of this information through a court advisory service staffed by QCS also has potential to standardise the information provided to courts, while ensuring that offenders who do not have access to the resources to seek specialist psychological or other reports are not disadvantaged. The greater availability of this information may further assist in building a shared understanding by courts and Corrective Services of what factors affect sentencing decisions, and how orders, once made, are administered, thereby over time potentially supporting improved confidence in the use of community-based sentencing orders.

---

<sup>2078</sup> Ibid.

The Council notes the views of the Australian Law Reform Commission (ALRC) in its 2006 report on the sentencing of federal offenders. The ALRC stated that these reports: ‘have a particularly important role in the sentencing of special categories of offenders, such as offenders with a mental illness or intellectual disability, and Aboriginal and Torres Strait Islander offenders’,<sup>2079</sup> In its more recent report — *Pathways to Justice* reporting on its inquiry into the incarceration of Aboriginal and Torres Strait Islander peoples, the ALRC has recommended the adoption of cultural reports for Aboriginal and Torres Strait Islander offenders, a form of which already exists in Queensland. These reports are discussed further below in section 14.1.5 of this report.

A court advisory service provided by QCS officers, as is available on a very limited basis in the Brisbane Magistrates Court, or staff recruited specifically for this purpose, may be the most efficient means of providing advice of this nature to sentencing courts, without the need for detailed written reports. Similar to Queensland, some jurisdictions allow for shorter written or oral reports by court duty officers that focus on the suitability and availability of particular sentencing options in addition to more detailed reports. The Council suggests it may be beneficial to clarify in legislation that a PSR can be delivered orally or in writing, as is the case in some other jurisdictions,<sup>2080</sup> and that additional guidance might be provided along the lines set out under Victoria’s *Sentencing Act 1991*.<sup>2081</sup>

While the required resourcing for a court advisory service is outside the scope of this review, to provide this service on a state-wide basis would require a commitment of additional funding and resources and, potentially, recruitment of additional staff to undertake this work. It is important any enhancements considered not be at the expense of existing service provision or result in increased workloads for QCS officers, who are already carrying high caseloads. Such a service could be trialled at select court locations to assess its impact, before consideration is given to broader rollout. This option would still allow for enhancements to the current court advisory service, operated on a very limited basis by QCS.

### 14.1.5 Cultural reports

Section 9(2)(p) of the PSA requires a sentencing court, if the offender is an Aboriginal or Torres Strait Islander person, to have regard to, among other matters, submissions made by a representative of a Community Justice Group (CJG) in the offender’s community relevant to sentencing, including:

- the offender’s relationship to their community;
- any cultural considerations; or
- any considerations relating to programs and services established for offenders in which the CJG participates.

This provision applies to all courts hearing criminal matters in Queensland. Submissions can be made orally or in writing, and submitted or made on their own, or in addition to a PSR.

The Department of Justice and Attorney-General (DJAG) provides funding to 49 CJGs to develop and deliver strategies within their communities to work towards reducing the overrepresentation of Aboriginal and Torres Strait Islander offenders and victims within the criminal justice system, including in support of sentencing hearings.<sup>2082</sup> New triennial funding arrangements commenced on 1 July 2017, with a total allocation of \$4 million annually. A further \$19.1 million over four years, and \$5.4 million per annum ongoing, has been announced as part of the 2019–20 State Budget to expand CJGs, targeted at areas of greatest need.<sup>2083</sup>

Nearly all CJG members are volunteers and include Elders, traditional owners, Respected Persons and community members of ‘good standing’. CJGs have a range of roles including supporting the Murri Courts, bringing Elders to court, and providing oral and written reports to assist in bail and sentencing matters.

<sup>2079</sup> Australian Law Reform Commission (n 145) 401 [14.46].

<sup>2080</sup> See *Crimes (Sentencing) Act 2005* (ACT) s 44; *Sentencing Act 2017* (SA) s 17(3); *Sentencing Act 1997* (Tas) s 82(1)(a); *Sentencing Act 1995* (WA) s 22(3);. The Tasmanian legislation distinguishes between: (a) an oral statement of a probation officer; and (b) a pre-sentence report.

<sup>2081</sup> *Sentencing Act 1991* (Vic) s 8B.

<sup>2082</sup> Magistrates Courts of Queensland (n 2062) 26.

<sup>2083</sup> Queensland Government, *Queensland Budget 2019–20: Budget Measures — Budget Paper No. 4* (2019) 67.

The Murri Court has adopted two special forms of written reports: Entry Reports and Sentence Reports. The procedures identified as best practice in the operation of the Murri Court, including the preparation of these reports, are detailed in a Practice Direction issued by the Chief Magistrate.<sup>2084</sup>

| MURRI COURT  |
|--|
| <p>Murri Court is a Queensland Magistrates Court bail-based program, which provides an opportunity for members of the Aboriginal and Torres Strait Islander community (including Elders and victims) to participate in a court process that requires defendants to take responsibility for their offending behaviour, but which respects and acknowledges Aboriginal and Torres Strait Islander culture.</p> <p>Defendants are required to take responsibility for their offending and are provided with support from Elders and support services to address the underlying causes of offending and encourage positive behavioural change. In addition, participants can be referred to treatment and support services, as well as taking part in cultural activities, including yarning circles and Men's and Women's groups. Stakeholders participating in Murri Court are encouraged to speak in 'plain English' rather than legal jargon, and the Magistrate speaks directly to the defendant and takes advice from Elders and Respected Persons.</p> <p>Murri Court continues to operate in 14 locations across the State including Maroochydore, Brisbane, Caboolture, Cairns, Cherbourg, Cleveland, Mackay, Mount Isa, Richlands, Rockhampton, St George, Toowoomba, Townsville, and Wynnum.</p> <p>In 2017–18, 615 defendants (588 adults and 27 children) appeared before Murri Courts and worked with Elders and support services to address the underlying contributors to their offending and connecting with culture.</p> <p>Source: Excerpt from Magistrates Courts of Queensland, <i>Annual Report 2017–2018</i> (2018) 27.</p> |

The reports used in the Murri Court and mainstream courts prepared by CJGs are in addition to sentencing submissions made on behalf of legal practitioners. For example, sentencing submissions made by the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS) on behalf of clients can include information about their clients' antecedents and, as part of this, relevant cultural and background information, such as their clients' current connection to culture and to their community.

In 2017–18, CJGs reported attending Queensland Magistrates Courts 1,557 times and provided 4,188 bail and sentencing court submissions through their support of 5,238 defendants as well as support to victims of crime throughout Queensland.<sup>2085</sup>

The value of cultural advice being provided to inform sentencing was expressly raised by members of the Council's Aboriginal and Torres Strait Islander Advisory Panel during consultation to ensure orders are appropriately tailored and take into account the offender's personal circumstances. More information about the panel can be found at section 4.5 of this report.

In a 2017 Court of Appeal decision of *R v SCU, Sofronoff P* found that the 'opinion of a [CJG] is a matter of great weight', noting that it has 'a statutory basis'.<sup>2086</sup> Section 150(1)(g) of the YJA makes 'it mandatory for a court to have regard to such submissions' when sentencing a child.<sup>2087</sup> In this context:

the provisions of s 150 are not merely 'certain cultural aspects'. Their centrality to the task of sentencing does not depend upon the offender's being merely Indigenous. They are directly relevant to the applicant's situation as a child offender and constitute some of the very reasons why detention ought not be ordered.<sup>2088</sup>

The ALRC, in its 2017 *Pathways to Justice* report on its inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples, summarised the reasons for the introduction of the Queensland provision as follows:

The key factors that led to the current form of s 9(2)(p) was the over representation of Aboriginal and Torres Strait Islander peoples in custody, and the need for greater community-based culturally appropriate options. It was intended that submissions from community justice groups would give the sentencing court insight into the 'reasons for the offending behaviour and relevant cultural and historical issues'.

<sup>2084</sup> Magistrates Courts of Queensland, *Practice Direction No. 2 of 2016: Queensland Murri Court (Amended)*, 13 April 2016 (amended 16 May 2017).

<sup>2085</sup> Magistrates Court of Queensland (n 2082) 26.

<sup>2086</sup> *R v SCU* [2017] QCA 198, 23 [113] (Sofronoff P) and see 11–12 [56] (Sofronoff P).

<sup>2087</sup> *Ibid* 24 [114] (Sofronoff P).

<sup>2088</sup> *Ibid* 25 [121] (Sofronoff P).

Community justice groups could make the court aware of local sentencing options, particularly those in which the group participated. Submissions to this effect were to be of particular benefit to circuit courts in remote areas, with the responsible Minister noting in the second reading speech that it would be 'expected that the advice of the community justice groups will lead to more appropriate sentencing options for offenders' allowing for the 'community to take a greater role in addressing offending behaviour in a culturally appropriate way'.<sup>2089</sup>

The Caxton Legal Centre, in a submission to the ALRC, found need for legislative reform on the basis that:

- 'There is no explicit requirement ... for a sentencing Court in Queensland to take into account the ongoing systemic and background factors that uniquely affect Aboriginal and Torres Strait Islander offenders' and, with reference to the High Court's position in *Bugmy v The Queen*,<sup>2090</sup> 'whilst cultural considerations, including systemic deprivation, can and will be taken into account on sentence in Queensland, they must have some evidentiary basis'.
- 'The evidentiary burden on Aboriginal and Torres Strait Islander offenders to raise such matters' can be a barrier to this occurring.
- 'There is no requirement submissions be sought from Community Justice Groups and, if obtained, no legislative requirement on judges to accept recommendations'.<sup>2091</sup>

It concluded:

In our view, sentencing principles should explicitly take into account individual and systemic factors arising out of an offenders Aboriginal or Torres Strait Islander background because 'individualised justice requires recognition of the relevant facts'.<sup>2092</sup>

The ALRC, after reviewing the relevant authorities and views expressed in submissions in support, recommended:

**Recommendation 6-1** Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.<sup>2093</sup>

The ALRC has suggested that: 'Where adopted, the provision should be uniform across the states and territories'.<sup>2094</sup>

The Commonwealth Government and Queensland Government are yet to issue a response to the ALRC's report.

In addition to this recommendation, the ALRC made two additional recommendations which would ensure courts are provided with the necessary information to give practical effect to this new provision:

**Recommendation 6-2** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

**Recommendation 6-3** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

<sup>2089</sup> Australian Law Reform Commission (n 21) 190 [6.22].

<sup>2090</sup> (2013) 249 CLR 571.

<sup>2091</sup> Caxton Legal Centre Inc., Submission No. 47 to Australian Law Reform Commission, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (4 September 2017) 9.

<sup>2092</sup> Ibid citing Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39 *Melbourne University Law Review* 47.

<sup>2093</sup> Australian Law Reform Commission (n 2089) 204.

<sup>2094</sup> Ibid 214 [6.114].

A Murri Court process evaluation is currently underway, which may allow for the suitability of current reports used in the Murri Court to be considered. The use and impact of cultural reports is also an important area for future research.<sup>2095</sup>

The Council suggests there may be opportunities to build on the successful CJG model in Queensland through the current evaluation, and any future evaluations of the CJG program, to ensure cultural reports meet the needs of judicial officers and provide sufficient detail to ensure the sentencing process responds to the circumstances of Aboriginal and Torres Strait Islander offenders.

## 14.2 Administrative mechanisms – section 651 applications, ex officio indictments, section 189 schedules

Under section 651 of the *Criminal Code* (Qld) if an indictment has been presented against a person before a higher court, the court may hear and decide summarily any charge of a summary offence, provided that:

- The court considers it appropriate to do so;
- The accused is legally represented;
- The Crown and accused consent;
- The accused states an intention to enter a plea of guilty; and
- A copy of the bench charge sheet or complaint is before the court.<sup>2096</sup>

An application to transmit a summary offence is governed by section 652 of the *Criminal Code* (Qld), which includes requirements that the application is to be made to the relevant court of summary jurisdiction, in writing and signed by the applicant with:

- A declaration under the *Oaths Act 1867* (Qld);
- Details of the charge;
- An intention to plead guilty; and
- That the reason for the transfer is for no other reason than to plead guilty.<sup>2097</sup>

Legal practitioners making an application must allow 28 days for this process. The Queensland Director of Public Prosecutions (DPP) has 14 days to consider whether to consent to an application.<sup>2098</sup> The application (together with the written DPP consent) must be delivered to the court of summary jurisdiction no later than 14 days prior to the date set for the hearing of the indictable offence.<sup>2099</sup>

The Office of the Director of Public Prosecutions' *Director's Guidelines*<sup>2100</sup> state that prosecutors should not consent, unless the summary matter has some connection to an indictable matter set down for sentence. Circumstances in which consent may be given include:

An evidentiary relationship: where the circumstances of the summary offence would be relevant and admissible at a trial for the indictable offence.

The facts form part of the one incident.

<sup>2095</sup> The Council is aware that the University of Technology Sydney (in partnership with the Victorian Aboriginal Legal Service Co-Operative Ltd, Five Bridges Ltd and the Australasian Institute of Judicial Administration) has received funding from the Australian Research Council to assess the impact of Indigenous Justice Reports in criminal sentencing on sentence practices and outcomes for Aboriginal and Torres Strait Islander women, comparing outcomes for women sentenced in the Victorian Koori Courts and Queensland Murri Courts. The research is due to be finalised in 2022.

<sup>2096</sup> *Criminal Code* (Qld) s 651(2).

<sup>2097</sup> *Ibid* s 652(3).

<sup>2098</sup> District Court of Queensland, *Practice Direction No. 3 of 2002 – Disposal of Charges of Summary Offences, Sections 651 and 652 Criminal Code*, 12 September 2002, 1 [4].

<sup>2099</sup> *Ibid* 1 [6]; Supreme Court of Queensland, *Practice Direction No. 1 of 2001 – Disposal of Charges of Summary Offences Section 651 and Section 652 Criminal Code*, 23 February 2001, 1 [2].

<sup>2100</sup> Office of the Director of Public Prosecutions, *Director's Guidelines* (as at 30 June 2018) (2018) 53–5 ('(vii) Transfer of Summary Matters').

The offences overlap or are based on the same facts.

The summary offences were committed in resistance to the investigation, or apprehension, of the offender for the indictable offence.

There is a substantive period of remand custody that could not otherwise be taken into account under section [159A] of the PSA.<sup>2101</sup>

Consent to a transfer of summary matters should not be given:

Where all offences could be dealt with in the Magistrates Court.

For a breach of the *Bail Act*. Such offences should be dealt with at the first appearance in the Magistrates Court.<sup>2102</sup>

### The approach in select jurisdictions (Victoria and New South Wales)

The *Criminal Procedure Act 2009* (Vic) provides the procedure for a Supreme or County Court (analogous to a District Court in Queensland) to deal with a related – and/or unrelated – summary offence.<sup>2103</sup> The key difference between the Queensland and Victorian regimes is that in Victoria, the consent of the DPP to transfer a summary offence is not required.

When an indictable offence is committed for trial, Victoria's Magistrates' Court must order that the proceedings for any related summary offence are transferred to the same court (without the need for a plea), unless the DPP and accused agree that the matter should remain in the Magistrates' Court. Once the indictable charge has proceeded to trial, a guilty plea is entered, or it is discontinued, and the court will then hear and determine the related summary charge without a jury. The court has the power to discharge the offender or impose any sentence that could be imposed by the Magistrates' Court.

In the case of an unrelated summary offence, if an offender has an indictment before a Supreme or County Court, intends to plead guilty and consents to the charge being heard by the higher court, the proceedings in the Magistrates' Court are transferred to the relevant higher court. There is no further guidance in the Victorian DPP guidelines.

In NSW, the *Criminal Procedure Act 1986* (NSW) provides for a related offence to be dealt with in a Supreme or District Court.<sup>2104</sup> When an indictable offence is committed for trial or sentence, the prosecution presents a certificate specifying each 'related offence', which is then transferred to the higher court (without a plea). Once the indictable offence has been determined, the court may deal with a summary offence, unless it would not be in the interests of justice. In NSW there is no provision for an unrelated summary offence to be transferred to a higher court when an offender has other matters indicted. The DPP guidelines do not provide any further guidance.

#### 14.2.1 Stakeholder views

Many stakeholders were of the view that in general the current process under sections 651 and 652 of the *Criminal Code* (Qld) is:

- inefficient;
- unnecessarily complex;
- laborious and inflexible;
- led to delay, and
- attempts to use the process were not always successful.

---

<sup>2101</sup> Ibid.

<sup>2102</sup> Ibid.

<sup>2103</sup> *Criminal Procedure Act 2009* (Vic) ss 145, 242–3.

<sup>2104</sup> *Criminal Procedure Act 1986* (NSW) ss 166–9.

Many stakeholders commented that the section 651 process may not provide for all offences that can be heard and decided summarily, such as Commonwealth offences, a breach of a community-based order<sup>2105</sup> or if the offence is an indictable offence under section 552B of the *Criminal Code* (Qld).<sup>2106</sup>

Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis of The University of Queensland School of Law suggested amendments to allow an offender's oral consent and removal of the requirement for DPP consent. They proposed that 'it should be for the higher court to determine (with the defendant's consent) whether it is in the interests of justice for the court to finalise the summary matter(s)'.<sup>2107</sup>

Sisters Inside supported an amendment to remove the requirement for DPP's consent and allow certification by a lawyer.<sup>2108</sup> LAQ supported an amendment to remove the requirement for an offender's signature.<sup>2109</sup>

The Bar Association of Queensland supported removing the discretion of the DPP and streamlining the application process and rules.<sup>2110</sup> They noted that the requirement that the offender sign the application created difficulty 'when the offender is in custody and the lawyers have only been given the pre-sentence custody certificate which revealed other offences'. Sentences were invariably adjourned for not being able to comply with the 14-day time limit imposed under the Practice Direction.<sup>2111</sup> They submitted: 'Pre-sentence custody certificates should be disclosed early, or a process should be developed in which the representatives can be given the document outlining outstanding offences in Queensland'.<sup>2112</sup>

The QLS considered the restriction on self-represented persons unreasonable, although conceded it was unlikely this cohort would use the process very often.<sup>2113</sup> The QLS supported removing requirements for the Oaths Act declaration and consent of the DPP.<sup>2114</sup> By analogy, it noted, the registry committal process required only the solicitor to sign, and this would reduce adjournments based on non-compliance with the 14-day filing requirement.<sup>2115</sup>

Finally, the QLS noted concern about whether Commonwealth offences and indictable matters dealt with under section 552B of the *Criminal Code* (Qld) could be transferred. They thought that the words 'hear and decide summarily any charge of a summary offence' in section 651 would allow for this.<sup>2116</sup>

However, the Office of the Commonwealth Director of Public Prosecutions (CDPP) was of the view that the section 651 process is 'not applicable to Commonwealth prosecutions due to the bounds of the Director's power to prosecute under section 6 of the *Director of Public Prosecutions Act 1983* (Cth)'.<sup>2117</sup>

Stakeholders responding to the Council's Options Paper did not suggest any amendment to section 189 of the PSA. Comment was made during consultation that the practice was extensive in the 1990s; however, it attracted criticism because the offences in section 189 schedules that were taken into account were not offences for which a conviction had been obtained. This could carry negative consequences regarding victims of those offences not feeling validated and being unable to later claim compensation or insurance.

<sup>2105</sup> It is noted that s 130(b) of the *Penalties and Sentences Act 1992* (Qld) expressly recognises that contraventions of the requirements of community-based orders may be dealt with under s 189 of that Act — although that process also requires prosecution consent (s 189(1)(a)). However contraventions of graffiti removal orders are excepted: sections 130 (note) and 189(12).

<sup>2106</sup> *Criminal Code* (Qld) s 552B: Charges of indictable offences that must be heard and decided summarily, unless defendant elects trial by jury.

<sup>2107</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 10.

<sup>2108</sup> Submission 7 (Sisters Inside) 10.

<sup>2109</sup> Submission 6 (Legal Aid Queensland) 14.

<sup>2110</sup> Preliminary submission (Bar Association of Queensland) 13 July 2018, 7.

<sup>2111</sup> Ibid.

<sup>2112</sup> Ibid.

<sup>2113</sup> Submission 15 (Queensland Law Society) 25.

<sup>2114</sup> Ibid.

<sup>2115</sup> Ibid 25–6.

<sup>2116</sup> Ibid 26.

<sup>2117</sup> Submission 13 (Commonwealth Director of Public Prosecutions) 3 [17].

In respect of section 561 of the *Criminal Code* (Qld), LAQ and Sisters Inside noted that ex officio indictments are still used and remain important to the process.<sup>2118</sup> It was also noted during consultation that registry committals could achieve the same benefits as the previously used ex officio indictments.

#### 14.2.2 The Council's view

The Council recognises that administrative processes that allow a higher court to deal with a summary offence are an important aspect of an efficient court system and can reduce sentencing complexity. The case of *R v Sabine*<sup>2119</sup> highlights the considerations, issues and anomalies that can arise when different courts are sentencing a person for multiple offences committed on different dates.

##### Need for a declaration and applicant's signature

As discussed above, a higher court can only hear and decide a summary offence where the person is legally represented. On this basis, the Council considers that it would be appropriate for the Magistrates Court registry to accept the signature of a legal practitioner on behalf of their client, instead of the declaration under oath of the applicant for the purpose of transmitting the charge. Furthermore, whether it is the person or their representative signing the requisite form, the Council considers that an *Oaths Act 1867* (Qld) declaration should not be required. As to entering a plea, section 651(3) of the *Criminal Code* (Qld) provides:

Subject to this section, the practices of the court and the express provisions of this Code relating to taking a plea on an indictment apply to the taking of a plea to the charge in a complaint or bench charge sheet.

Section 651 applications are of most importance when the offender is in custody or has pre-sentence custody, and in most cases are in custody when the application form must be signed. Requiring the person's signature in the form of a sworn declaration constitutes two significant impediments that have resource costs for the defence (often LAQ) and prison management staff.

While legal practitioners may not wish to sign such a form on their client's behalf without written instructions to do so from their client, there may be situations where it is more expedient to obtain the client's written instructions in a more generic form, before certain court file numbers, and other information that might be required for the formal application form, are obtained.

##### Need for DPP consent

The Council has considered whether the DPP's consent should be required. As discussed above, the DPP's *Director's Guidelines* provide a presumption not to consent, unless certain circumstances are met, such as there is an evidentiary relationship, the facts form part of the one incident or the offences overlap or are based on the same facts, or there is a substantial period of pre-sentence custody that could not otherwise be taken into account.<sup>2120</sup> If the consent of the DPP is removed as a legislative requirement, the court can still decide if it is appropriate to deal with the summary offence/s.

The Council notes that the current requirement for prosecution consent to a section 651 application ensures that the DPP is informed of the defence intention to make the section 651 application and has the QP9 forms and bench charge sheets that outline the factual allegations of the relevant charge/s. Removing the requirement for consent could risk the prosecution not having reasonable notice of the transmission of the charges or their details. Section 95A of the *Evidence Act 1977* (Qld) is an example of a provision that places an onus on the applicant party to provide relevant material to the other party or parties within a specific timeframe, which can be extended by the court on application.

There are arguments against removing the requirement for DPP consent. The courts may adopt a similar guideline or set of principles to determine whether it is appropriate for a summary offence to be dealt with. This may result in greater administrative work to transmit and then remit a matter to its summary jurisdiction if it is deemed inappropriate. It may result in higher court judges spending court time having to determine the issue of appropriateness during sentence hearings, by reviewing the QP9 (or schedule of facts), which could take some time in the case of multiple charges. This could risk creating a new form of inefficiency and delay greater than that which the change is intended to remedy.

<sup>2118</sup> Submission 7 (Sisters Inside) 10, Submission 6 (Legal Aid Queensland) 14.

<sup>2119</sup> [2019] QCA 36.

<sup>2120</sup> Office of the Director of Public Prosecutions (n 2100) 55.

In the performance of this function, it would be expected that the court would wish to hear submissions from the prosecution about this. This would be the first opportunity for the DPP to influence the process, where historically the DPP has been the first-stage filter for such applications. This is also at odds with the fact that the DPP determines whether indictable charges committed from the Magistrates Courts proceed to indictment (as the charge committed or as another charge)<sup>2121</sup> or are discontinued by no true bill and whether ex officio indictment requests are granted.

While the Council is minded to recommend the removal of the requirement for DPP consent, it notes that this will increase the importance of the good judgment required by defence in initiating a section 651 application and discernment in practitioners advising clients whether particular summary offences are likely to be viewed as appropriate to be dealt with by a court. An amended section 651 process would still have the effect that a court ‘must not hear and decide the summary offence unless ... the court considers it appropriate to do so’.

However, the Council makes this recommendation with a substantial caveat: it acknowledges that further consultation with the judiciary and DPP will be required, and that this consultation may result in the recommendation not being accepted.

If other recommendations are adopted such as broadening the scope for pre-sentence custody to be declared by removing the words ‘for no other reason’ in section 159A of the PSA and if legislation provides for a breach of a community-based order to be transmitted to a higher court, this may reduce the impact on defendants of the DPP not consenting to a charge being transmitted via a section 651 process.

The Council does not recommend amendments be made to section 561 of the *Criminal Code* (Qld) or section 189 of the PSA.

#### RECOMMENDATIONS: ADMINISTRATIVE MECHANISMS

57. Section 652(2) of the *Criminal Code* (Qld) should be amended to allow either the person charged or his or her legal representative to sign the application to transmit a summary charge or charges from a Magistrates Court to a higher court registry.
58. Section 652(3)(a) of the *Criminal Code* (Qld) should be omitted, so that a declaration is no longer required for an application, regardless of who signs it.
59. Subject to further consultation with the Office of the Director of Public Prosecutions (Qld) and the judiciary, section 651(2)(c) of the *Criminal Code* (Qld) should be amended to remove the requirement for consent of the Crown. Instead, there should be a requirement that the Crown is provided with the application material, including copies of the QP9 form/s and bench charge sheets, within a timeframe set by the legislation.

### 14.3 Convicted and not further punished

The sentencing order that an offender be ‘convicted and not further punished’ is a staple of Queensland courts’ sentencing options, constantly relied on to achieve fair and expedient resolutions of criminal charges. It is particularly useful for sentencing multiple charges where one of a group of offences will attract the head sentence, or where pre-sentence custody or other issues mean that another form of order would be unjust.

This form of sentencing disposition is not expressly recognised in Queensland legislation. It may appear similar to section 19(1)(a) of the PSA (absolute discharge), but that order can only be made if a conviction is not recorded in every instance.<sup>2122</sup>

The Council looked at this form of order because it is often used as a form of disposition for charges joined with a more serious offence that has attracted a term of imprisonment. In one scenario, the Court of Appeal has all but mandated it: where a trafficking count is ‘largely constituted by acts of supplying a dangerous

<sup>2121</sup> *Criminal Code* (Qld) s 560.

<sup>2122</sup> *Penalties and Sentences Act 1992* (Qld) s 16.

drug, error occurs from the imposition of additional punishment for the same act if concurrent terms of imprisonment are imposed for the counts of supplying'.<sup>2123</sup>

In a July 2013 report,<sup>2124</sup> the NSW Law Reform Commission recommended that, 'in the interests of simplicity' the NSW provisions dealing with dismissal of a charge without proceeding to conviction<sup>2125</sup> and conviction with no other penalty<sup>2126</sup> 'should be replaced with a single provision which allows the court to deal with an offender without imposing any penalty'. This did not eventuate, and the relevant provision remains:

10A Conviction with no other penalty

(1) A court that convicts an offender may dispose of the proceedings without imposing any other penalty.

(2) Any such action is taken, for the purposes of the *Crimes (Appeal and Review) Act 2001* and the *Criminal Appeal Act 1912*, to be a sentence passed by the court on the conviction of the offender.

Note. The *Crimes (Appeal and Review) Act 2001* and the *Criminal Appeal Act 1912* provide for appeals against sentence, including (in some circumstances) by the prosecutor.

The NSW Law Reform Commission had recommended that the proposed new provision could be modelled on a South Australian equivalent,<sup>2127</sup> which has since been repealed, then revived and expanded in a new Act in 2017:

23—Discharge without penalty

(1) If a court finds a person guilty of an offence but finds the offence so trifling that it is inappropriate to impose a penalty, the court may—

(a) without recording a conviction—dismiss the charge; or

(b) on recording a conviction—discharge the defendant without penalty.

(2) If a court finds a person guilty of an offence and—

(a) the defendant has spent time in custody in respect of the offence; and

(b) the court is satisfied there is good reason not to impose any further penalty on the defendant, the court may—

(c) without recording a conviction—dismiss the charge; or

(d) on recording a conviction—discharge the defendant without further penalty.

(3) A court may exercise the powers conferred by this section despite any minimum penalty fixed by an Act or statutory instrument.<sup>2128</sup>

These provisions appear to have the same effect as the equivalent Victorian provision:

73 Unconditional discharge

A court may discharge a person whom it has convicted of an offence.<sup>2129</sup>

<sup>2123</sup> *R v Chan* [2017] QCA 8, 2 [4] (Douglas J, Gotterson and Morrison JJA agreeing), citing *R v Connolly* [2016] QCA 132, 4 [16] (Philippides JA, McMurdo JA and Flanagan J agreeing) and *R v Bobonica* [2009] QCA 287, 9 [38] (Muir JA, McMurdo P and Cullinane J agreeing) (which in turn cited s 16 of the *Criminal Code* (Qld); *R v Kiripatea* [1991] 2 Qd R 686, 702 (Williams J, Ambrose J agreeing); *R v Dang* [1999] QCA 414, 9 [21] (Davies JA and Cullinane J, Ambrose J agreeing); and *R v Elhusseini* [1988] 2 Qd R 442, 445 (Connolly J), see also 455 (Williams J).

<sup>2124</sup> NSW Law Reform Commission (n 76) 304 [13.58]–[13.60], Recommendation 13.17.

<sup>2125</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).

<sup>2126</sup> *Ibid* s 10A.

<sup>2127</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 15.

<sup>2128</sup> *Sentencing Act 2017* (SA) s 23.

<sup>2129</sup> *Sentencing Act 1991* (Vic) s 73.

### 14.3.1 Stakeholder views

Most responses to this question supported creating a clear legislative basis for a sentencing court to ‘convict and not further punish’ as a sentencing option.<sup>2130</sup>

The majority of legal stakeholders considered that if this sentencing option was legislated, the recording of a conviction should remain an option at the court’s discretion (in accordance with section 12 of the PSA).

Fighters Against Child Abuse Australia (FACAA) did not support a discretion not to record a conviction and suggested that this sentencing option ‘should only [be] used in the case of forensic patients found not guilty by reason of mental defect or illness’.<sup>2131</sup>

The Office of the CDPP advised that ‘this disposition has no application to federal sentencing’.<sup>2132</sup>

Sisters Inside did not believe it was a high priority to legislate this form of order.<sup>2133</sup>

The QLS noted that the order is particularly appropriate in cases where no punishment can be imposed, such as ‘where double punishment is prohibited by s. 16 of the *Criminal Code 1899*, or where no additional penalty should be imposed by a later court for reasons of totality’.<sup>2134</sup> The QLS distinguished this order from a section 19 PSA order, but saw ‘no reason for a specific legislative provision to provide for the sentencing order that an offender can be convicted and not further punished. [If drafted, it] ought to provide expressly that the order may be made whether or not the court records the conviction’.<sup>2135</sup>

### 14.3.2 The Council’s view

The Council considers that judicial discretion is important in sentencing and that courts should be provided an identifiable power at law to convict and not further punish an offender as a sentencing option. The Council agrees with majority stakeholder view that judicial discretion to record or not to record a conviction should remain for this sentencing option.

#### RECOMMENDATION: CONVICT AND NOT FURTHER PUNISH

60. A sentencing option, ‘convict and not further punish’ should be added to the *Penalties and Sentences Act 1992* (Qld). Judicial discretion to record or not record a conviction under section 12 of the *Penalties and Sentences Act 1992* (Qld) should remain in relation to these orders.

## 14.4 Breaches of community-based orders

Three issues emerged in consultation regarding dealing with breaches of community-based orders (community service order, graffiti removal order, ICO or probation order).<sup>2136</sup> The issues raised (discussed further below) were:

- a higher-court power to deal with a lower-court community-based order;
- a lower-court power to deal with a higher-court community-based order;
- Magistrates Courts’ discretion to action a breach of Magistrates Court community-based order on its own initiative.

While the discussion below relates to the existing PSA provisions and current community-based orders, the issues may be of relevance to any future CCO as well.

<sup>2130</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 10; Submission 4 (Fighters Against Child Abuse Australia) 32; Submission 6 (Legal Aid Queensland) 14; Submission 7 (Sisters Inside) 10.

<sup>2131</sup> Submission 4 (Fighters Against Child Abuse Australia) 32.

<sup>2132</sup> Submission 13 (Commonwealth Director of Public Prosecutions) 3 [20].

<sup>2133</sup> Submission 7 (Sisters Inside) 10.

<sup>2134</sup> Submission 15 (Queensland Law Society) 26.

<sup>2135</sup> Ibid.

<sup>2136</sup> *Penalties and Sentences Act 1992* (Qld) s 4.

### 14.4.1 Amendment and revocation powers

The amendment and revocation provisions<sup>2137</sup> apply their powers to the court that made the community-based order.<sup>2138</sup> There is recognition of a court, other than the one that imposed the order, amending or revoking for non-compliance or inability to comply. It must then notify the court that made the order.<sup>2139</sup> However, the provision dealing with re-sentencing on revocation contains no recognition of a court other than the one that originally made the order.<sup>2140</sup>

### 14.4.2 Breaches

The relevant PSA provisions are in Part 7, Division 2. Section 123 creates an offence of contravening a community-based order requirement, which carries a fine as the maximum penalty.

Proceedings for this offence ‘may be brought in any Magistrates Court’ (s 124) – subject to sections 128 or 129 (see below). The proceedings ‘may be taken, and the offender dealt with, under this division for the contravention even though the order has been terminated or revoked’.<sup>2141</sup>

Under section 142 of the PSA: ‘Proceedings for an offence against a community based order, if not initiated by a court, must be started by a complaint made by a person authorised by the chief executive (corrective services) to do so, either generally or in a particular case’.<sup>2142</sup>

A Magistrates Court has no such power to initiate breach proceedings. If the magistrate convicts the offender of the offence brought to court against section 123, further powers are available in section 125 – in addition to, or instead of, dealing with the offender under section 123. Section 125(2) allows the magistrate to admonish and discharge or make one or more of a choice of orders that do not affect the continuation of the community-based order (s 125(3)). Section 125(4) contains further discretion to:

- sentence afresh, if the community-based order was made by a Magistrates Court (this terminates the order);<sup>2143</sup> or
- if the community-based order was made by a higher court, commit the offender into custody or grant bail to facilitate their appearance before that court (if two or more community-based orders were made by courts of different jurisdictions, this order may be made to effect appearance before the higher of those courts).<sup>2144</sup>

Sections 128 and 129 highlight that, while a magistrate might make certain orders regarding a breach of a higher court community-based order, it cannot re-sentence and thereby terminate such an order. They deal with a justice issuing a summons or warrant requiring appearance in court for a contravention of section 123. One factor the justice must consider is whether the corrective services officer bringing the complaint ‘intends to recommend to the court before which the offender appears, or is brought, if the offender is convicted, that the offender be [resentenced, so that the order is terminated]’.<sup>2145</sup>

Section 126 of the PSA sets out the powers of the Supreme and District Courts to deal with a section 123 offence. It does not contemplate a higher court dealing with a Magistrates Court community-based order.

<sup>2137</sup> These are in Part 7, Division 1 of the *Penalties and Sentences Act 1992* (Qld), and see also ss 99, 108, 110I, 119 regarding termination).

<sup>2138</sup> *Penalties and Sentences Act 1992* (Qld) ss 120(1), 120A, 121.

<sup>2139</sup> *Ibid* ss 120(2)–120A(3). A court to which an application is made under the division, which did not make the order, has a similar notice requirement (s 122(5)).

<sup>2140</sup> *Ibid* s 121. It is not clear what the ‘first court’ means in this division, in the sense that a court of lower jurisdiction might action an order made by a higher court. ‘First’ and ‘original’ courts are not defined in the definitions in section 4, and ‘court’ is defined in three distinct contexts – but not for this division.

<sup>2141</sup> *Penalties and Sentences Act 1992* (Qld) s 132.

<sup>2142</sup> *Ibid* s 142.

<sup>2143</sup> For termination see *Penalties and Sentences Act 1992* (Qld) ss 99(b), 108(b), 110I(b), 119(b) regarding probation, community service, graffiti removal, intensive correction orders, respectively.

<sup>2144</sup> *Penalties and Sentences Act 1992* (Qld) ss 124(b), 125(5).

<sup>2145</sup> *Ibid* ss 128(4) and 129(4).

This appears to only apply to the District Court if that court made the order, while the Supreme Court can deal with a community-based order made by the District Court as well.<sup>2146</sup>

However, section 126(7) of the PSA does clearly apply to community-based orders made by the Supreme Court where the offender 'is convicted before a District Court of another offence committed during the period' of the community-based order (but not a PSA s 123 offence).<sup>2147</sup> In such a case, the District Court 'may' commit the offender into custody or grant bail to facilitate their appearance before the Supreme Court.

The court's powers under the subsections prior to section 126(7) are similar to the Magistrates Courts' powers in section 125 in the PSA.<sup>2148</sup>

The court can also sentence afresh if the offender is before the court:

- where the District Court has committed up a Supreme Court breach;<sup>2149</sup>
- 'under a summons or warrant issued under sections 128 or 129';<sup>2150</sup> or
- having just convicted that offender 'of another offence committed during the community-based order and the offender is also the subject of community based orders made by courts of lower jurisdiction'.<sup>2151</sup>

#### 14.4.3 Higher courts dealing with community-based orders imposed by a Magistrates Court

Allowing higher courts to deal with a breach of a Magistrates Court imposed community-based order would involve an extension of section 126(1)(a) of the PSA to community-based orders made in a Magistrates Court.

Magistrates Courts do not have power under section 125 to commit a breach of community-based order made by that court to a higher court. There is a narrow power in sections 125(5) and 126(5)(c) for a court to deal with incidental lower-court community-based orders when dealing with their own. Otherwise, section 126(1) of the PSA does not allow higher courts to deal with Magistrates Court community-based orders and only permits the exercise of jurisdiction regarding section 123 as against higher-court community-based orders.<sup>2152</sup> A question of reasonable excuse on a contravention is determined by the judge.<sup>2153</sup>

Furthermore, sections 128(3) and 129(3) are drafted so as to give discretion to require appearance before (a) the court that made the order ['if it was not a Magistrates Court': s 128] or (b) a Magistrates Court. They

<sup>2146</sup> Ibid s 126(1): This section applies if – (a) the community-based order to which the offender is subject was made by the Supreme Court or a District Court; and (b) the offender is before the court or, if the order was made by a District Court, before the Supreme Court; and (c) the court is satisfied that the offender committed an offence against section 123(1) in relation to the community-based order.

<sup>2147</sup> Ibid s 126(7) reflects the Magistrates Courts' discretion in section 125(4)(b) – the District Court 'may' commit the offender into custody or grant bail to facilitate the offender's appearance before the Supreme Court.

<sup>2148</sup> Including dealing with the offender under section 123, admonishing and discharging (s 126(2)(a)), as well as sentencing afresh (which means terminating the order (s 126(4))); although it lacks the power in section 125 to increase the number of hours for community service or graffiti removal service, or the duration of such an order.

<sup>2149</sup> *Penalties and Sentences Act 1992* (Qld) ss 126(5)(a), (7). This supports the interpretation that section 126(1) does not permit the District Court to terminate a Supreme Court community-based order.

<sup>2150</sup> Ibid s 126(5)(b).

<sup>2151</sup> Ibid s 126(5)(c).

<sup>2152</sup> Section 126 effectively grants jurisdiction to the District or Supreme Court to deal with a section 123 offence, which is a summary offence. Note the comments of Pincus JA in *R v Tootoo* (2000) 115 A Crim R 90, 91 [3]: 'The District Court's criminal jurisdiction is of course statutory and its extent is set out principally in Div 1 of Pt 4 of the *District Court Act 1967*. Subject to any provision changing that position, the District Court has no jurisdiction to "inquire of, hear, and determine" any offences other than indictable offences. The summary offences in question here were created by statute; in each instance it was provided that prosecution should be under the *Justices Act 1886* [for community-based orders, see s 138 of the *Penalties and Sentences Act 1992* (Qld) which applies the *Justices Act 1886* (Qld) to a complaint, summons, warrant or penalty under Part 7] ... The purpose of the learned primary judge in taking into account the outstanding summary offences was to enable his Honour to fix a single penalty appropriate for them as well as for the offence charged under the indictment before him. But his Honour had no jurisdiction in respect of the summary offences, other than that given by the *Criminal Code* and the *Penalties and Sentences Act* ...'.

<sup>2153</sup> *Penalties and Sentences Act 1992* (Qld) s 131.

do not permit a summons or warrant for a contravention of a Magistrates Court community-based order being dealt with in a higher court.

There could be occasions where, for reasons of totality or pre-sentence custody declaration, it would be in the interests of justice to take such a course.

For breaches of suspended sentences, the PSA dictates that if the court that convicts an offender of a breaching offence is of higher jurisdiction than the court that made the order, the higher court must deal with the breach, unless it would be in the interests of justice for the lower court that made the order to instead deal with the breach.<sup>2154</sup> South Australia has a provision of similar effect regarding reoffending on a home detention order.<sup>2155</sup> An example of where such a power could be of use is as follows:

- An offender is sentenced for two offences in a Magistrates Court to a suspended sentence and a probation order.
- During those orders, the offender commits robbery and is remanded in custody.

If the power contemplated above existed, the District Court could deal with the robbery and contravention of probation order (by offending on the order) and activate the existing suspended sentence with the sentence for the robbery. Otherwise, the District Court could only deal with the robbery and the suspended sentence. A breach action instituted regarding the probation order would be dealt with in a Magistrates Court. The District Court could not declare the time spent in custody for any breach at the time of sentence (but could take it into account).

If this power were to be introduced, it would mean that such breach proceedings would require the provision of material regarding the facts of the offence giving rise to the community-based order that has been contravened, as well as material from QCS regarding the offender's compliance while on the order. The parties would need to be proactive in ensuring this material was available for the higher-court sentence of the offence committed during the period of the order.

If this reform were made, the way in which it would apply to regional areas serviced only by District and Supreme Court circuits would have to be considered. If the higher-court sentence of the offence committed during the period of the order were the catalyst for the breach proceedings, with both matters to be dealt with together, this may not be as acute a problem.

### Stakeholder views

All submissions responding to these questions supported legislative amendment to permit breaches of community-based orders to be dealt with in different jurisdictions,<sup>2156</sup> although different criteria were proposed to achieve this.

The Office of the CDPP advised<sup>2157</sup> that, for each of these three options, if state community-based orders are applicable in the federal sentencing scheme via section 20AB [of the *Crimes Act 1914* (Cth)], breaches would be initiated by an information sworn pursuant to section 20AC. Section 20AC(2)(a) requires such information to be returned to the court before which the original sentence was passed:

Accordingly, any amendments made to the PSA in respect of the procedure and jurisdiction to empower a court other than the original sentencing court to deal with a breach would be inconsistent with the federal law and therefore not applicable to federal sentences.<sup>2158</sup>

<sup>2154</sup> Ibid s 146(2A).

<sup>2155</sup> *Sentencing Act 2017* (SA) s 73(11): 'If a person subject to a home detention order is found guilty of an offence by a court of a superior jurisdiction to that of the court that made the order, being an offence committed during the period of the home detention order, any proceedings for breach of condition arising out of the offence are to be taken in the court of superior jurisdiction'.

<sup>2156</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 10–11. Submission 4 (Fighters Against Child Abuse Australia) 33–5; Submission 6 (Legal Aid Queensland) 14–15; Submission 7 (Sisters Inside) 10; Submission 10 (Queensland Police Union of Employees) 10.

<sup>2157</sup> Submission 13 (Commonwealth Director of Public Prosecutions) 3–4.

<sup>2158</sup> Citing *Putland v The Queen* (2004) 218 CLR 174, 179 [7] (Gleeson CJ).

LAQ supported the amendment with a threshold requirement being that the parties consent.<sup>2159</sup>

The QLS saw benefits in this proposal and noted that there were:

many instances where an offender with a community based order imposed by a Magistrates Court is prejudiced in the finalisation of their matters because of an inability to declare pre-sentence custody where that person has been on remand both for a breach of that order as well as for further charges which have necessarily proceeded on indictment.<sup>2160</sup>

### The Council's view

The Council recommends amending section 126 of the PSA to give higher courts statutory power to deal with breaches of Magistrates Court community-based orders. The power would be exercised on the court's own volition (which could, in a practical sense, be engaged by submissions from either party) and not be subject to initiation by the filing of an application of a party or department.

The Council does consider that the consent of the parties (being the defence and DPP) should be required. This can be distinguished from the Council's position below regarding a Magistrates Court's discretion to deal with an order made by that court on its own initiative, because in that situation it is open to QCS to initiate proceedings in the same court without defence consent, and the matter is not being dealt with in a court different from the original sentencing court.

This power could be used in situations where the order is breached by reoffending, which forms a sentence in the higher court, and thus the offence of contravention under section 123 is made out by the conviction of the new offence. However, it might be possible to imagine scenarios where a particular condition is clearly breached through the accepted facts of the sentence, even though the offence itself is not committed during the operational period of the community-based order.

A potential negative of such a reform might be that because QCS is not initiating the breach proceeding, it is not a party to the proceeding; therefore, important information regarding the offender's performance on the order that is exclusively within the possession of QCS is not required to be provided to the court. This might be resolved by the court ordering the provision of a PSR under section 344 of the CSA, although this may result in adjourning sentence hearings for that purpose.

Another impediment would be the reliance on QCS or the Queensland Police Service (also not a party) for QP9 material regarding the facts of the offence giving rise to the Magistrates Court community-based order. There would be the further possibility that the facts heard or decided by the sentencing Magistrate do not reflect the contents of the QP9. Transcripts of Magistrates Court sentences are not produced as a matter of course.

These issues underline the importance of the discretion of the higher court in determining whether or not to deal with the matter, as well as the safeguarding of the consent of the parties.

Section 131 (Contravention of requirements of order — judge to determine) and 132 (Proceedings after end of period of order) would continue to apply to the amended section 126.

Finally, where proceedings under section 123 of the PSA have been commenced in the Magistrates Courts and an indictment has been presented for the breaching offence, the Council recommends that the contravention proceedings can be transmitted to a higher court via a section 651 application.

### RECOMMENDATIONS: HIGHER COURT DEALING WITH BREACH OF LOWER-COURT ORDERS

61. Section 126 of the *Penalties and Sentences Act 1992* (Qld) should be amended to give the District and Supreme Courts discretion to deal with a breach of any Magistrates Court community-based order where: the offender is before either of these higher courts, the higher court is satisfied the offender committed an offence against section 123(1) and the defence and prosecution consent to the higher court dealing with the breach of the order.

<sup>2159</sup> Submission 6 (Legal Aid Queensland) 14.

<sup>2160</sup> Submission 15 (Queensland Law Society) 26.

62. Section 651 of the *Criminal Code* (Qld) should be amended to clarify that an offence under section 123 of the *Penalties and Sentences Act 1992* (Qld) before a Magistrates Court is a summary offence for the purpose of section 651.

#### 14.4.4 A lower court having discretion to deal with the breach itself as well as committing to a higher court

There may be delay in dealing with a breach of community-based order committed to a higher court.<sup>2161</sup> However, committing the matter is discretionary, which should militate against committing minor or trivial matters. There is no such discretion in the same scenario regarding a suspended sentence.<sup>2162</sup>

The breach provisions in the PSA appear designed to ensure that a court cannot re-sentence on breach of, and therefore revoke, a community-based order made by a higher court. This is a key distinction to the discussion of the same point in the context of suspended sentences in Chapter 10. A court that activates a suspended sentence is 'dealing with' the offender under that sentence as opposed to sentencing afresh.<sup>2163</sup> By contrast, re-sentencing on a community-based order as a consequence of a breach of section 123 involves 'deal[ing] with the offender for the offence' for which the community-based order was imposed, as if the offender had just been convicted of it,<sup>2164</sup> which terminates the community-based order. The current position under the PSA also guards against scenarios where a lower court faces dealing with the breach of a community-based order imposed by a higher court for an offence that the lower Magistrates Court<sup>2165</sup> or the District Court<sup>2166</sup> has no power to sentence on.

This was the subject of discussion in the Council's Options Paper regarding suspended sentences, where potential models proposed were defence election, referral to the DPP seeking consent to have the matter dealt with in this way or (the Council's preferred option) by the court (on its own motion), with an adaption of section 651 of the *Criminal Code* (Qld)-type considerations.<sup>2167</sup> The legislation in England and Wales mentions community orders and suspended sentence orders made by the Crown Court that include an ability for the Crown Court to expressly direct that any failure to comply with the requirements of the order is to be dealt with by a Magistrates Court.<sup>2168</sup> This appears to allow a higher court to determine at the time of sentencing whether or not the matter is one that could be appropriately dealt with by a Magistrates Court on a breach.

#### Stakeholder views

Professors Douglas and Walsh, Dr Lelliott and Ms Wallis supported the amendment proposed in the Options Paper and recommended the process to be modelled on section 552D of the *Criminal Code* (Qld).<sup>2169</sup> LAQ supported the proposal and suggested a process based on defence election with a requirement that the relevant material is before the court.<sup>2170</sup> The Queensland Police Union of Employees (QPU) supported amendments 'subject to an accused having a statutory right to review any lower court order to the court which made the original [community-based order] in addition to any appeal rights'.<sup>2171</sup> Sisters Inside agreed with such a power, to 'be exercised on the court's own motion, if the court is satisfied that it is appropriate

<sup>2161</sup> See *Penalties and Sentences Act 1992* (Qld) ss 125(4)(b), (5), 126(7).

<sup>2162</sup> See *ibid* ss 146(3)–(4) regarding Magistrates Courts; ss 146(5)–(6) regarding the District Court.

<sup>2163</sup> *R v Skinner; Ex parte A-G (Qld)* [2001] 1 Qd R 322, 324–5 [12] (de Jersey CJ, Davies and Pincus JJA).

<sup>2164</sup> *Penalties and Sentences Act 1992* (Qld) ss 125(4)(a), 126(4).

<sup>2165</sup> See *Criminal Code* (Qld) ch 58A, regarding the Magistrates Courts' ability to deal with indictable offences.

<sup>2166</sup> See *District Court of Queensland Act 1967* (Qld) pt 4 div 1, regarding the District Court's criminal jurisdiction.

<sup>2167</sup> The court must consider it appropriate, the accused must have legal representation, the Crown and accused must consent and sufficient information about the original offence and circumstances in which it was imposed must be before the court.

<sup>2168</sup> *Criminal Justice Act 2003* (UK) sch 8, paras 5(4), 6(2), 6A(2), 7(1)(b), 8(1), 14(1)(a), 16(5)(b) regarding community orders, and paras 5(2), 5A(2), 6(1)(b), 7(1), 13(3)(b) regarding suspended sentences.

<sup>2169</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 11.

<sup>2170</sup> Submission 6 (Legal Aid Queensland) 14.

<sup>2171</sup> Submission 10 (Queensland Police Union of Employees) 10.

in all the circumstances and the defence consents'.<sup>2172</sup> FACCIA believed that this could free up higher court time.<sup>2173</sup>

The Queensland Law Society (QLS) supported this as it would bring swifter resolution and assist in cases where, for instance, an offender is remanded in custody on the breach even though imprisonment may not be a likely breach outcome, or where a prisoner on parole and a community-based order has parole suspended pending resolution of the breach. The QLS stated:

The present system whereby the lower court can admonish and discharge on a higher court CBO, but take no other action itself, creates a difficulty for the lower court in addressing a minor but not completely trivial breach. The court may feel torn between wanting not to unnecessarily delay resolution of the matter, particularly in the above cases, but where they want to take some action beyond simply admonishing.

The UK model whereby a superior Court can, on passing sentence and making a CBO, make a declaration as to whether or not in the event of a breach this could be dealt with by a lower court is a neat way of addressing this – in that the court with appropriate jurisdiction to hear the matter at the outset, makes an informed decision about whether a lesser Court could adequately address the matter in the event of a breach of the order.<sup>2174</sup>

The QLS saw a disadvantage of that model would be that it could weaken the confidence of offenders and the community generally in the courts' orders. The QLS also suggested that a process involving referral to the DPP would be workable, provided guidelines were in place, and noted a final option based on section 552D of the *Criminal Code* (Qld).<sup>2175</sup>

### The Council's view

The Council ultimately does not recommend Magistrates Courts and the District Court be provided with a new discretionary power to deal with a breach of a community-based order imposed by a higher court because of a jurisdictional quandary: Magistrates Courts having a power to deal with an offender for the offence for which a community-based order was made by the District or Supreme Courts in any way that it (the Magistrates Court) could deal with the offender if the offender had just been convicted by it (the Magistrates Court) of the offence.<sup>2176</sup>

To a lesser extent, this could be a problem for the District Court as well. However, the great proportion of the volume of matters affected are likely to be in the Magistrates Courts.

The main purpose of such a change would seem to be geared towards revoking and, potentially, resentencing. This is an important distinction with a breach of suspended sentence.

Firstly, a lower court would be revoking a higher court's order. Secondly, there is a real possibility of the Magistrates Court imposing a sentence for an offence it has no statutory power to sentence on.

As indicated above, section 552D of the *Criminal Code* (Qld) is one potential model to alleviate this concern. However, the Council notes that section 552D relates to a Magistrates Court dealing with offences that are already within its jurisdiction as determined by Chapter 58A of the *Criminal Code* (Qld). That section permits the court to abstain from exercising its existing jurisdiction because the offence may not be adequately punished on summary conviction or because of exceptional circumstances.

The scenario here is a Magistrates Court being called upon to sentence on an offence for which it has no legal power to punish, not that an offence for which it otherwise has power to punish is too serious in the particular circumstances of the case. The maximum duration of a probation order is 3 years. The maximum penalty that a Magistrates Court can impose is 3 years' imprisonment. It is difficult to envisage a scenario where a breach is so egregious that an offence for which the District or Supreme Court imposed not more than 3 years' probation requires more than 3 years' imprisonment on re-sentence.

<sup>2172</sup> Submission 7 (Sisters Inside) 10.

<sup>2173</sup> Submission 4 (Fighters Against Child Abuse Australia) 34.

<sup>2174</sup> Submission 15 (Queensland Law Society) 27–8.

<sup>2175</sup> Ibid 28.

<sup>2176</sup> This applies the wording of current *Penalties and Sentences Act 1992* (Qld) ss 125(4)(a) regarding Magistrates Courts powers for Magistrates Court community-based order resentences.

Other options based on party consent, or even recognition in the higher court's order of the potential for a Magistrates Court to deal with any subsequent breach, do not assuage the Council's concerns.

The utility of this potential amendment is to allow a court to revoke a higher court community-based order and resentence on the original offence. For these reasons, the Council does not recommend this potential reform.

#### **RECOMMENDATION: LOWER COURT DEALING WITH BREACH OF HIGHER-COURT ORDERS**

63. Magistrates Courts and the District Court should not have a new discretionary power to deal with breach of a community-based order imposed by a higher court.

#### **14.4.5 Magistrates Courts' power to deal with a breach of their own community-based orders on their own initiative**

Another option considered by the Council was to give Magistrates Courts a discretionary power to deal immediately with a breach of section 123 by reoffending during the order, if that court has just convicted the person of the new (non-section 123) offence,<sup>2177</sup> without the need for QCS institute breach proceedings. It would resemble section 146 of the PSA regarding suspended sentences, and section 126 regarding higher-court community-based order breach powers. This could minimise delay and better accommodate totality issues on sentence.

However, it might risk causing the very delay that it would be designed to prevent:

- QCS would probably still be required to engage in the process, as the sole repository of information regarding the offender's performance on the order, which would be relevant to every breach proceeding (and is expressly required to be considered in the case of resentencing).<sup>2178</sup>
- The facts upon which the original offence was sentenced giving rise to the community-based order would also be relevant and may not be capable of immediate production.

#### **Stakeholder views**

Stakeholders agreed that a magistrate should have a power to initiate proceedings as proposed. LAQ's support was predicated on consent and suggested guidelines would be required; for instance, that the appropriate material be before the court.<sup>2179</sup> Sisters Inside supported the proposal.<sup>2180</sup> The QPU was supportive but also supported the current section 123 remaining.<sup>2181</sup> Professors Douglas and Walsh, Dr Lelliott and Ms Wallis stated that this would be more efficient and reduce delay.<sup>2182</sup> FACCIA thought this could have resource benefits.<sup>2183</sup>

The QLS supported the proposal, with caveats:

It should not be a situation where a person who is otherwise appropriately carrying on their order but for the re-offending (particularly re-offending of a different and perhaps trivial nature), should not inappropriately have to re-litigate the matter the subject of the CBO. The current protection of sorts for that is that such is only considered when Corrective Services assess both the breaching conduct and the person's conduct on the order and determine that such warrants breach action by a court, noting obviously that other lesser steps can also be taken – warnings, increase in reporting obligations, new referrals for

<sup>2177</sup> Reoffending on the order being a breach of the first mandatory requirement of each community-based order in the *Penalties and Sentences Act 1992* (Qld) ss 93(1)(a), 103(1)(a), 110C(1)(a), 114(1)(a), regarding probation, community service, graffiti removal, intensive correction orders, respectively.

<sup>2178</sup> *Penalties and Sentences Act 1992* (Qld) s 125(6).

<sup>2179</sup> Submission 6 (Legal Aid Queensland) 15.

<sup>2180</sup> Submission 7 (Sisters Inside) 10.

<sup>2181</sup> Submission 10 (Queensland Police Union of Employees) 10.

<sup>2182</sup> Submission 2 (Professors Heather Douglas and Tamara Walsh, Dr Joseph Lelliott and Ms Rebecca Wallis, TC Beirne School of Law, The University of Queensland) 11.

<sup>2183</sup> Submission 4 (Fighters Against Child Abuse Australia) 35.

supports and so on. A Magistrates Court obviously does not have such powers, if empowered to deal with the breach it's an all or nothing equation.

In that context it is important that such a power, if made, is discretionary in nature — not that the Magistrates Court must act on any such breach. Such should perhaps be only enlivened on application of either of the parties to ensure that this step is only in practice taken when it is appropriate to do so, and both parties should be able to be heard on that. Considerations of when it would be appropriate to do so would include, and should be provided legislatively.

The QLS nominated the nature of the breach, compliance with the order, time remaining on it, and whether the defendant is legally represented and relevant considerations. Finally, it submitted, adjournments should be provided for.<sup>2184</sup>

### The Council's view

The Council recommends that section 124 of the PSA should be amended to allow a Magistrates Court to deal with a breach, by reoffending, of a community-based order imposed by a Magistrates Court, without proceedings first having to be instituted under section 123. In order to remain consistent with section 126 regarding higher courts and to maximise judicial discretion, this power to act on a Magistrates Court's own initiative should not be mandatory. For the same reasons, the Council does not suggest that consent of either party should be a threshold requirement.

The same cautions regarding QCS input in respect of performance on the order — and provision of material about the original offence raised above regarding District and Supreme Court powers to deal with a breach of a community-based order imposed by a Magistrates Court — are apposite here.

To give certainty to offenders, best consider totality issues, and ensure that breaches are dealt with in a timely way, this power should be confined to the court sentencing for the breaching offence during that hearing (including if that hearing is adjourned).

#### **RECOMMENDATION: MAGISTRATES COURTS' POWER TO DEAL WITH A BREACH OF THEIR OWN COMMUNITY-BASED ORDER ON THEIR OWN INITIATIVE**

64. Section 124 of the *Penalties and Sentences Act 1992* (Qld) should be amended to allow a Magistrates Court to deal with a breach, by reoffending, of a community-based order imposed by a Magistrates Court, without proceedings first having to be instituted under section 123. To give certainty to offenders, to ensure totality issues are considered, and to ensure that breaches are dealt with in a timely way, this power should be confined to the court sentencing for the breaching offence during that hearing (including adjournment of that hearing).

## **14.5 High-volume imprisonment in Magistrates Courts: breaches of domestic violence orders and breaches of bail**

The Council produced data which show that in the Magistrates Courts in the most recent financial year (2017–18):

- 27.6 per cent of imprisonment sentences were imposed for justice and government offences;
- close to two-thirds (62.7%) of these offences were for breach of a violence order; and
- 30.0 per cent were for breach of bail offences, with other offences (such as breach of community-based orders) making up the remainder.

Over the course of the Council's data period, the lowest proportion of imprisonment sentences imposed were for justice and government offences in 2011–12, when:

- 20.2 per cent of imprisonment sentences imposed were for justice and government offences;
- 50.0 per cent of these offences were for breach of a violence order; and
- 36.5 per cent were for breach of bail offences.

<sup>2184</sup> Submission 15 (Queensland Law Society) 28–9.

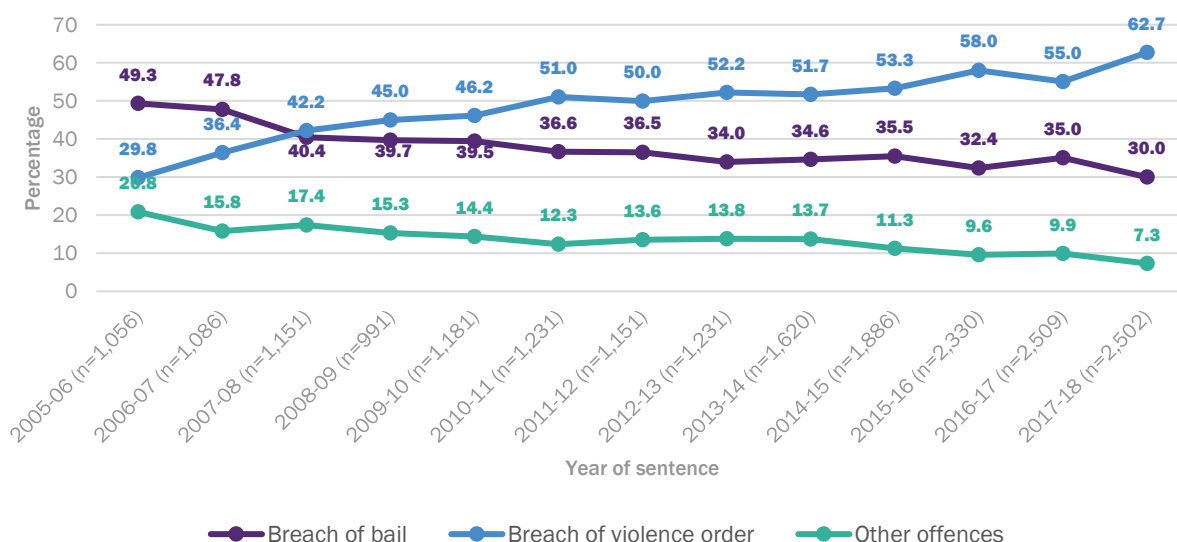
The highest proportion of imprisonment sentences imposed for justice and government offences occurred in 2005–06, at the commencement of the Council's data period:

- 30.9 per cent of imprisonment sentences imposed were for justice and government offences;
- 29.8 per cent of these offences were for breach of a violence order; and
- 49.3 per cent were for breach of bail offences.

Overall, within justice and government offences that received an imprisonment sentence, the proportion of breach of violence order increased, while breach of bail decreased – see Figure 14-1 below.

Section 11.8 presented trends in the use of short terms of imprisonment, including for breach of a violence order and breach of bail. This analysis shows that while the overall number of imprisonment sentences imposed for 'breach of bail – fail to appear' and breach of violence orders are both increasing, in the case of breach of bail offences, this is largely due to the increasing number of these offences coming before the courts, rather than a change in sentencing practices over time.

**Figure 14-1: 'Justice and government' category offences that attracted an imprisonment sentence, Magistrates Courts, Queensland, 2005–06 to 2017–18**



Source: QGSO, Queensland Treasury – Courts Database, extracted September 2018. Stakeholders raised concern about these statistics.

The Queensland Police Service, in its submission to the Council, advised that:

Recognising the high volume of breach proceedings for bail in the lower courts, the QPS is currently exploring a risk-based approach for police to exercise greater discretion in actioning contraventions of court-ordered bail. This approach aims to reduce punitive responses to technical and low-risk breaches of bail while ensuring the integrity of arrangements for managing defendants in the community. This may also contribute to a reduction in the proportion of offenders (particularly, Aboriginal people and Torres Strait Islander people) incarcerated for contravention of bail undertakings.<sup>2185</sup>

Different trends were, however, evident in the case of breach of violence orders, with increasing numbers of short imprisonment sentences being both a product of an increasing number of these offences coming before the courts, and an increased use of imprisonment.

Sentencing practices for breach of bail and breach of violence orders are an important and relevant area for further investigation, raising issues beyond the scope of the Council's current Terms of Reference.<sup>2186</sup> There is a complex interrelationship between recent amendments to bail and criminal laws regarding domestic violence, and the increasing awareness of the seriousness and risk that domestic violence offending poses. To the extent that the Council's recommendations may reduce reliance on short terms of imprisonment, they

<sup>2185</sup> Submission 3 (Queensland Police Service) 1–2.

<sup>2186</sup> For a discussion of a similar review undertaken in Victoria, see n 1300.

may assist in addressing the growth in imprisonment for these offences. The importance of enhancing access to services and support, including as this applies to domestic violence offending, is highlighted in Chapter 13 of this report.

## 14.6 Data quality

In conducting its review, the Council has identified problems in working with administrative data and a lack of research into the effectiveness of orders that use appropriate statistical techniques, such as propensity score matching. The quality of the evidence to support reform is, therefore, in some cases, either lacking or ambiguous. This can compromise the degree of confidence that can be placed in certain potential reform options.

Administrative data are collected by a number of agencies across the criminal justice system. There are many instances where these administrative datasets do not reflect the legal framework of the wider system. Two such scenarios are where:

- agencies operate using different ICT systems and any information recorded by one agency is not linked to information in other systems, making it difficult to get the full picture;
- administrative data are not validated in the context of the legal framework, leading to inaccuracies in the underlying datasets.

The 2008 *Review of the Civil and Criminal Justice System in Queensland* noted a lack of reliable, comprehensive data in the criminal justice system.<sup>2187</sup> The review noted that:

Reliable, up to date, accurate and accessible data is the life blood of an effective criminal justice system. It allows decision makers at all levels to make evidence based decisions; it challenges entrenched beliefs and perceptions, and it provides a foundation to secure funding. Such a system is dependent on effective information technology support.<sup>2188</sup>

It was noted that ‘the criminal justice system is made up of a number of interactive agencies ... what one agency does or does not do impacts on other agencies, a benefit to one agency may come at a cost to others’.<sup>2189</sup> Benefits of an effective information system were listed, and included to:

- Identify variations and trends and formulating effective, flexible and immediate responses;
- Accurately assess the effectiveness of strategies in order to make evidence based evaluation with consequent adjustments;
- Identify related cases or those with common characteristics to enable specific strategies to be developed to address unique needs;
- Identify and [deal] with impacts of changes on other agencies and on the system as a whole;
- Ensure focused, effective allocation of resources; and
- Make cost benefit and process analysis, and budget bids.<sup>2190</sup>

The Council is aware there is work underway across government to address current data difficulties. The Council considers this is important work to be prioritised, particularly in light of its relevance in informing future policy and system reform.

One example of a lack of sufficient data noted in Chapter 11 is the absence of clear evidence about the relative effectiveness of court ordered versus Board ordered parole. Further, the Council is aware that the reported court ordered parole and Board ordered parole completion rates represent a point in time and may not (and in a number of recent examples brought to the Council’s attention by the Parole Board, **do not**) capture further offending that occurred within the order period but was yet to be finalised by the court prior to the order expiring, or suspensions during the order. QCS has advised that the counting rules used in Queensland to calculate completion rates are derived from National Counting Rules.

<sup>2187</sup> Hon Martin Moynihan AO QC (n 5) 20, expanded on in section 10.6.

<sup>2188</sup> Ibid 105.

<sup>2189</sup> Ibid.

<sup>2190</sup> Ibid.

The Council notes that Queensland has a unique parole system, which allows offenders to serve an entire period of imprisonment on parole. The mandatory legislative consequences of reoffending on parole can result in such an offender being drawn further into the system (see section 11.9.3). These factors increase the significance of the Council and other stakeholders having a proper understanding of rates of compliance with parole.

### **Classification of suspended sentences and breach outcomes**

In undertaking this review, the Council has further identified that the administrative data used to classify suspended sentences as either wholly or partially suspended may be recorded in a way that is unclear or liable to misinterpretation. Analysis revealed that a number of wholly suspended sentences were recorded as having declared pre-sentence custody, which is not allowable under section 159A(2)(c) of the PSA. A manual review of a sample of 92 sentencing remarks was undertaken to determine the nature of each order; 52 cases were confirmed as wholly suspended sentences (57%), 32 were partially suspended sentences that had been incorrectly recorded as wholly suspended sentences (35%), and the status of the remaining eight could not be determined from the sentencing remarks. Statistical research on declared pre-sentence custody is rarely conducted by other agencies; as such, these data do not undergo the rigorous validation processes that are applied to more frequently used data items.

The Council was also not able to determine in the case of breach of a suspended sentence by reoffending, whether formal breach action was initiated and, if so, what action the court took on finding the breach proven (for example, whether the sentence was activated in full or in part, or the operational period of the order extended). This means it is very difficult to determine how effective suspended sentences are in Queensland in diverting offenders from prison.

### **Time on remand**

A specific research question relevant to this reference was the extent to which remand status may influence sentencing practices. However, it is not possible to analyse whether spending time on remand increases the likelihood of a person receiving a custodial penalty in Queensland due to the lack of linkage between datasets held in different administrative systems across separate agencies. Specifically, the data pertaining to the amount of time a person spends in a custodial facility on remand (held by Queensland Corrective Services) are not linked to the data relating to a person's final sentencing outcome (held by Queensland Courts).

The only available data relate to the amount of pre-sentence custody recorded at the final sentencing event; however, these data are incomplete as they only reflect time in pre-sentence custody that has been declared as time served. As discussed in section 11.11, pre-sentence custody may not be declared in circumstances where:

- the court imposes a penalty outcome that does not involve imprisonment;
- the court imposes imprisonment but exercises its discretion not to make a declaration; or
- a person has been held in custody for multiple offences that are not all sentenced at the same time or has been in custody for other reasons such as serving a sentence or is remanded on some charges but on bail on others.

In these circumstances the pre-sentence custody cannot be declared.

The Council considers research into pre-sentence custody and how it relates to sentencing outcomes is an important area for further investigation.

In addition to allowing the input of pre-sentence custody on sentencing practices to be assessed, it may provide a greater context in respect of actual sentencing outcomes. For example, an offender may have served a substantial period in custody prior to sentence, a period that cannot be declared. At sentence, the court may reduce the sentence it would have otherwise imposed to take this time into account. The data, as currently recorded, would not capture the time spent in custody that was taken into account and, as a result, may skew statistics about average sentence length.

## Chapter 15 Implementation

This report outlines a program of work that represents significant change to Queensland's sentencing architecture. It is focused on increasing sentencing options to better address the purposes of sentencing. However, the Council has identified that the way in which change is implemented is just as critical to the success of the framework as getting the framework right in the first place.

The Council acknowledges that achieving the significant change proposed in this report is a substantial undertaking and represents more than just legislative change. There will be a need to consider:

- How these changes are to be funded — it is likely there will need to be progressive investment made over a number of budget cycles, first, to bring Queensland's investment in community corrections to the same level as that of other Australian jurisdictions, and secondly, to support the additional investment that will be required for implementation of the Council's proposed reform package.
- Workforce requirements — including whether current staffing levels are sufficient to allow for the effective case management and supervision of people on community correction orders (CCOs) within a framework of support and rehabilitation, rather than purely a compliance focus, particularly those orders that have multiple conditions and require intensive supervision of offenders who have multiple and complex needs. Also, determining whether corrective services officers have the right skills to work with offenders to achieve long-term behavioural change.
- Whether the required services are available in the community and accessible to people on orders — including whether the service sector is suitably skilled and resourced to achieve the outcomes sought to be delivered, and whether there are adequate services available to people living in rural and remote areas of the State.
- Whether the existing information technology systems can accommodate the needs of the new sentencing architecture — including, whether current systems can capture the level of detail about the new orders that the Council considers is required to enable them to be administered and monitored appropriately, such as the types of conditions ordered under the proposed new CCO.
- Training and information requirements for those working within the criminal justice system — including judges and magistrates, corrective services officers, police, court staff, legal practitioners, and community justice groups, as well as those who are to be subject to these orders. The intention behind the new framework, transitional arrangements, as well as the operational aspects of the orders themselves, must be communicated thoroughly before the orders become operational.

A long implementation period will be required to enable the supporting arrangements to be developed, and reforms implemented progressively. All large-scale change programs take considerable time to embed, and require strong leadership, suitable governance arrangements, and appropriate funding.

### 15.1 Achieving cultural change — setting the foundations

The Council does not underestimate the paradigm shift that adopting this new framework represents. As John Halliday, Cecelia French and Christina Goodwin noted in their report (the 'Halliday report'),<sup>2191</sup> that contributed to sentencing reforms later introduced in England and Wales, the following important conditions must be in place for successful reform to be achieved:

- sufficient understanding of, and commitment to the main elements of the reform programme, including its goals and how it is expected to work, amongst all those directly involved, and a wider public (the 'hearts and minds' aspect of implementation);
- comprehensive assessment of needs for investment in infrastructure and services, including completing necessary policy development; constructing essential systems, obtaining necessary human and financial resources; and enacting legislation;
- adequate planning for the change process through a comprehensive plan that recognises the needs of all concerned and commands a sufficient level of confidence across all agencies.<sup>2192</sup>

<sup>2191</sup> Halliday, French and Goodwin (n 559).

<sup>2192</sup> Ibid 65 [10.1].

While the key operational elements are important to 'get right', in fact the more significant, and perhaps the more difficult, outcome to achieve is cultural change. This cultural change needs to begin with the community, the media and government responses to law and order issues. Punitive responses alone do not, as the evidence presented in this report and the supporting literature review shows, achieve change for individuals in the criminal justice system, and cannot alone keep our community safe from reoffending. Something more than prison is needed, and imprisonment should be reserved — as articulated in section 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld) (PSA) — as a true penalty of last resort.

The Council's own community engagement work demonstrates that when people are given more details about offences and offenders, they change their attitudes. The media also has a central role to play.

The Council will continue its important community engagement work to talk to the community about the criminal justice system and about sentencing. In whatever way possible, the Council is committed to listening to people, taking their views on board, and helping them to understand why judicial officers make the decisions they do.

As identified in section 6.2 of this report, judicial officers also face significant challenges in shifting their sentencing practices to embrace a new set of sentencing options — and developing jurisprudence to guide the application of the new orders. The greater individualisation of sentencing responses both provides an opportunity to better target conditions to meet the purposes of sentencing and the needs and capacity of individual offenders who come before the court and makes sentencing in some respects more challenging.

There are several approaches to cultural change documented in the change management literature which could be adopted to achieve a coordinated and successful process.

### 15.1.1 Models of change

Existing traditional models of change that managers and leaders in government, community and the private sectors use to achieve successful change include:

- Kurt Lewin's three-stage theory of change: Unfreeze – Change – Refreeze.<sup>2193</sup>
- Kotter's eight-step model for helping people lead change, which groups change into three phases that provide for effective planning, implementation and consolidation of change in organisations.<sup>2194</sup>
- Evans and Schaefer's ten tasks of change,<sup>2195</sup> which breaks the tasks of change down further into smaller milestone sets of activities.
- The ADKAR model, named for its five steps: *Awareness* of the needs to change, *Desire* to support the change, *Knowledge* of how to change, *Ability* to demonstrate skills and behaviours, and *Reinforcement* to make change stick.<sup>2196</sup>

At their heart, each of these theories or models have very similar approaches to the challenge of creating and sustaining change in organisations. Each of them provides guidance in how to structure and embed change in a way that ensures it can be approached systematically and collaboratively.

While the approach to implementation is ultimately a matter for government, the Council is concerned to ensure, drawing on the experiences of other jurisdictions that have recently implemented similar sentencing reforms, that a formal change process is integrated into the implementation of the new sentencing framework. Without a clearly documented approach, and sufficient human resources to drive and oversee change, the reforms are unlikely to operate as intended.

<sup>2193</sup> Kurt Lewin, 'Frontiers in Group Dynamics: Concept, Method and Reality in Social Science; Social Equilibria and Social Change' (1947) 1(1) *Human Relations* 5.

<sup>2194</sup> Vicky Webster and Martin Webster (eds) 'Successful Change Management — Kotter's 8-Step Change Model', *Leadership Thoughts* (Web Page) <<https://www.leadershipthoughts.com/kotters-8-step-change-model/#successfulchangemanagement>>.

<sup>2195</sup> Jeff Evans and Chuck Schaefer, *Ten Tasks of Change: Demystifying Changing Organisations* (Jossey-Bass/Pfeiffer, 2001).

<sup>2196</sup> Prosci, 'The Prosci ADKAR Model', *Prosci* (Web Page) <<https://www.prosci.com/adkar>>.

The Council sought the views of key stakeholders in Victoria about the implementation of sentencing changes in 2012 at the time of the introduction of CCOs, which coincided with the removal of suspended sentences. These significant issues were identified in meetings with these stakeholders:

- There were considerable delays in offenders getting access to programs following the orders being made.
- There was significant under-funding for programs and services initially following the introduction of CCOs, which led to breaches of orders occurring prior to offenders having any access to the potential benefits of order conditions, and subsequent loss of early confidence by judicial officers in the new sentencing order.
- Prior to the decision in *Boulton v The Queen*<sup>2197</sup> in 2014, which very clearly set out the guidelines for sentencing courts in relation to the new CCO, legal stakeholders reported feeling they were 'flying in the dark'. For the two years within which the CCO was available, but before the judicial guidance provided by *Boulton*, one stakeholder commented there was an absence of judicial endorsement for the imposition of a CCO in place of a term of imprisonment for more serious offences. This undermined the potential benefits of the CCO until better guidance was provided.
- Another stakeholder commented that the Victorian experience was that the introduction of CCOs was rushed, with training of relevant officers not widespread enough, and a lack of clarity about transitional arrangements for people on existing community-based sentencing orders.

Lessons from the Victorian experience confirm the Council's view that implementation must be carefully considered and conducted over a longer period. The Council recommends a staged approach to implementation over a sufficient period of time before CCOs are introduced.

## 15.2 Establishing an implementation strategy

There are a series of work strands the Council can foresee will need to be progressed simultaneously to support effective implementation. Some strands of work will be contingent on the completion of other strands of work before they can begin. As with any large-scale reform, an in-depth review (or a 'stocktake') of the current position in Queensland is required before change can even be considered.

The key work strands identified are:

- Infrastructure
- Planning and oversight
- Monitoring and evaluation
- Services and programs

The next sections outline potential work to be undertaken under each of these strands.

### 15.2.1 Infrastructure

While capital infrastructure is not envisaged by the Council, there are a number of key elements required that will enable the new sentencing framework to be implemented. These are outlined below.

#### Legislative review and change

At a minimum, the PSA and the *Corrective Services Act 2006* (Qld) will require substantial amendment to provide for the new sentencing framework. Other consequential amendments may also need to be considered. Developing legislation takes time and requires close consultation with legal stakeholders to ensure the amendments as drafted are consistent with the intention behind the reforms, and any legal, operational or practice implications are fully considered.

The *Queensland Legislation Handbook* outlines the standard process for developing or amending legislation, which involves:

---

<sup>2197</sup> (2014) 46 VR 308.

- initial development of policy;
- consultation, both within and outside government;
- departmental and ministerial approval of the Cabinet Authority to Prepare a Bill submission;
- Cabinet approval of the Authority to Prepare a Bill submission;
- drafting;
- final consultation;
- final drafting and preparation of the Bill for introduction, including preparation of the explanatory notes for the Bill;
- departmental and ministerial approval of the Cabinet Authority to Introduce a Bill submission;
- Cabinet approval of the Authority to Introduce a Bill submission;
- passage through the Parliament, including referral to a portfolio committee for examination for a period up to six months; and
- subsequent commencement and implementation.<sup>2198</sup>

The Handbook notes: ‘It may take a year or more for the policy for a medium-sized Bill to be developed (that is, from being originally conceived to obtaining Cabinet’s approval to prepare the Bill)’.<sup>2199</sup> Once this approval is secured, the Handbook outlines the indicative timeframes associated with the Bill-development process:

- For a small Bill (20 pages or less) – three months;
- For a medium Bill (21–90 pages) – six months;
- For a large Bill (over 90 pages) – 12 months.<sup>2200</sup>

These timeframes can be affected by the priority the Bill has in the broader Parliamentary work program, the complexity of the issues the Bill deals with, and the quality of the drafting instructions provided. The Parliamentary process that follows, including introduction of the Bill into Parliament, the review of the Bill by the relevant portfolio committee, and its debate and passage, can also take several months.

Once the Bill is passed, subordinate legislation will also need to be prepared, which involves a separate process that requires further consultation.

## Funding

The Council considers adequate funding and resourcing to be critical to the success of the reforms proposed. Mapping of what funding and resourcing is needed to support the reforms, and at what stages of the implementation process, will require time.

It is likely funding will need to be sought across a number of budget cycles. Any request for funding will need to be considered by government in the context of current budget commitments, as well as emerging budget pressures.

Resourcing pressures following the introduction of the Victorian CCO reforms were a key issue identified by the Victorian Auditor-General’s Office as affecting the management of offenders on CCOs.<sup>2201</sup> In discussions with NSW, it has also become apparent that the volume of offenders subject to supervision by NSW Corrective Services following commencement of the sentencing reforms has been far greater than originally anticipated.

It is important that time is taken to fully consider the likely cost and resourcing implications of the reforms recommended by the Council and to seek necessary funding.

<sup>2198</sup> Queensland Government, Department of the Premier and Cabinet, *The Queensland Legislation Handbook* (2014) 8 [2.8].

<sup>2199</sup> *Ibid* (emphasis in original).

<sup>2200</sup> *Ibid*.

<sup>2201</sup> Victorian Auditor-General’s Office (n 420). This report’s findings are discussed in section 8.6.2 of this report.

### Information technology systems

There are already existing problems and gaps in key administrative data systems that need to be addressed, particularly within QWIC (Queensland Wide Inter-Linked Courts database administered by Court Services Queensland) and IOMS (Integrated Offender Management System administered by Queensland Corrective Services). A first step in implementation is to upgrade data systems to address data gaps (see section 15.2.3 below), and to undertake a thorough review of all relevant information technology systems to ascertain what will need to be amended to accommodate the data capture needed to support the new sentencing framework.

Stakeholders in other Australian jurisdictions who have implemented new sentencing orders (particularly Victoria, NSW and Tasmania) have pointed to the IT upgrades as one of the most challenging areas of implementation. Given the existing inadequacies in the operation of QWIC, IOMS and other relevant IT systems, and their inability to map and track individual offenders through the criminal justice system from agency to agency, a significant program of work needs to be commenced to upgrade systems to enable more sophisticated monitoring and reporting.

### Supervision workforce

The Council has observed data published by the *Report on Government Services* that shows the significant current funding gap per offender being supervised by QCS. A submission received from Queensland Corrective Services (QCS) made additional comment on this:

Queensland has the highest offender-to-operational staff ratio in Australia (29.1 compared to a national average of 18.7) and the highest offender to all staff ratio (22.8 compared to a national average of 15.2) ... These factors are relevant when considering significant reform to the orders QCS manages and QCS' ability to amend or expand existing practices.<sup>2202</sup>

Even without any changes to the current sentencing framework, this is an issue the Council considers must be addressed. The Council strongly believes, as confirmed by a number of stakeholders in both Queensland and interstate, that the success of community-based sentencing orders ultimately lies in the quality of the supervision provided by corrective services officers and in the services available to offenders in the community (including housing, drug and alcohol, mental health and other support services). To deliver an expanded and much more individualised community sentencing framework that is evidence based and strongly focused on offender rehabilitation, considerable investment in QCS staffing is required, as is an investment in the secondary service system.

It is likely that a significant number of additional corrective services staff will be required, with analysis of qualifications, experience and expertise required to ensure only appropriately qualified staff are employed, are properly trained and have access to the necessary support and professional supervision. It is likely the scale of this recruitment and professional development process in itself may take a number of years to complete and would need to be approached in a phased manner.

## 15.2.2 Planning and oversight

Given the number of agencies that will be affected by the establishment of a new sentencing framework in Queensland, communication and governance will be a foundational element for implementation success. In recent years, governance frameworks for key reforms such as the domestic and family violence reforms and the Our Future State: Advancing Queensland's priorities, have demonstrated the value of having high-level multi-agency oversight, paired with operational multi-agency working groups and stakeholder reference groups involved as well. These large programs of reform must be properly scaffolded by appropriate levels of decision-making, with close communication both internally within government and externally across the broader sector.

### Oversight bodies

The Council proposes the establishment of three oversight mechanisms. The first — a high-level oversight group with membership at Deputy Director-General level of each relevant agency — would be the ultimate decision-making group. Members of this group should be receiving detailed monitoring reports from their agency in preparation for meetings where key risks are managed and monitored, changes to the

<sup>2202</sup> Submission 11 (Queensland Corrective Services) 3.

Implementation Strategy can be made, and as a central point for reporting to the Premier quarterly on the progress of implementation. The key responsibility for this group is to ensure the 'change vision' is maintained and underpins all implementation activities.

Sitting underneath this senior-level oversight group, the Council envisages a more operational working group, again with membership of all relevant agencies, which can lead the implementation work from a functional perspective. This group would be communicating regularly, both at formal meetings and in between meetings, to consider risks and blockages, address problems as they arise, and escalate issues to the senior-level oversight group where resolution cannot be achieved locally.

Finally, a stakeholder reference group, with membership including legal stakeholders and other key groups, should be convened to continue the valuable input this group provides to systems reform. The Council strongly encourages the continuation of the relationships built throughout the Council's own review work to ensure ongoing support and input from key players in the system.

### **Project team**

The Council considers it vital to employ a dedicated group of public service officers to coordinate the work required to achieve sentencing reform. The project team would be responsible for:

- leading the development of the relevant legislation, including managing Cabinet and Parliamentary processes, working with Courts Services Queensland on the development of any other judicial guidance such as benchbooks or practice directions, and development of new forms;
- developing funding submissions;
- developing and delivering on all planning documentation;
- managing all project reporting;
- providing secretariat support for the oversight bodies;
- engaging and managing relevant consultants to undertake discrete pieces of work;
- undertaking, or overseeing, the workforce analysis required to support the reforms;
- undertaking, or overseeing, the review of data systems; and
- undertaking, or overseeing, the service system review and designing the requirements of an updated set of services and programs.

The project team will need to include officers with a range of skills, including a dedicated Change Manager.

### **Implementation strategy**

An implementation strategy should be developed to map out all strands of work and associated tasks to ensure delivery can be achieved. The strategy should include a phased approach to planning for each of the work strands as follows:

- the roles, responsibilities and meeting schedule for each of the oversight bodies, as well as the reporting structure;
- the legislative work program, including development of the amendment Bill, subordinate legislation and forms;
- the Cabinet Budget Review Committee submission process;
- the review and upgrade of the information technology architecture;
- the workforce review;
- the service system review and re-design;
- a communication strategy, which maps out how the project will be communicated to different groups of stakeholders.

## Change strategy

The Council envisages that the project team will also be responsible for designing and delivering the change strategy, which might be based on one of the existing change models as outlined earlier in this chapter. The change strategy would be designed to bring all agencies and stakeholders along progressively to ensure the overarching vision of the reform work remains central across all work strands and activities, and in all forums. The change strategy will ideally identify and manage change risks, map the needs of each stakeholder group to provide an insight into where adoption of new approaches might founder, continue to articulate the need for change, engage with staff in the change process, and embed the new vision into the organisational culture of each relevant agency.

Table 15-1 provides the Council's initial views about how these strands of work might operate together over the implementation period. This is presented for illustrative purposes only, to demonstrate the complexity of what is required to be achieved and why a lengthy implementation period will be necessary.

### 15.2.3 Monitoring and evaluation

Monitoring is 'the systematic process of observing, tracking and recording activities or data for the purpose of measuring program or project implementation and its progress towards achieving objectives'.<sup>2203</sup> Information gathered through monitoring is used to analyse or evaluate all of the components of a project to measure its effectiveness and adjust inputs and activities where necessary.

Evaluation is 'the systematic collection and analysis of information to make judgements, usually about the effectiveness, efficiency and appropriateness of a program or initiative'.<sup>2204</sup> Although many types of evaluation exist, the process typically involves comparing aspects of a program and its impact to the program objectives to judge the success of the program. Given that the majority of criminal justice initiatives are implemented in a non-controlled environment (that is, they are not always implemented following the development of a clear set of objectives), a number of factors external to the initiative may also need to be considered.<sup>2205</sup>

Monitoring and evaluation work together to enable policy makers and practitioners to assess the impact of reform, and to make adjustments to policy and operations where unintended consequences of the reform arise.

The Council sees the need for both monitoring and evaluation activities to provide feedback to the oversight bodies and relevant agencies on whether the reforms are achieving their purposes.

### Immediate data-capture requirements

To enable effective monitoring and evaluation, the Council acknowledges the critical importance of data capture that will enable all key agencies to understand how the reforms are impacting on individual agencies, but also any impacts on other areas of the criminal justice system.

In Chapter 14, the Council documented a number of data gaps that prohibited adequate exploration of important issues such as the dynamics of order completion. This is an existing data gap the Council has clearly articulated as a priority area for rectification. Without an understanding of basic issues such as what conditions are currently being imposed, which orders are being completed at which rates, who is reoffending and for what reason, the sort of analysis that is central to effective, evidence-based policy making is not able to be undertaken.

While some aspects of information are critical to resolve in the short term, others can wait, and are likely to require substantial time and investment before the systems are capable of doing what is needed.

The higher priority data requirements are:

- an accurate and reliably recorded distinction between wholly and partially suspended sentences;

<sup>2203</sup> 'Monitoring — definition', *Investor Words* (Web Page) <<http://www.investorwords.com.19314/monitoring.html>>.

<sup>2204</sup> Queensland Government, Department of the Premier and Cabinet, *Criminal Justice Evaluation Framework: Guidelines for Evaluating Criminal Justice Initiatives* (2014) 3 citing Australian Evaluation Society, *Guidelines for the Ethical Conduct of Evaluations* (2006).

<sup>2205</sup> *Ibid* 4.

- following implementation of the Council's proposed reforms, an ability to capture information about the use of dual sentencing orders for a single charge (for example, a suspended sentence combined with probation or, following commencement of the new CCO, a CCO);
- an ability to capture information about what conditions are being imposed on community-based sentencing orders and parole orders;
- a clear indication about why community-based sentencing orders are breached (if due to a breach of a condition, then what condition has been breached, or if by reoffending, the nature of the offence), and the final outcome of breach proceedings, to enable tracking offenders as they move through their penalty to completion; and
- an accurate and reliable measure of time spent in custody on remand (not just pre-sentence custody declared as time served for the purposes of a sentence imposed) to understand how it is being taken into account at sentencing.

The Council envisages updates to administrative data systems to begin immediately to enable these matters to be completed during Phase 1 of implementation (see Table 15-1).

### **Long-term upgrade of criminal justice data capability**

A longer-term solution to a lack of accurate, reliable and timely data will necessarily have financial implications and will need to be built into the funding requirements for implementation of this reform. For many years, the inability to link individuals across separate agency datasets has been a significant limitation of the Queensland criminal justice system and has affected the ability of researchers to undertake meaningful data analysis and research to inform policy. Many efforts across several decades have been made to try to remedy this, most significantly in November 2011, when QPS began sharing the Single Person Identifier with other criminal justice entities to assist in tracking an offender through the criminal justice system.<sup>2206</sup> Work to progress this key data gap is necessarily a long-term effort. With the introduction of the Crime Statistics and Research Unit within the Queensland Government Statistician's Office in 2017, the foundations for a more coordinated and integrated approach to criminal justice data have been laid. The Crime Statistics and Research Unit was developed to provide an independent crime statistical body to publish crime statistics for Queensland. With all agency datasets now centralised into a single location, there is a new opportunity to explore data linkage and more sophisticated data modelling for demand management across the system.

While the mechanics of centralising administrative datasets has been achieved — the Crime Statistics and Research Unit published its first statistical reports earlier in 2019 — there is still significant investment required to individual data systems in home agencies, as well as the need to continue to improve consistency of terminology across systems (for example, through the development and updating of data dictionaries for each agency to ensure common terms are used, and variables are consistent across each dataset).

The Council envisages that longer-term investment in data systems is required to enable proper tracking and more sophisticated analysis of offender trajectories through the criminal justice system. This will be the only way to underpin appropriate adjustments to the new sentencing framework as it begins rolling out.

### **Evaluation of the reforms**

The Council recommends an evaluation program that should be designed and run alongside the implementation of the reforms.

Governments, both Commonwealth and state, have consistently articulated the importance of evaluation, particularly where large investments are being made to areas of public service.<sup>2207</sup>

<sup>2206</sup> Queensland Audit Office, *Criminal Justice System — Reliability and Integration of Data* (Report 14: 2016–17, 2017) 20.

<sup>2207</sup> See, for example, Queensland Commission of Audit, *Final Report* (2013) 1–33, Recommendation 52; and National Commission of Audit, *Towards Responsible Government: The Report of the National Commission of Audit, Phase Two* (Commonwealth of Australia, 2014) xxiv, Recommendation 10.

The importance of well-designed evaluations of government initiatives was drawn to prominence by the Queensland Audit Office in its audit of the Drink Safe Precincts trial (which ran between 2010 and 2012).<sup>2208</sup>

The Legal Affairs and Community Safety Committee review of the QAO report commented that the report findings highlighted:

how critical effective planning and evaluation are to the success of program trials... The Committee hopes that lessons have been learnt from the implementation of the trial, and seeks the Attorney-General's assurance that a more robust approach will be taken to any future initiatives not just in relation to targeting alcohol-related violence, but in all areas within the Committee's portfolio area of responsibility.<sup>2209</sup>

Queensland Treasury has since issued a guide on program evaluation, which provides a practical handbook for government agencies in conducting evaluation work. The guide begins with the statement:

Evaluation is an essential part of the management and delivery of public sector programs. Well-designed evaluations are an essential tool for public sector agencies to strengthen efficiency of program delivery and to demonstrate the effectiveness of programs in generating outcomes.<sup>2210</sup>

The Department of the Premier and Cabinet has also issued an evaluation guide specifically for the criminal justice sector, which provides more detailed guidance for evaluating criminal justice programs, policies, activities, plans, products, services, systems, and strategies.<sup>2211</sup>

The Council is confident there is sufficient existing guidance for the proposed project team to establish an evaluation framework early enough to ensure it can be effective.

#### 15.2.4 Services and programs

Finally, the adequacy of the community-based service system will need to be systematically assessed.

Chapter 13 has documented the nature and extent of programs and services in three discrete Queensland locations, as well as the experiences of service agencies, highlighting a number of service gaps and challenges. These findings are echoed by QCS in its submission:

Only a very small number of programs (sexual offending programs, substance abuse programs and, in some locations, general offending programs) are offered by QCS staff in the community. Where possible, QCS brokers supportive relationships with non-government organisations and external stakeholders to ensure a range of treatment and support options are available to offenders in the community. Some of these services experience more demand for support than can be provided, particularly if they are the only available service in the local area.<sup>2212</sup>

The Council's findings have clearly articulated the need to improve the availability of the right services, delivered in the right way, in the right place, at the right time, and targeting the right people.

While the Council has worked to demonstrate the current service strengths and gaps in the three locations, a comprehensive service-mapping exercise will need to be undertaken as early in Phase 1 of implementation as possible. This service mapping will enable:

- a full understanding of what services and programs are currently being delivered to people across the State, to learn where the service strengths and gaps are;
- the identification of the services and programs that will be required to enable a fully operational CCO to work successfully;
- the design of services and programs for delivery to people in rural and remote areas of Queensland, including culturally appropriate services and programs for Aboriginal and Torres Strait Islander people, and whether there are new or innovative service delivery models that can be considered;

<sup>2208</sup> Queensland Audit Office, *Drink Safe Precincts Trial: Report to Parliament 13: 2012–13* (State of Queensland, 2013).

<sup>2209</sup> Legal Affairs and Community Safety Committee, Parliament of Queensland, *Review of the Auditor-General's Report to Parliament 13: 2012–13, Drink Safety Precincts Trial* (Report No. 38, 2013) 6.

<sup>2210</sup> Queensland Government, Queensland Treasury and Trade, *Queensland Government Program Evaluation Guidelines* (2014) 2.

<sup>2211</sup> Queensland Government, Department of the Premier and Cabinet (n 2204).

<sup>2212</sup> Submission 11 (Queensland Corrective Services) 6.

- the ability to document a more effective service system, model the potential demand for different aspects of the service system, and undertake a costing project to feed into the annual budget cycle; and
- the design of packages of order conditions that can come online progressively as the new orders become operational, and to ensure the service sector has the capacity to deliver the programs and services envisaged.

The Council was impressed with many of the dedicated program leaders and service delivery staff already in place in some areas of Queensland. There is clearly substantial knowledge and expertise across the State that should be drawn on in thinking through and designing an improved service system. These valuable resources should be leveraged to co-design system enhancements to support rehabilitative outcomes. In undertaking the place-based case study work, the Council heard many creative and thoughtful ideas about innovative ways to support people to change their lives. The current excellence in service delivery, and the ideas about how to build a better system, should be encouraged and developed further as part of the service system redesign.

The Council is also conscious of the existing opportunities to maximise resources and funding already available through state and federal budgets for health, drug and alcohol services, employment services, and the NDIS. Fragmented across different areas of government services, there is an opportunity to coordinate and focus these already available resources. Investment in funding interfacing and coordination, alongside a longer-term increased investment and service provision strategy, will ensure both urgent service gaps (particularly in the areas of access to housing, family violence perpetrator intervention and drug and alcohol rehabilitation) can be addressed, in tandem with broader service system improvements.

Again, the potentially significant demand that might emerge will mean there will be a need to take time to assess and build the service system over a longer period.

One of the central criticisms of Victorian legal stakeholders, when interviewed about the implementation of the Victorian CCO, was that services and programs were not immediately in place when the new CCO came online, meaning there were significant delays attached to order commencements and numerous situations where CCOs were breached before a service or program could be accessed by an offender, which consequently eroded the confidence of judicial officers in imposing the new order, or imposing particular conditions.

Queensland has a unique opportunity to learn from these experiences.

Table 15-1 provides an indicative map of how the Council envisages each strand of work might be rolled out across the implementation period. This is depicted alongside where the Council sees the key components of the new sentencing framework coming online.

**Table 15-1: Timeline for phased implementation**

|                                  | Phase 1  | Phase 2  | Phase 3  |
|----------------------------------|--|--|--|
| <b>Infrastructure</b>            | <ul style="list-style-type: none"> <li>• First tranche of funding secured</li> <li>• Legislation developed and introduced</li> <li>• Develop a Workforce Strategy</li> <li>• Enhance existing data capture</li> <li>• Review data systems for long-term improvement</li> </ul> | <ul style="list-style-type: none"> <li>• Second tranche of funding secured</li> <li>• Regulations developed</li> <li>• Other guidance developed and forms designed</li> <li>• Implement first round of improvements to data systems</li> <li>• Implement first recruitment drive</li> </ul>              | <ul style="list-style-type: none"> <li>• Third tranche of funding secured</li> <li>• Finalise all recruitment</li> <li>• Implement first round of improvements to data systems</li> </ul>  |
| <b>Planning and oversight</b>    | <ul style="list-style-type: none"> <li>• Establish oversight bodies</li> <li>• Establish cross-agency working group</li> <li>• Establish project team and appoint officers</li> <li>• Develop Implementation Strategy</li> <li>• Develop Change Strategy</li> </ul>            | <ul style="list-style-type: none"> <li>• Continue oversight</li> <li>• Report quarterly to Premier</li> <li>• Monitor and respond to risks</li> <li>• Consult with stakeholders</li> <li>• Ensure adequate resourcing continues</li> </ul>   | <ul style="list-style-type: none"> <li>• Continue oversight</li> <li>• Report quarterly to Premier</li> <li>• Monitor and respond to risks</li> <li>• Consult with stakeholders</li> <li>• Ensure adequate resourcing continues</li> </ul>   |
| <b>Sentencing orders</b>         | <ul style="list-style-type: none"> <li>• Introduce ability to impose dual orders for a single offence</li> </ul>   | <ul style="list-style-type: none"> <li>• Introduce a new CCO and remove ability to make new probation and community service orders</li> <li>• Implement expansion of court ordered parole</li> </ul>   | <p>Subject to the outcome of monitoring and evaluation:</p> <ul style="list-style-type: none"> <li>• abolish ICOs</li> <li>• remove parole for short sentences of imprisonment</li> </ul>  |
| <b>Monitoring and evaluation</b> | <ul style="list-style-type: none"> <li>• Address data issues to capture additional information about order conditions imposed and order outcomes (including parole)</li> </ul>   | <p>First evaluation conducted focusing on:</p> <ul style="list-style-type: none"> <li>• progress and results of improved data capture</li> <li>• the success of the Implementation Strategy</li> <li>• the success of the Change Strategy</li> <li>• stakeholder feedback on change readiness</li> </ul> | <p>Second evaluation conducted focusing on:</p> <ul style="list-style-type: none"> <li>• progress and results of improved data capture</li> <li>• the success of the Implementation Strategy</li> <li>• the success of the Change Strategy</li> <li>• implementation of the CCO</li> <li>• the impact of parole expansion</li> </ul> |
| <b>Services and programs</b>     | <ul style="list-style-type: none"> <li>• Undertake full service review</li> <li>• Map service requirements of new framework</li> <li>• Identify service model appropriate for rural and remote areas</li> </ul>  | <ul style="list-style-type: none"> <li>• Implement first package of conditions and association programs/services</li> <li>• Pilot new services, including options for remote and rural locations</li> </ul>  | <ul style="list-style-type: none"> <li>• Implement second package of conditions and associated programs/services</li> <li>• Finalise arrangements for the final package of conditions</li> </ul>   |

## RECOMMENDATIONS: SUCCESSFUL CHANGE AND IMPLEMENTATION

### Implementation timeframe

65. The implementation of a new sentencing framework for Queensland should allow adequate time for a phased approach to enable key contingent matters to be designed and implemented first before the introduction of the new orders, with milestones mapped according to budget availability.

### Implementation strategy

66. An implementation strategy, which includes a formal communication strategy, should be developed that enables the phased introduction of the new framework over the full implementation period. The implementation strategy should cover infrastructure issues, planning and oversight, monitoring and evaluation, and ensure an appropriate community-based service system is available to support the new orders.

### Change strategy

67. A change strategy should be developed that sets out the program of change across all relevant agencies, monitoring change risk and change performance across the entire program of work over the full course of the implementation timeframe.
68. A dedicated Change Manager should be appointed to deliver the change strategy.

### Monitoring and evaluation of reforms

69. An evaluation framework should be designed and implemented alongside the reforms to enable agencies to monitor the impact of the new sentencing orders, and to evaluate the success of the reforms in relation to their intended objects.
70. Agencies should improve systems to capture data required for effective monitoring and evaluation of sentencing orders, including the linkage of offender-level data across agency datasets.

### Implementation governance

71. A high-level body with senior decision-makers (Deputy Director-General level) representing key agencies should be established to oversee and report to the Premier on the implementation of the new sentencing framework.
72. A cross-agency working group should also be established to work through operational issues, to ensure communication is strong and focused between agencies, to ensure blockages are addressed and to prioritise matters needing more senior guidance across the life of the implementation.
73. A stakeholder reference group should be established to ensure the ongoing input and communication with key legal and other stakeholders.
74. A dedicated full-time project team should be established for the duration of the program of work, which is responsible for delivering on the implementation strategy. This work will include:
- achieving the legislative changes required to the *Penalties and Sentences Act 1992* (Qld) and *Corrective Services Act 2006* (Qld) and any associated legislation;
  - working with Queensland Treasury to secure the funding required to implement the new model;
  - delivering both the change and the implementation strategies;
  - working with agencies to design the information technology architecture required to enable the new orders to be administered and monitored appropriately;
  - designing the workforce strategy to underpin the new framework;
  - designing the service system required to operationalise the full range of community correction order conditions;
  - working with Queensland Courts to develop benchbooks, practice directions and other judicial guidance to support the introduction of the new sentencing orders;
  - designing the various training and information tools required for different audiences in the criminal justice system; and
  - designing and embedding the monitoring and evaluation framework.

## Appendix 1: Terms of Reference

I, Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills, having regard to:

- the 2016 *Queensland Parole System Review Final Report* (Parole System Review Report) by Mr Walter Sofronoff QC, in particular the observations made in the report regarding the lack of flexibility of community based sentencing options available to a court and the likely adverse impact this has upon the prison population and the need to improve Queensland's sentencing laws;
- Recommendation 2 of the Parole System Review Report that court ordered parole should be retained;
- Recommendation 4 in the Parole System Review Report that a suitable entity, such as the Sentencing Advisory Council, should undertake a review into sentencing options and in particular, community based orders to advise the Government of any necessary changes to sentencing options;
- the Queensland Government's Response to Recommendations 3 and 4 of the Parole System Review Report which stated that the Government will have the Queensland Sentencing Advisory Council undertake a review that considered those recommendations.
- Recommendation 2 in the 2016 Queensland Audit Office report, *Criminal justice system- prison sentences, Report 4: 2016-17* that the Department of Justice and Attorney-General in collaboration with the Queensland Police Service assess the need to review sentencing legislation to reduce the complexity of sentence calculations;
- the importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992*;
- the importance of sentencing orders of the court being properly administered so that they satisfy the intended purposes of the sentencing order and facilitate a fair and just sentencing regime that protects the community's safety;
- the purpose of parole is allowing an offender to serve part of their period of imprisonment in the community in order to successfully reintegrate a prisoner into the community and minimise the likelihood an offender reoffending;
- the need to further encourage and maintain public confidence in the criminal justice system and ensure that sentencing practices meet the community's expectations; and
- the impact of any recommendation the Council may make on the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system;

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(1) of the *Penalties and Sentences Act 1992*, a review of community based sentencing orders, imprisonment and parole options.

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

- review sentencing and parole legislation, including but not limited to the *Penalties and Sentences Act 1992* and the *Corrective Services Act 2006*, to identify any anomalies in sentencing or parole laws that create inconsistency or constrain the available sentencing options available to a court and advise how these anomalies could be removed or minimised;
- consider Recommendation 3 of the Parole System Review Report and advise as to whether a court should have discretion to set a parole release date or parole eligibility date for sentences of greater than 3 years where the offender has served a period of time on remand and the court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence;
- consider and advise on Recommendation 5 of the Parole System Review Report that court ordered parole should apply to a sentence imposed for a sexual offence;

- assess restrictions on the ability of a court to impose a term of imprisonment with a community based order and advise on whether those restrictions should be removed or modified in order to better enable offenders to be appropriately monitored and managed upon release in to the community to support the reintegration and rehabilitation of an offender and prevent recidivism;
- consider flexible community based sentencing orders that provide for supervision in the community that are used in other jurisdictions (for example, the CCOs contained in *Sentencing Act 1991* (Vic)) and advise on appropriate options for Queensland;
- assess whether there are any inherent complexities in the legislative framework including recognition of pre-sentence custody, that contribute to, or cause complexity in calculating an offender's overall period of incarceration, and advise on how those inherent complexities can be addressed with a view to simplifying the calculation process and preventing discharge and detention error;
- consult with key stakeholders, including but not limited to the legal profession, the judiciary, victim of crime groups, prisoner advocacy and support groups, relevant government department and agencies; and
- advise on any other matter relevant to this reference.

The Queensland Sentencing Advisory Council is to provide a report on its examination to the Attorney-General and Minister for Justice and Minister for Training and Skills by 30 April 2019. \*

Dated the 25th day of October 2017

**YVETTE D'ATH**

**Attorney-General and Minister for Justice and Minister for Training and Skills**

\* Extension granted to 31 July 2019 — Letter from Attorney-General and Minister for Justice, Yvette D'Ath to John Robertson, Chair, Queensland Sentencing Advisory Council, 15 October 2018.

## Appendix 2: Agencies consulted and submissions received

### Agencies consulted – Stages 2 & 3

| Date              | Agency  |
|-------------------|---|
| 8 January 2018    | Queensland Law Society  |
| 23 January 2018   | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd   |
| 1 February 2018   | Crime and Corruption Commission   |
| 2 February 2018   | Protect All Children Today Inc  |
| 15 February 2018  | Bar Association of Queensland   |
| 23 February 2018  | Queensland Corrective Services  |
| 23 February 2018  | Legal Aid Queensland  |
| 26 February 2018  | Bravehearts   |
| 28 February 2018  | Parole Board Queensland   |
| 1 March 2018      | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd   |
| 6 March 2018      | Queensland Magistrates Courts Criminal Law Committee  |
| 9 March 2018      | Legal Services Commission of South Australia  |
| 13 March 2018     | New Zealand Crown Law   |
| 13 March 2018     | Sentencing Advisory Council of South Australia  |
| 21 March 2018     | Criminal Law Policy and Operations, Victorian Government  |
| 24 March 2018     | Queensland Law Society  |
| 4 July 2018       | Queensland Corrective Services  |
| 6 July 2018       | Sisters Inside  |
| 6 July 2018       | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd   |
| 6 July 2018       | Office of the Commonwealth Director of Public Prosecutions  |
| 12 July 2018      | Court Services Queensland   |
| 16 July 2018      | Bar Association of Queensland   |
| 25 July 2018      | Legal Aid Queensland  |
| 25 July 2018      | Queensland Police Service   |
| 1 August 2018     | Queensland Corrective Services  |
| 10 August 2018    | Office of the Director of Public Prosecutions (Qld)   |
| 13 August 2018    | Sisters Inside  |
| 28 August 2018    | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd   |
| 31 August 2018    | Bar Association of Queensland   |
| 6 September 2018  | Queensland Corrective Services  |
| 11 September 2018 | Queensland Law Society  |
| 13 September 2018 | Queensland Corrective Services  |
| 24 September 2018 | Supreme Court of Queensland   |
| 24 September 2018 | District Court of Queensland  |
| 26 September 2018 | Queensland Corrective Services  |
| 9 October 2018    | Queensland Corrective Services  |
| 10 October 2018   | Queensland Corrective Services  |
| 19 October 2018   | Queensland Corrective Services  |
| 31 October 2018   | Queensland Magistrates Courts Criminal Law Committee  |
| 2 November 2018   | Parole Board Queensland   |
| 8 November 2018   | Queensland Corrective Services  |
| 30 November 2018  | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd   |
| 3 December 2018   | Bar Association of Queensland   |
| 5 December 2018   | Queensland Corrective Services  |
| 17 December 2018  | Queensland Police Service   |
| 18 December 2018  | Legal Aid Queensland  |
| 19 December 2018  | Office of the Director of Public Prosecutions (Qld)   |
| 20 December 2018  | Queensland Law Society  |
| 9 January 2019    | Queensland Government Statistician's Office   |
| 17 January 2019   | Sisters Inside  |
| 21 January 2019   | Bar Association of Queensland   |
| 31 January 2019   | Queensland Police Service   |
| 5 February 2019   | Sisters Inside  |
| 7 February 2019   | Aboriginal and Torres Strait Islander Advisory Panel, Queensland Sentencing Advisory Council                            |
| 8 February 2019   | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd   |
| 9 February 2019   | Queensland Corrective Services  |
| 25 February 2019  | Specialist Courts, Referral and Support Services, Courts Innovation Program, Department of Justice and Attorney-General |

| Date             | Agency  |
|------------------|---|
| 27 February 2019 | Stakeholder roundtable #1 – Representatives from Office of the Director of Public Prosecutions (Qld), Legal Aid Queensland, Office of the Commonwealth Director of Public Prosecutions, Aboriginal and Torres Strait Islander Legal Service (Qld) Inc, Office of the Chief Magistrate (Qld), Queensland Corrective Services, Parole Board Queensland, Sisters Inside, Queensland Police Service, Queensland Law Society, Bar Association of Queensland, Prisoners' Legal Service, QSAC Aboriginal and Torres Strait Islander Advisory Panel, Strategic Policy and Legal Services Department of Justice and Attorney-General |
| 1 March 2019     | Parole Board Queensland   |
| 6 March 2019     | Parole Board Queensland   |
| 14 March 2019    | Queensland Corrective Services  |
| 20 March 2019    | Bar Association of Queensland   |
| 29 March 2019    | Queensland Corrective Services  |
| 25 March 2019    | Parole Board Queensland   |
| 26 March 2019    | Parole Board Queensland   |
| 26 March 2019    | Stakeholder roundtable #2 – representatives as for meeting #1 as well as Courts Innovation, Department of Justice and Attorney-General and Mr Brendan Butler AM SC, District Court Judge, Chief Magistrate (retired)  |
| 5 April 2019     | Queensland Corrective Services  |
| 8 April 2019     | Legal Aid Queensland  |
| 10 April 2019    | Supreme Court of Queensland   |
| 10 April 2019    | Queensland Magistrates Courts Criminal Law Committee  |
| 24 April 2019    | District Court of Queensland  |

#### Agencies consulted – Stage 4

| Date          | Agency  |
|---------------|---|
| 29 April 2019 | Queensland Corrective Services Commissioner   |
| 2 May 2019    | Queensland Police Service   |
| 3 May 2019    | Victoria Legal Aid (via Legal Aid Queensland)   |
| 10 May 2019   | Legal Aid Queensland  |
| 13 May 2019   | Queensland Corrective Services  |
| 14 May 2019   | Stakeholder roundtable #3 – representatives as for meeting #2, but excluding the Office of the Chief Magistrate (Qld) |
| 15 May 2019   | Commonwealth Director of Public Prosecutions  |
| 23 May 2019   | Corrections Victoria; Queensland Corrective Services  |
| 24 May 2019   | Reform and Support Services, Court Services Queensland, Department of Justice and Attorney General                    |
| 28 May 2019   | Commonwealth Director of Public Prosecutions Office   |
| 3 June 2019   | Law Institute Victoria  |
| 4 June 2019   | NSW Corrections   |
| 4 June 2019   | Commonwealth Director of Public Prosecutions Office   |
| 4 June 2019   | Victorian Office of Public Prosecutions   |
| 4 June 2019   | Victorian Legal Aid   |
| 4 June 2019   | Victorian Aboriginal Legal Service  |
| 4 June 2019   | Victorian Federation of Community Legal Centres   |
| 5 June 2019   | Magistrates Criminal Law Committee [Qld]  |
| 6 June 2019   | Legal Aid Tasmania  |
| 6 June 2019   | Legal Aid NSW   |
| 17 June 2019  | Corrections Victoria  |
| 18 June 2019  | Queensland Corrective Services  |
| 18 June 2019  | Corrective Services, Department of Justice, Tasmania  |
| 18 June 2019  | Department of Justice and Community Corrections, NSW  |
| 19 June 2019  | Chief Magistrate, Victoria  |
| 19 June 2019  | Chief Judge and two other Judges of the Victorian County Court  |
| 20 June 2019  | Justice Strategy and Policy Division, NSW Department of Justice   |

**Submissions received**

| Submission number      | Date received   | Agency   |
|------------------------|-----------------|--|
| Preliminary submission | 6 July 2018     | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd    |
| Preliminary submission | 13 July 2018    | Bar Association of Queensland                                    |
| Preliminary submission | 31 August 2018  | Bar Association Queensland                                       |
| Preliminary submission | 8 February 2019 | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd    |
| Preliminary submission | 20 March 2019   | Bar Association Queensland                                       |
| 1                      | 15 May 2019     | Name withheld  |
| 2                      | 21 May 2019     | Douglas, Walsh, Lelliott and Wallis – UQ TC Beirne School of Law |
| 3                      | 28 May 2019     | Queensland Police Service  |
| 4                      | 31 May 2019     | Fighters Against Child Abuse Australia                           |
| 5                      | 31 May 2019     | Queensland Network of Alcohol and Other Drug Agencies            |
| 6                      | 3 June 2019     | Legal Aid Queensland   |
| 7                      | 31 May 2019     | Sisters Inside   |
|                        | 14 June 2019    | Sisters Inside – addendum submission                             |
| 8                      | 3 June 2019     | Queensland Council for Civil Liberties                           |
| 9                      | 5 June 2019     | Department of Aboriginal and Torres Strait Islander Partnerships |
| 10                     | 4 June 2019     | Queensland Police Union of Employees                             |
| 11                     | 10 June 2019    | Queensland Corrective Services                                   |
|                        | 17 June 2019    | Queensland Corrective Services – addendum submission             |
| 12                     | 4 June 2019     | Parole Board Queensland  |
|                        | 14 June 2019    | Parole Board Queensland – addendum submission                    |
| 13                     | 7 June 2019     | Commonwealth Director of Public Prosecutions                     |
| 14                     | 16 June 2019    | Jannean Dean   |
| 15                     | 20 June 2019    | Queensland Law Society   |
| 16                     | 20 June 2019    | Bar Association of Queensland                                    |

## Appendix 3: What works in sentencing – summary tables

Table 1: Evidence of the effectiveness of different sentencing orders

| Order type                          | Strength of evidence   | Studies considered  | Conclusion  |
|-------------------------------------|--|---|---|
| <b>Imprisonment</b>                 | A strong level of evidence is available.                     | Gendreau, Goggin & Cullen (1999)<br>Heijden (2014)<br>Kay (2019)<br>Killias, Villettaz & Zoder (2006)<br>Kurlychek, Brame & Bushway (2006)<br>Meade, Steiner, Makarios & Travis (2013)<br>Mears, Cochran & Bales (2012)<br>Mews, Hiller, McHugh & Coxon (2015)<br>Mitchell, Cochran, Mears & Bales (2017)<br>Nagin, Cullen & Johnson (2009)<br>Revolving Doors Agency (2012)<br>Ritchie (2011, 2012)<br>Sentencing Advisory Council (2013)<br>Spelman (2000)<br>Spohn & Holleran (2002)<br>Sydes, Eggins & Mazerolle (2018)<br>Tollenaar, van der Laan & van der<br>UK Ministry of Justice (2011, 2013)<br>Villiettaz, Gillieron & Killias (2015)<br>Weatherburn (2010) | Mixed findings. Effective as a means of achieving the objectives of punishment and denunciation.<br><br>Largely ineffective as a deterrent and limited in its ability to incapacitate (thereby providing community safety).<br><br>Periods of imprisonment up to 12 months are least effective, most likely due to insufficient time to engage in programs compounded by disruption to family, employment and other social connections. |
| <b>Partially suspended sentence</b> | Insufficient methodologically robust evidence.               | Bartels (2009b)<br>Aarten, Denkers, Borgers & van der Laan (2012)   | Conclusions cannot be reached.  |
| <b>Wholly suspended sentence</b>    | Some robust research exists, but there are significant gaps. | Aarten, Denkers, Borgers & van der Laan (2012)<br>Bartels (2009a)<br>Lulham, Weatherburn & Bartels (2009)<br>Poynton & Weatherburn (2012)<br>Sentencing Advisory Council (2013)<br>Weatherburn & Bartels (2008)   | A small but significant impact on reducing recidivism has been observed compared with the impact of imprisonment, and the effect seems stronger for repeat offenders.<br><br>Further work is needed to understand what factors are associated with successful completion, and to understand which offenders are most likely to succeed.   |
| <b>Parole</b>                       | Reasonable evidence.   | Carmichael et al (2005)<br>Clark et al (2016)<br>Edo, Ouden and Skeen (2011)<br>Jones, Donnelly, McHutchison & Heggie (2006)<br>Lai (2013)<br>Ostermann (2012)  | Mixed findings, but authors conclude that active supervision that focuses on rehabilitation rather than compliance is more effective.<br><br>Mixed results on Board versus court ordered parole.  |

| Order type                            | Strength of evidence  | Studies considered   | Conclusion   |
|---------------------------------------|---|--|--|
|                                       |   | Schlager & Robbins (2008)<br>Stavrou, Poynton & Weatherburn (2016)<br>Thompson, Forrester & Stewart (2015)<br>Verbrugge et al (2002)<br>Vito, Higgins & Tewksbury (2017)<br>Wan, Poynton, van Doorn & Weatherburn (2014)<br>Weatherburn & Ringland (2014)<br>Wright & Rosky (2011) |  |
| <b>Conditional suspended sentence</b> | Insufficient methodologically robust evidence.  | Bartels (2009b)<br>Potas, Eyland & Munro (2005)  | Conclusions cannot be reached.   |
| <b>Intensive Correction Order</b>     | Two robust studies.   | Ringland & Weatherburn (2013)<br>Wang & Poynton (2017)   | Supervision combined with rehabilitation programs can have a significant impact on reoffending rates, with programs targeted at high-risk offenders producing larger reductions in reoffending than those targeted at middle and low-risk offenders.   |
| <b>Home detention</b>                 | Some robust research available on both 'front-end' and 'back-end' home detention. Significant gaps in research exist. | Avdija & Lee (2014)<br>Bouchard & Wong (2018)<br>Cale & Burton (2018)<br>Development Services Group (2014)<br>Gibbs & King (2003b)<br>Henderson (2006)<br>Marie, Moreton & Goncalves (2011)<br>Stanz & Tewksbury (2000)  | Mixed and inconsistent findings.<br><br>Authors conclude that home confinement can assist offenders reintegrate into the community on release from custody and can deter offending.<br><br>However, effectiveness in reducing recidivism remains uncertain.  |
| <b>Community Service Order</b>        | Reasonable evidence.  | Killias, Aebi & Ribeaud (2000)<br>Klement (2015)<br>KPMG (2010)<br>Morris & Sullivan (2015)<br>Snoball (2008)<br>Snowball & Bartels (2013)<br>Wermink et al (2010)   | Community service orders are effective at reducing recidivism, but further research is needed to understand the underlying reasons for success, who it is most successful for, and under what circumstances.   |
| <b>Probation</b>                      | A substantial body of research exists.  | Burke & Keaton (2004)<br>Caudy, Tillyer & Tillyer (2018)<br>Degiorgio & DiDonato (2014)<br>DeVall et al (2017)<br>Hawken & Kleiman (2009)<br>Hepburn & Griffin (2004)<br>Kilmer et al (2013)<br>Lattimore et al (2016)<br>MacKenzie, Browning, Skroban & Smith (1999)              | Strong evidence of effectiveness at reducing recidivism compared to imprisonment, including for vulnerable offenders such as women, offenders with mental illness and possibly also for sex offenders.<br><br>Failure on probation appears more likely for those with a criminal history or substance abuse issues |

| Order type                        | Strength of evidence  | Studies considered   | Conclusion                     |
|-----------------------------------|---|--|--------------------------------|
|                                   |   | Meloy (2005)<br>Michigan, Gray, Fields & Maxwell (2001)<br>Olson, Alderden & Ligurio (2003)<br>Skeem et al (2009)<br>Smith, Heyes, Fox, Harrison, Kiss & Bradbury (2018)<br>Wodahl, Boman & Garland (2015) |                                |
| <b>Community Correction Order</b> | No real research has been conducted on the effectiveness of these orders as they were only introduced in Victoria in 2012 and have not yet been properly evaluated. | Victorian Sentencing Advisory Council (2016)   | Conclusions cannot be reached. |

Source: Gelb, Stobbs and Hogg (n 28).

**Table 2: The effectiveness of specific conditions on orders**

| Condition                           | Evidence                      | Studies considered   | Conclusion  |
|-------------------------------------|-------------------------------|--|---|
| <b>Electronic monitoring</b>        | Sufficiently robust evidence. | Bales, Mann, Blomberg, Gaes, Barrick, Dhungana & McManus (2010)<br>Belur et al (2017)<br>Gies (2012)<br>Henneguelle, Monnery & Kensey (2016)<br>Killias, Gillie'ron, Kissling & Villettaz (2010)<br>Renzema & Mayo-Wilson (2005)<br>Roman, Liberman, Taxy & Downey (2012)<br>Washington State Institute of Public Policy (2017a)<br>Washington State Institute of Public Policy (2017b)<br>Williams & Weatherburn (2019) | Reduces recidivism cost effectively, particularly when used as an alternative to prison, and when used in conjunction with counselling and therapy. Some cohorts, such as sex offenders, demonstrate greater success using electronic monitoring.<br><br>Concerns have been raised in the academic literature about the potential for a net-widening effect, but there is currently not enough research to conclude that this is happening. |
| <b>Treatment programs (generic)</b> | Substantial evidence.         | Gendreau & Andrews (1996)<br>Latessa & Lowencamp (2006)<br>Lipsey, Chapman & Landenberger (2001)<br>Lipsey & Cullen (2007)<br>McGuire (2002)<br>Pertersilia (2007)<br>Vennard, Sugg & Hedderman (1997)   | The most effective treatment programs provide meaningful contact between the offender and the provider; they must be designed to address the assessed criminogenic needs of the offender and must be delivered consistently.  |

| Condition  | Evidence                                     | Studies considered  | Conclusion  |
|--|--|---|---|
| <b>Cognitive behavioural therapy (therapy that aims to change a person's thought patterns to move away from criminogenic thought patterns to pro-social behaviour)</b> | Good consensus and rigorous research exists. | Aos, Miller & Drake (2006)<br>Davis et al (2008)<br>Mackenzie (2000)<br>Pearson et al (2002)<br>Vennard, Sugg & Hedderman (1997)<br>Washington State Institute of Public Policy (2017d)                   | Evidence shows that offenders engaging in this treatment were less likely to reoffend and it is cost effective when considering the cost of treatment versus the financial benefits associated with reduced offending.  |
| <b>Drug treatment</b>  | Some robust evidence.                        | Aos, Miller & Drake (2006)<br>Davis et al (2008)<br>Vennard, Sugg & Hedderman (1997)  | Drug treatment found to be particularly effective in reducing offending for men and younger offenders.  |
| <b>Sex offender programs</b>   | Some robust evidence.                        | Hanson, Bourgon, Helmus & Hodgson (2009)<br>Landenberger and Lipsey (2005)<br>Lipsey, Chapman & Landenberger (2001)<br>Losel & Schmucker (2005)<br>Rietzel & Carbonell (2006)<br>Schmucker & Losel (2017) | There are some promising findings to suggest that programs designed specifically for sex offenders are more effective than generalised programs.  |
| <b>Violent offender programs</b>   | Some robust evidence.                        | Joliffe & Farrington (2007)   | Promising findings that suggest programs involving greater duration, an anger control component, cognitive skills, role-play, and relapse prevention, and which include homework tasks, are most likely to reduce reoffending.  |
| <b>Domestic violence offender programs</b>   | Good level of evidence available.            | Babcock, Green & Robie (2004)<br>Feder (2005, 2006)<br>Miller, Drake and Nafziger (2013)<br>Smedslund, Dalsbo, Steiro, Winsvold & Clench-Aas (2007)<br>Vigurs, Schucan-Bird, Quy & Gough (2016)           | Inconclusive evidence. Small effect sizes, at best, are demonstrated, although promising findings appear to be associated with programs that involve cognitive behavioural therapy, couples therapy and substance abuse treatment. No conclusive evidence about what constitutes an effective intervention for domestic violence offenders. |

| Condition   | Evidence                          | Studies considered  | Conclusion  |
|---|-----------------------------------|---|---|
| <b>Supervision</b><br><b>High-intensity supervision, involving increased numbers of contacts, home visits and drug tests</b><br><b>Low-intensity supervision, reduced number of contacts</b><br><b>Environmental corrections, where staff assist an offender to avoid problematic environments and situations, and maximise positive influences</b> | Good level of evidence available. | Aos & Drake (2013)<br>Barnes et al (2010, 2012)<br>Bonta et al (2008)<br>Drake (2011)<br>Gendreau, Goggin, Cullen & Andrews (2000)<br>Gill, Hyatt & Sherman (2009)<br>Lowencamp et al (2010)<br>Petersilia & Turner (1993b)<br>Ringland & Weatherburn (2013)<br>Schafer (2018)<br>Sydes, Eggins & Mazerolle (2018)<br>Washington State Institute of Public Policy (2017e)<br>Weatherburn & Trimboli (2008)<br>WODC (2014) | Mixed support, although evidence broadly suggests that supervision that focuses on rehabilitative rather than surveillance or monitoring alone is most effective. The evidence on high-intensity supervision is mixed, and there is little evidence of the effectiveness of low-intensity supervision. Limited evidence about the impact of an environmental approach to supervision shows some promise in reducing recidivism. |

Source: Gelb Stobbs and Hogg (n 28).

## Appendix 4: Summary of mandatory sentencing provisions in Queensland

| Act and section  | Offence   | Mandatory penalty   |
|--|---|---|
| <b>Mandatory imprisonment</b>  |   |   |
| <i>Criminal Code</i> (Qld): s 305  | Murder  | Life imprisonment   |
| <i>Penalties and Sentences Act</i> 1992 (Qld): s 161E  | Repeat serious child sex offenders<br>'Serious child sex offence' is defined in <i>Penalties and Sentences Act</i> , sch 1A<br><i>Criminal Code</i> (Qld):<br>s 213 Owner etc. permitting abuse of children on premises<br>s 215 Carnal knowledge with or of children under 16<br>s 219 Taking child for immoral purposes<br>s 222 Incest<br>s 229B Maintaining a sexual relationship with a child<br>s 349 Rape<br>s 352 Sexual assaults | Life imprisonment   |
| <i>Penalties and Sentences Act</i> 1992 (Qld): s 161R  | Serious organised crime offences<br><br>Prescribed offences are listed in <i>Penalties and Sentences Act</i> , sch 1C   | Imprisonment imposed under law for the offence (base component) plus the lesser of 7-years' imprisonment or the maximum penalty for the offence (mandatory component), served cumulatively. |
| <i>Weapons Act</i> 1990 (Qld): s 50(1)(d)(i)<br><br><i>Weapons Categories Regulation</i> 1997 (Qld)        | Unlawful possession of a firearm if:<br>10 or more category D, E, H or R weapons<br>10 or more weapons<br>Possession of category D, H, R, C or E weapon<br>And:<br>Possess and use for an indictable offence  | Mandatory minimum 18-months' imprisonment served wholly in a corrective services facility.  |
| <i>Weapons Act</i> 1990 (Qld): s 50(1)(d)(ii)-(iii)<br><br><i>Weapons Categories Regulation</i> 1997 (Qld) | Unlawful possession of a firearm if:<br>10 or more and at least 5 are category D, E, H or R weapons<br>10 or more weapons<br>Possession of category D, H, R, C or E weapon<br>And:<br>Possess for the purpose of committing or facilitating the commission of an indictable offence or<br>Possess a short firearm in public   | Mandatory minimum 1-year's imprisonment served wholly in a corrective services facility.  |
| <i>Weapons Act</i> 1990 (Qld): s 50(1)(e)(i)<br><br><i>Weapons Categories Regulation</i> 1997 (Qld)        | Unlawful possession of a firearm if:<br>Possess category A, B or M weapon for use in an indictable offence  | Mandatory minimum 9-months' imprisonment served wholly in a corrective services facility.   |
| <i>Weapons Act</i> 1990 (Qld): s 50(1)(e)(ii)<br><br><i>Weapons Categories Regulation</i> 1997 (Qld)       | Unlawful possession of a firearm if:<br>Possess category A, B or M weapon for the purpose of committing or facilitating the commission of an indictable offence   | Mandatory minimum 6-months' imprisonment served wholly in a corrective services facility.   |
| <i>Weapons Act</i> 1990 (Qld): s 50B(1)(d)   | Unlawful supply of a firearm<br>5 or more and 1 is a category D, E, H or R weapon and if 1 is a short firearm   | Mandatory minimum 3-years' imprisonment served wholly in a corrective services facility.  |

| Act and section  | Offence   | Mandatory penalty   |
|--|---|---|
| <i>Weapons Categories Regulation 1997 (Qld)</i>  |   |   |
| <i>Weapons Act 1990 (Qld): s 50B(1)(e)</i><br><i>Weapons Categories Regulation 1997 (Qld)</i>                        | Unlawful supply of a firearm<br>Category D, H, or R and is a short firearm  | Mandatory minimum 2.5-years' imprisonment served wholly in a corrective services facility.  |
| <i>Weapons Act 1990 (Qld): s 65(1)(c)</i><br><i>Weapons Categories Regulation 1997 (Qld)</i>                         | Unlawful trafficking in weapons<br>If at least 1 is a category H or R weapon  | Mandatory minimum 5-years' imprisonment served wholly in a corrective services facility.  |
| <i>Weapons Act 1990 (Qld): s 65(1)(d)</i><br><i>Weapons Categories Regulation 1997 (Qld)</i>                         | Unlawful trafficking in weapons<br>If at least 1 is a category A, B, C, D or E, a category M crossbow or explosives                               | Mandatory minimum 3.5-years' imprisonment served wholly in a corrective services facility.  |
| <i>Dangerous Prisoner (Sexual Offenders) 2003 (Qld): s 43AA(2)</i>   | Contravene a relevant order<br><br>If released prisoner removes or tampers with a monitoring device.  | Mandatory minimum 1-year's imprisonment served wholly in a corrective services facility.  |
| <i>Transport Operations (Road Use Management) Act 1995 (Qld): s 79(1C)</i>   | Vehicle offences involving liquor or other drugs<br><br>If there are two convictions within five years. For offences, see sections 79(1C)(a)–(f). | The court must impose imprisonment as whole or part of the punishment.  |
| <b>Mandatory Non-Parole Periods</b>  |   |   |
| <i>Criminal Code (Qld): s 305</i><br><i>Corrective Services Act 2006 (Qld): ss 181(2)(a)-(c)</i>                     | Murder  | Parole eligibility date: <ul style="list-style-type: none"> <li>• 30 years – murder of more than one person or by an offender with a previous murder conviction</li> <li>• 25 years – murder of a police officer</li> <li>• 20 years – murder other than listed above</li> </ul>  |
| <i>Penalties and Sentences Act 1992 (Qld): s 161E</i><br><i>Corrective Services Act 2006 (Qld): s 181A</i>           | Repeat serious child sex offenders<br>'Serious child sex offence' is defined in <i>Penalties and Sentences Act</i> , sch 1A                       | Parole eligibility date after 20-years' imprisonment  |
| <i>Penalties and Sentences Act 1992 (Qld): s 161R</i><br><i>Corrective Services Act 2006 (Qld): ss 181A, 181(2A)</i> | Serious organised crime offences<br>Prescribed offences are listed in <i>Penalties and Sentences Act</i> , sch 1C                                 | If sentenced to life imprisonment: <ul style="list-style-type: none"> <li>• 37 years – murder of more than one person or by an offender with a previous murder conviction</li> <li>• 32 years – murder of a police officer</li> <li>• 27 years – murder other than listed above</li> <li>• 27 years – repeat serious child sex offence</li> <li>• 22 years – otherwise</li> </ul> |
| <i>Criminal Code (Qld): s 314A(5)</i>  | Unlawful Striking Causing Death<br>If offender is sentenced to a term of imprisonment (not an ICO or suspended sentence)                          | The offender must serve 80% of the term of imprisonment or 15 years (whichever is less).<br>If sentenced to life imprisonment, see <i>Corrective Services Act 2006 (Qld): s 181(2)(d)</i> .   |
| <i>Penalties and Sentences Act 1992 (Qld): ss 161A–161B</i>  | Serious Violent Offender (SVO)<br>'Serious violent offence' is defined in <i>Penalties and Sentences Act</i> , sch 1.                             | The mandatory non-parole period is 80% of the term of imprisonment or 15 years (whichever is less).   |

| Act and section  | Offence  | Mandatory penalty  |
|--|--|--|
| <i>Corrective Services Act 2006</i> (Qld): s 182                             | <p>If convicted on indictment of an offence against sch 1 or counselling, procuring the commission of, or attempting or conspiring to commit an offence against a provisions in sch 1 and sentenced to 10 years or more — SVO declaration is mandatory.</p> <p>If sentenced to less than 10 years but more than 5 years — discretion to make an SVO declaration.</p> <p>If convicted on indictment of an offence that involved the use of, counselling or procuring the use of, or conspiring or attempting to use, serious violence against another person, or that resulted in serious harm to another person and is sentenced to a term of imprisonment for the offence — discretion to make an SVO declaration regardless of whether it is a sch 1 offence and what length of imprisonment is imposed.</p> |  |
| <b>Mandatory Minimum Penalties</b>   |  |  |
| <i>Police Powers and Responsibilities Act 2000</i> (Qld): s 754              | Evasion offence (previously Failing to Stop)   | Minimum 50 penalty units or 50 days imprisonment served wholly in a corrective services facility   |
| <b>Mandatory Community Service Orders</b>                                    |  |  |
| <i>Penalties and Sentences Act 1992</i> (Qld): ss 108A–108D                  | <p>Community service orders mandatory for particular offences</p> <p>If a prescribed offence is charged with a circumstance of aggravation that it was committed in a public place while the offender was intoxicated.</p> <p>Prescribed offences</p> <p><i>Criminal Code</i> (Qld):</p> <ul style="list-style-type: none"> <li>• s 72: Affray;</li> <li>• s 320: Grievous bodily harm;</li> <li>• s 323: Wounding;</li> <li>• s 335: Common assault;</li> <li>• s 339: Assaults occasioning bodily harm;</li> <li>• s 340(1)(b) or (2AA): Serious assaults against a police officer (1(b)) or a public officer (2AA);</li> </ul> <p><i>Penalties and Sentences Act</i>: s 790: assault or obstruct police officer</p>   | <p>Must make a community service order whether or not another order is imposed.</p> <p>If offender is sentenced to imprisonment the community service order will be deferred until release.</p> <p>Unless the court is satisfied that because of a physical, intellectual or psychiatric disability the offender is not capable of complying.</p> <p>Minimum — 40 hours</p> <p>Maximum — 240 hours</p> |
| <i>Penalties and Sentences Act 1992</i> (Qld): s 110A                        | <p>Graffiti removal order</p> <p>If convicted of a graffiti offence</p>  | <p>Must make a graffiti removal order whether or not another order is imposed.</p> <p>Unless the court is satisfied that because of a physical, intellectual or psychiatric disability the offender is not capable of complying.</p> <p>Maximum — 40 hours</p>   |
| <b>Mandatory Driving Disqualification</b>                                    |  |  |
| <i>Police Powers and Responsibilities Act 2000</i> (Qld): s 754(3)           | Evasion offence (previously Failing to Stop)   | 2-year disqualification  |
| <i>Transport Operations (Road Use Management) Act 1995</i> (Qld): ss 78, 86. | Disqualification of drivers of motor vehicles for certain offences   | Various  |

| Act and section                                       | Offence  | Mandatory penalty   |
|---|--|---|
| <b>Mandatory Parole Release or Parole Eligibility</b> |  |   |
| <i>Penalties and Sentences Act 1992 (Qld): s 160B</i> | Sentence of 3 years or less and not a serious violent offence or sexual offence  | Parole Release Date   |
| <i>Penalties and Sentences Act 1992 (Qld): s 160C</i> | Sentence of more than 3 years and not a serious violent offence or sexual offence  | Parole Eligibility Date   |
| <i>Penalties and Sentences Act 1992 (Qld): s 160D</i> | Sentence for a serious violent offence or sexual offence   | Parole Eligibility Date   |
| <b>Mandatory Cumulative Sentences</b>                 |  |   |
| <i>Bail Act 1980 (Qld): s 33(4)</i>                   | Failure to appear in accordance with undertaking   | The term of imprisonment must be served cumulatively.   |
| <i>Penalties and Sentences Act 1992 (Qld): s 156A</i> | <p>Cumulative order of imprisonment must be made in particular circumstances.</p> <p>If offender convicted of an offence against sch 1 or counselling or procuring the commission of or attempting or conspiring to commit an offence against sch 1 and:</p> <ul style="list-style-type: none"> <li>• offender is serving a term of imprisonment;</li> <li>• release on post-prison community release or parole;</li> <li>• on leave of absence; or</li> <li>• unlawfully at large.</li> </ul> | The sentence imposed must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve. |

## Appendix 5: Offending behaviour programs for community-based orders

| Program description   | Program target                         | Program duration          | Locations (Probation and Parole offices)                  | Parole criteria  | Internally or externally delivered?  |
|---|--|---------------------------|---|--|--|
| <b>Getting Started Preparatory Program (GSPP)</b>   |  |                           |   |  |  |
| A motivational program designed to assist offenders to reduce barriers and responsibility factors known to inhibit further intensive sexual offending programs.   | Sexual offending motivational program  | 24 hours (6 weeks)        | Cairns<br>Brisbane Central<br>Ipswich<br>South Coast      | Sufficient time to complete program with current sexual offence conviction   | Program Delivery Officers (PDO)  |
| <b>Medium intensity sexual offending program (MISOP)</b>  |  |                           |   |  |  |
| All sexual offending interventions are based on the Cognitive Behaviour Therapy model of interventions. Sexual offending programs target the cognitive drivers behind sexual offending while providing sexual offenders with the cognitive, emotional and behavioural skills to live an offence-free lifestyle.             | Sexual offending                       | 75–175 hours (4–6 months) | Cairns<br>Brisbane Central<br>Ipswich<br>South Coast      | Prisoners and offenders assessed as low to moderate risk of sexual reoffending. Sufficient time to complete program with current sexual offence conviction.      | PDO  |
| <b>Sexual offending maintenance program (SOMP)</b>  |  |                           |   |  |  |
| The Sexual Offending Maintenance Program is designed to build on and strengthen offenders' cognitive, emotional and behavioural skills linked with living an offence-free lifestyle.  | Sexual offending                       | 16–24 hours (12 weeks)    | Brisbane Central<br>Logan/Ipswich<br>Townsville<br>Cairns | Sufficient time to complete program with current sexual offence conviction. Completed previous sexual offending intervention. Can be referred to multiple SOMPs. | PDO  |
| <b>Turning Point preparatory program</b>  |  |                           |   |  |  |
| Turning Point is a brief 15 to 20 hour psycho-educational program designed to target offenders' responsibility issues surrounding their readiness to change. Based on cognitive behaviour change, the program uses the motivational interviewing approach to assist people to prepare for and work towards positive change. | General offending motivational program | 15–20 hours               | Multiple locations<br>Ipswich                             | Sufficient time on order. Can be used as preparation for further intensive program participation, or to increase engagement with community supervision.          | PDO  |
| <b>Positive Futures</b>   |  |                           |   |  |  |
| The Positive Futures program is a culturally sensitive 'strength-based program' targeting family violence and anger and violence, alcohol and drug abuse, power and control, jealous, trust and fear, family and community and parenting.   | Substance abuse and violence           | 32–36 hours (6–8 weeks)   | Multiple central and remote P&P locations                 | Sufficient time to complete the program.   | PDO, Cultural Liaison Officers or male facilitators from community stakeholder |

| Program description   | Program target                 | Program duration | Locations (Probation and Parole offices)                 | Parole criteria  | Internally or externally delivered?            |
|---|--------------------------------|------------------|--|--|--|
| <b>Short Substance Intervention (SSI)</b>   |                                |                  |  |  |  |
| Short Substance Intervention is an educational-based program that starts offenders on the pathway to addressing their substance abuse needs. This program does not include a written completion report and does not include a relapse prevention plan. The program is delivered by external providers.              | Substance abuse                | 8–12 hours       | Multiple P&P locations                                   | Substance abuse needs  | External providers                             |
| <b>Low Intensity Substance Intervention (LISI)</b>  |                                |                  |  |  |  |
| Low Intensity Substance Intervention is based on Cognitive Behavioural Therapy and relapse prevention approaches, providing offenders the skills to manage their substance abuse and link to further support mechanisms in the community. This program can be delivered by QCS staff or external providers.         | Substance abuse                | 16–24 hours      | Multiple P&P locations                                   | Sufficient time to complete the program. Substance abuse needs.              | PDO and external providers                     |
| <b>Substance Abuse Maintenance Intervention (SAMI)</b>  |                                |                  |  |  |  |
| A maintenance program for substance abuse offenders who have completed a substance abuse intervention and have an existing relapse prevention/safety plan. Can be run in a rolling or closed group format. Participants can cycle through this intervention on more than one occasion.                              | Substance abuse                | 30 hours         | Multiple P&P locations                                   | Completion of QCS substance abuse programs                                   | PDO and external providers                     |
| <b>Strong not Tough: Adult Resilience Program</b>   |                                |                  |  |  |  |
| The Strong Not Tough: Adult Resilience program aims to develop an individual's resilience — their ability to 'bounce back' from hardship, to cope with the negative effects of stress, to adapt in the face of challenging circumstances and the courage to embrace new opportunities.                              | Emotional coping and wellbeing | 10 hours         | Brisbane Central<br>Logan/Ipswich<br>Cairns<br>Redcliffe | Sufficient time. History of poor coping and self-harm. First-time offenders. | Psychologists<br>Counsellors<br>PDO            |
| <b>Men's Domestic Violence Education and Intervention Program</b>   |                                |                  |  |  |  |
| An intervention based on the Duluth model aimed at working with men to assist them to end their violence and increase the safety of women and their children. The model prioritises a community commitment to hold men accountable for their future use of violence, relying on an integrated response to violence. | Domestic violence              | 48 hours         | Multiple P&P locations                                   | As referred from Court   | Gold Coast DV Service co-facilitative with QCS |

| Program description   | Program target               | Program duration | Locations (Probation and Parole offices)          | Parole criteria                    | Internally or externally delivered?       |
|---|------------------------------|------------------|---|------------------------------------|---|
| <b>Mind Wise</b>  |                              |                  |   |                                    |   |
| The program is a treatment group addressing substance use. The group will consist of psychoeducational and skills-based approaches. The aims of the group will be to provide evidence-based treatment and education around substance use and offending.   | Substance abuse              | 6 hours          | Beenleigh<br>Burleigh Heads<br>Logan<br>Southport | Anyone with substance abuse issues | Mind Wise Psychology<br>Not funded by QCS |
| <b>Alcohol-fuelled Violence Program (AFVP)</b>  |                              |                  |   |                                    |   |
| AFVP is designed to target the factors associated with the occurrence of alcohol-related violence. The program provides education around the cognitive, behavioural and emotional effects of alcohol use, how individual differences can impact on an individual's response to alcohol consumption and the cultural factors that can influence attitudes towards alcohol use. | Substance abuse/<br>violence | 3 hours          | Brisbane Central                                  | 17–25 year old offenders           | Ted Noff Foundation<br>Not funded by QCS  |

## Appendix 6: Summary of relevant PSA and CSA provisions

The consequences of further offending on court ordered parole – summary of the relevant PSA and CSA provisions as discussed in several judgments:<sup>2213</sup>

### **Penalties and Sentences Act 1992 (Qld)**

Sections 160B(2) and (3):

- For a sentence of 3 years or less and not a serious violent or sexual offence, a sentencing court must fix a parole eligibility date if the offender has had a court ordered parole order<sup>2214</sup> cancelled under CSA section 205 or 209 ‘during the offender’s period of imprisonment’. Otherwise, a parole release date must be fixed.

‘Period of imprisonment’ – s 160:

- Period of imprisonment means the period of imprisonment that includes the term of imprisonment mentioned in section 160A.

Note – Period of imprisonment, therefore, includes the term of imprisonment a court is imposing at the time of sentence.

‘Period of imprisonment’ – s 4:

- Period of imprisonment means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether—  
(a) ordered to be served concurrently or cumulatively; or  
(b) imposed at the same time or different times;  
and includes a term of imprisonment.

‘Term of imprisonment’ – s 4:

- Means the duration of imprisonment imposed for a single offence and includes—  
(a) the imprisonment an offender is serving, or is liable to serve—  
(i) for default in payment of a single fine; or  
(ii) for failing to comply with a single order of a court; and  
(b) for an offender on whom a finite sentence has been imposed, any extension under section 174B(6) of the offender’s finite term.

### **Corrective Services Act 2006 (Qld)**

Section 209 – a parole order is automatically cancelled if:

- the prisoner is sentenced to another period of imprisonment;
- for an offence committed;
- in Queensland or elsewhere;
- during the period of the order; and
- even if the period of the order has expired (s 209(2); see s 215).

Section 210 – Automatic cancellation under section 209 leads to the prisoner serving the ‘unexpired portion’ (see below discussion of s 211(2) regarding the prisoner’s ‘period of imprisonment’) consequent upon the execution of a warrant.

<sup>2213</sup> This follows the order as discussed in *R v Smith* [2015] 1 Qd R 323, 325–6 [13]–[20] (Morrison JA, Muir JA and Daubney J agreeing). See also *R v Hall* [2018] 3 Qd R 628 [13]–[15] (Dalton J); *Soanes v Commissioner of Police* [2013] QDC 26, 9–15 [24]–[37] (Long SC DCJ); *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487, 4–5 [13]–[19] (Rafter SC DCJ); *R v Bond* [2009] QDC 28, 2–3 [7]–[14] (Everson DCJ).

<sup>2214</sup> This issue does not arise where the original order involved a parole eligibility date. An offender to be sentenced under s 160B who had a Board ordered parole order cancelled will fall under s 160B(2) and the court must fix a parole release date. See also *Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487, 8 [32] (Rafter SC DCJ).

Section 211 — Effect of cancellation: If cancelled due to a ground giving rise to the Parole Board's power, or because of further sentence regarding section 209 (s 211 reflects the language of s 209, but uses 'term' instead of 'period'):

(2) The time for which the prisoner was released on parole before one of the following events happens counts as time served under the prisoner's period of imprisonment—

[In respect of the Board's power — prisoner failed to comply, or order was cancelled for another s 205(1) reason]

(2)(c) the prisoner committed the offence mentioned in the context of s 209 [even, therefore, if the prisoner remained in the community and otherwise complied with their parole order and despite s 214, see below].

(3) Despite section 206(3)(b), the Parole Board may, by written order, direct that the prisoner serve only part of the unexpired portion of the prisoner's period of imprisonment [prisoner must reapply for parole].

One Supreme Court judge has noted that sections 210(3) and 211(3) of the CSA show that:

The legislative intention is that upon cancellation of a parole order the offender is to return to jail. They are to serve a period of time equal to the period between the date of the commission of the offence for which the triggering sentence is imposed, and the full-time release date on the original sentence.<sup>2215</sup>

A 2017 Australian Law Reform Commission (ALRC) report identified two different parole revocation schemes operating in Australia. Queensland's s 211(2) of the CSA fell into the first: Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), counts towards the head sentence. The ALRC criticised the second: Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), does not count towards the head sentence, and must be served again in prison upon the parolee's return. In respect of that second scheme, the ALRC recommended the abolition of parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.<sup>2216</sup>

Section 214 — A prisoner released on parole is still serving their sentence.

Section 215 — The period of imprisonment is taken to be served if the order expires without being cancelled under s 205 or 209 [but note the effect of s 209(2), which effectively nullifies this in certain circumstances].

<sup>2215</sup> *R v Hall* [2018] 3 Qd R 628 [15] (Dalton J).

<sup>2216</sup> Australian Law Reform Commission (above n 21) 303, Recommendation 9-2.

## Appendix 7: Sexual offences listed in schedule 1 of the Corrective Services Act 2006 (Qld)

| Offence   | MSO sentenced 2005–06 to 2017–18 | QASOC subgroup   | Classified as a contact offence <sup>^</sup> |
|---|----------------------------------|--|--|
| <b>Classification of Computer Games and Images Act 1995</b>         |                                  |  |  |
| s 23 Demonstration of an objectionable computer game before a minor | 0                                | Censorship offences  | No   |
| s 26 (3) Possession of objectionable computer game                  | 72                               | Child pornography offences   | No   |
| s 27 (3) Making objectionable computer game                         | 0                                | Child pornography offences   | No   |
| s 27 (4) Making objectionable computer game                         | 2                                | Child pornography offences   | No   |
| s 28 Obtaining minor for objectionable computer game                | 0                                | Child pornography offences   | No   |
| <b>Classification of Films Act 1991</b>                             |                                  |  |  |
| s 41 (3) Possession of objectionable film                           | 1                                | Child pornography offences   | No   |
| s 42 (3) Making objectionable film                                  | 0                                | Child pornography offences   | No   |
| s 42 (4) Copying objectionable film                                 | 0                                | Child pornography offences   | No   |
| s 43 Procurement of minor for objectionable film                    | 0                                | Non-assaultive sexual offences against a child   | No   |
| <b>Classification of Publications Act 1991</b>                      |                                  |  |  |
| s 12 Sale etc. of prohibited publication                            | 6                                | Censorship offences  | No   |
| s 13 Possession of prohibited publication                           | 0                                | Censorship offences  | No   |
| s 14 Possession of child abuse publication                          | 6                                | Child pornography offences   | No   |
| s 15 Exhibition or display of prohibited publication                | 0                                | Censorship offences  | No   |
| s 16 Leaving prohibited publication in or on public place           | 0                                | Censorship offences  | No   |
| s 17 Producing prohibited publication                               | 0                                | Censorship offences  | No   |
| s 18 Procurement of minor for RC publication                        | 0                                | Censorship offences  | No   |
| s 20 Leaving prohibited publication in or on private premises       | 0                                | Censorship offences  | No   |
| <b>Crimes Act 1914 (Cwlth)</b>                                      |                                  |  |  |
| s 50BA Sexual intercourse with a child under 16                     | 3                                | Indecent treatment of a child  | Yes  |
| s 50BB Inducing child under 16 to engage in sexual intercourse      | 0                                | Indecent treatment of a child  | NC   |
| s 50BC Sexual conduct involving child under 16                      | 1                                | Indecent treatment of a child  | Yes  |
| s 50BD Inducing child under 16 to engage in sexual conduct          | 0                                | Indecent treatment of a child  | NC   |
| s 50DA Benefiting from offence against this Part                    | 0                                | Aggravated sexual assault  | NC   |
| s 50DB Encouraging from offence against this Part                   | 0                                | Aggravated sexual assault  | NC   |
| <b>Criminal Code (Qld)</b>  |                                  |  |  |
| s 210 Indecent treatment of children under 16                       | 2,576                            | Indecent treatment of a child/Non-assaultive sexual offences against a child/Indecent treatment (consent proscribed)   | Yes  |
| s 211 Bestiality  | 5                                | Bestiality   | Yes  |
| s 213 Owner etc. permitting abuse of children on premises           | 5                                | Non-assaultive sexual offences against a child   | No   |
| s 215 Carnal knowledge with or of children under 16                 | 865                              | Carnal knowledge of children   | Yes  |
| s 216 Abuse of persons with an impairment of the mind               | 142                              | Indecent treatment of a child/Indecent treatment (consent proscribed)/ Aggravated sexual assault (remainder)/ Non-assaultive sexual offences, nec* (remainder) | Yes  |
| s 217 Procuring young person etc. for carnal knowledge              | 8                                | Non-assaultive sexual offences   | No   |
| s 218 Procuring sexual acts by coercion etc.                        | 10                               | Non-assaultive sexual offences, nec* (remainder)/ Administer harmful substances  | No   |

| Offence   | MSO sentenced 2005–06 to 2017–18 | QASOC subgroup  | Classified as a contact offence <sup>^</sup> |
|---|----------------------------------|---|--|
| s 218A Using internet etc. to procure children under 16   | 270                              | Non-assaultive sexual offences against a child  | No   |
| s 218B Grooming children under 16   | 47                               | Non-assaultive sexual offences against a child  | No   |
| s 219 Taking child for immoral purposes   | 5                                | Abduction   | No   |
| s 221 Conspiracy to defile  | 0                                | Aggravated sexual assault   | No   |
| s 222 Incest  | 73                               | Incest  | Yes  |
| s 228 Obscene publications and exhibitions  | 10                               | Censorship offences/Non-assaultive sexual offences against a child  | No   |
| s 228A Involving child in making child exploitation material                                      | 18                               | Non-assaultive sexual offences against a child  | Yes  |
| s 228B Making child exploitation material   | 57                               | Child pornography offences  | Yes  |
| s 228C Distributing child exploitation material   | 111                              | Child pornography offences  | No   |
| s 228D Possessing child exploitation material   | 1,045                            | Child pornography offences  | No   |
| s 228DA Administering child exploitation material website   | 0                                | Child pornography offences  | No   |
| s 228DB Encouraging use of child exploitation material website                                    | 0                                | Child pornography offences  | No   |
| s 228DC Distributing information about avoiding detection   | 0                                | Child pornography offences  | No   |
| s 229B Maintaining a sexual relationship with a child   | 643                              | Maintaining a sexual relationship with a child  | Yes  |
| s 229L Permitting young person etc. to be at place used for prostitution                          | 0                                | Permitting minors to be at place of prostitution  | No   |
| s 349 Rape  | 1,247                            | Rape/Attempted rape   | Yes  |
| s 350 Attempt to commit rape  | 57                               | Attempted rape/Non-aggravated sexual assault  | Yes  |
| s 351 Assault with intent to commit rape  | 36                               | Assault with intent to commit rape  | Yes  |
| s 352 Sexual assaults   | 1,110                            | Non-aggravated sexual assault/Aggravated sexual assault (remainder)/Non-assaultive sexual offences, nec* (remainder)/Perform an indecent act with intent/Rape | Yes  |
| <b>Criminal Code (Qld) provisions repealed by Health and Other Legislation Amendment Act 2016</b> |                                  |   |  |
| s 208 Unlawful sodomy   | 107                              | Aggravated sexual assault/Carnal knowledge of children/Aggravated sexual assault (remainder)  | Yes  |
| <b>Criminal Code (Qld) provisions repealed by Criminal Law Amendment Act 1997</b>                 |                                  |   |  |
| s 208 Unlawful anal intercourse   | 10                               | Aggravated sexual assault/Carnal knowledge of children/Aggravated sexual assault (remainder)  | Yes  |
| s 221 Conspiracy to defile  | 0                                | Aggravated sexual assault   | No   |
| s 222 Incest by man   | 4                                | Incest  | Yes  |
| <b>Criminal Code (Cwlth)</b>  |                                  |   |  |
| s 270.6 Sexual servitude offences   | 0                                | Sexual servitude offences   | NC   |
| s 270.7 Deceptive recruiting for sexual services  | 0                                | Sexual servitude offences   | NC   |
| <b>Customs Act 1901 (Cwlth)</b>   |                                  |   |  |
| s 233BAB Special offence relating to tier 2 goods   | 0                                | Import/export regulations   | No   |

Notes:

\* Nec – Not Elsewhere Classified.

<sup>^</sup> NC – Not classified as no offences were sentenced during data period.

## Appendix 8: Queensland sexual offending programs

Group-based programs remain the most proven means of addressing sexual offending, as well as addressing a range of mental health needs. The strongest evidence of effectiveness is for cognitive behavioural approaches, based on the assumption that particular ways of ‘thinking that lead to criminal conduct are learned and get reinforced by the outcomes resulting’ from those ways of thinking. Participants develop a blueprint for change and the internal mindsets to support desistance from offending.

Queensland Corrective Services currently delivers best-practice, group-based cognitive behavioural programs to address sexual offending. The programs are a mixture of high-intensity treatment, preparatory, and maintenance programs. All sexual offending programs are delivered by QCS staff.

| Program description   | Target                                     | Hours                        | Location  | Quick criteria   |
|---|--|------------------------------|---|--|
| <b>GETTING STARTED PREPARATORY PROGRAM (GSPP)</b>   |  |                              |   |  |
| A motivational program designed to provide offenders and QCS to reduce barriers and responsivity factors know to inhibit further intensive sexual offending programs.   | Sexual offending motivational program      | 24 hours<br>(6 weeks)        | Wolston<br>Townsville<br>Lotus Glen<br>Cairns<br>Brisbane Central<br>Ipswich<br>South Coast | Sufficient time to complete program with current sexual offence conviction   |
| <b>MEDIUM INTENSITY SEXUAL OFFENDING PROGRAM (MISOP)</b>  |  |                              |   |  |
| All sexual offending interventions are based on the Cognitive Behavioural Therapy Model of interventions. Sexual offending programs target the cognitive drivers behind sexual offending while providing sexual offenders with the cognitive, emotional and behavioural skills to live an offence-free lifestyle. | Sexual Offending                           | 75–175 hours<br>(4–6 months) | Wolston<br>Townsville<br>Cairns<br>Brisbane Central<br>Ipswich<br>South coast               | Prisoners and offenders assessed as low to moderate risk of sexual reoffending<br><br>Sufficient time to complete program with current sexual offence conviction |
| <b>HIGH INTENSITY SEXUAL OFFENDING PROGRAM (HISOP)</b>  |  |                              |   |  |
| Based on the same approach outlined above, this program is a high-intensity sexual offending program specifically designed for higher-risk offenders.   | Sexual Offending                           | 350 hours<br>(9–12 months)   | Wolston   | Prisoners assessed as high risk of sexual reoffending<br><br>Sufficient time to complete program with current sexual offence conviction                          |
| <b>INCLUSION SEXUAL OFFENDING PROGRAM (ISOP)</b>  |  |                              |   |  |
| The Inclusion Sexual Offending Program is an adapted program for offenders with low cognitive and/or low social/emotional abilities. Although based on a CBT model of change, the inclusion program uses techniques known to increase learning, social functioning and inhibition in this cohort.                 | Sexual Offending<br><br>Cognitive Impaired | 108 hours<br>(5 months)      | Wolston   | Assessed as requiring support to participate in a sexual offending program<br><br>Sufficient time to complete program with current sexual offence conviction     |

| Program description   | Target           | Hours                         | Location   | Quick criteria  |
|---|------------------|-------------------------------|--|---|
| <b>SEXUAL OFFENDING PROGRAM FOR INDIGENOUS MALES (SOPIM)</b>  |                  |                               |  |   |
| The Sexual Offending Program for Indigenous males is designed to meet the specific cultural needs of Aboriginal and Torres Strait Islander offenders. The basic constructs of Cognitive Behavioural Therapy exist, yet more narrative in nature targeting the cognitive, emotional and behavioural drivers behind sexual offending. | Sexual Offending | 75–350 hours<br>(3–12 months) | Lotus Glen   | Sufficient time to complete program with current sexual offence conviction  |
| <b>SEXUAL OFFENDING MAINTENANCE PROGRAM (SOMP)</b>  |                  |                               |  |   |
| The Sexual Offending Maintenance Program is designed to build on and strengthen offenders' cognitive, emotional and behavioural skills linked with living an offence-free lifestyle.  | Sexual Offending | 16–24 hours<br>(12 weeks)     | Wolston<br>Townsville<br>Lotus Glen<br>Brisbane Central<br>Logan/Ipswich<br>Townsville<br>Cairns | Sufficient time to complete program with current sexual offence conviction<br><br>Completed previous sexual offending intervention<br><br>Can be referred to multiple SOMPs |

## Glossary

|                                    |   |
|------------------------------------|---|
| <b>Actual term of imprisonment</b> | A term of imprisonment served wholly or partly in a corrective services facility.   |
| <b>Alternative sanctions</b>       | Alternative sanctions or alternative sentencing options are orders that can be used in place of actual imprisonment. They are not dependent on a term of imprisonment being imposed, but rather generally exist as sentencing orders in their own right. See also 'substitutional sanctions'.   |
| <b>Average</b>                     | The average is a measure used to determine where the centre of a distribution lies. The average is calculated by adding up all the values in a dataset and dividing the sum by the total number of values. The average is affected by outliers – extreme scores at either end of the distribution can cause the average to shift significantly. Also referred to as the mean.   |
| <b>Bail</b>                        | The release of a defendant into the community until a court decides the charge/s against them. Bail orders always include a condition that the defendant must attend court hearings. Additional conditions, such as a requirement to reside at a certain address or report to police, may be added to a person's bail.  |
| <b>Board ordered parole</b>        | Where a person has a parole eligibility date (either fixed by a court or by legislation) the person must apply to the Parole Board for release onto a parole order. The Parole Board then decides if the person is released on parole and on what conditions. Board ordered parole is the only form of early release from prison for offenders sentenced to imprisonment for greater than 3 years, and for sexual offences and serious violent offences for prison sentences of any length. |
| <b>Case law</b>                    | Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as common law.   |
| <b>Common law</b>                  | Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as case law.   |
| <b>Community-based order</b>       | In Queensland, any community service order, graffiti removal order, intensive correction order or probation order.  |
| <b>Community correction order</b>  | A flexible non-custodial sentencing order served in the community with conditions including supervision, community service, and program conditions.   |
| <b>Community service order</b>     | An order to do unpaid community service for between 40 and 240 hours, usually within 12 months, and to comply with reporting and other conditions, with or without a conviction being recorded.   |
| <b>Concurrent sentences</b>        | Individual sentences ordered for each offence in a case that are to be served at the same time. This means the shortest sentence is subsumed into the longest sentence (also called the 'head sentence'). For example, prison sentences of 5 years and 2 years served concurrently would be a total of 5 years' imprisonment.   |
| <b>Conviction</b>                  | A determination of guilt made by a court.   |
| <b>Court of Appeal</b>             | A division of the Supreme Court. The Court of Appeal hears appeals against conviction, sentence or both. It usually comprises three judges.   |
| <b>Court ordered parole</b>        | A parole order where the parole release date is fixed by the court (meaning the offender is automatically released on that date). The court must fix a date for the offender to be released on parole if the offender has a sentence of 3 years or less and the sentence is not for a sexual offence or serious violent offence (with some legislated exceptions).  |
| <b>Crown</b>                       | The prosecution may be referred to as the Crown. The Crown refers to the Queensland Government representing the community of Queensland.  |

|  |   |   |   |   |   |    |    |    |    |    |    |    |
|--|---|---|---|---|---|----|----|----|----|----|----|----|
| Cumulative sentences                         | Individual sentences for each offence are served one after the other. For example, a person sentenced to 5 years for one offence and to 2 years for another and ordered to be served cumulatively would have to serve a total of 7 years' imprisonment.   |   |   |   |   |    |    |    |    |    |    |    |
| Custodial sentencing order                   | A sentencing order that involves a term of imprisonment being imposed.  |   |   |   |   |    |    |    |    |    |    |    |
| Defendant                                    | A person who has been charged with an offence but who has not yet been found guilty or not guilty. Can be used interchangeably with accused.  |   |   |   |   |    |    |    |    |    |    |    |
| Denunciation                                 | Communication of society's disapproval of an offender's criminal conduct.   |   |   |   |   |    |    |    |    |    |    |    |
| Deterrence                                   | Discouraging offenders and potential offenders from committing a crime by the threat of a punishment or by someone experiencing a punishment. One of the five statutory sentencing purposes in Queensland.  |   |   |   |   |    |    |    |    |    |    |    |
| Full-time custody                            | Imprisonment served wholly in custody, without release on parole or suspension after a portion of it is served.   |   |   |   |   |    |    |    |    |    |    |    |
| Full-time discharge date                     | The date on which the head sentence is due to expire.   |   |   |   |   |    |    |    |    |    |    |    |
| Head sentence — imprisonment                 | The total period of imprisonment imposed. A person will usually be released on parole or a suspended sentence before the entire head sentence is served.  |   |   |   |   |    |    |    |    |    |    |    |
| Instinctive synthesis                        | Sentencing by taking account of all relevant factors, balancing different and conflicting features, to arrive at a single result that takes due account of them all.  |   |   |   |   |    |    |    |    |    |    |    |
| Intensive correction order                   | A sentence of imprisonment (custodial sentence) served by way of intensive correction in the community.   |   |   |   |   |    |    |    |    |    |    |    |
| Median                                       | <div><p>The median is a measure used to determine where the centre of a distribution lies. The median is the middle value (or the half-way point) of an ordered dataset. Half of the values lie above the median, and half below. The advantage of using the median is that, compared to the mean, it is relatively unaffected by extreme scores at either end of the distribution.</p><table><tr><td>1</td><td>2</td><td>3</td><td>6</td><td>7</td><td>8</td><td>10</td><td>11</td><td>12</td><td>14</td><td>20</td></tr></table><p>Median</p></div> | 1 | 2 | 3 | 6 | 7  | 8  | 10 | 11 | 12 | 14 | 20 |
| 1  | 2   | 3 | 6 | 7 | 8 | 10 | 11 | 12 | 14 | 20 |    |    |
| Minimum time served in prison before release | The minimum time an offender must serve in prison before being eligible to apply for release on parole or, in the case of a person sentenced to imprisonment with a parole release date or a partially suspended sentence, the total time that must be served before their automatic release date.  |   |   |   |   |    |    |    |    |    |    |    |
| Most serious offence (MSO)                   | For this report, the MSO refers to an offender's most serious offence at a court event. It is the offence receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics (ABS). An offender records one MSO per court event.  |   |   |   |   |    |    |    |    |    |    |    |
| Moynihan reforms                             | Reforms arising from a report by Martin Moynihan that resulted in an expansion of the Magistrates Courts jurisdiction and increased the District Court's general criminal jurisdiction.   |   |   |   |   |    |    |    |    |    |    |    |
| Non-parole period                            | The time an offender serves in prison before being released on parole or becoming eligible to apply for release on parole.  |   |   |   |   |    |    |    |    |    |    |    |
| Offender                                     | A person who has been found guilty of an offence or who has pleaded guilty to an offence.   |   |   |   |   |    |    |    |    |    |    |    |

|   |  |
|---|--|
| <b>Office of the Director of Public Prosecutions</b>  | The Office of the Director of Public Prosecutions (ODPP) represents the State of Queensland in criminal cases. Also referred to as the prosecution.  |
| <b>Operational period (suspended sentence)</b>        | The period (up to 5 years) during which an offender who is subject to a suspended sentence must not commit a new offence punishable by imprisonment in order to avoid the risk of having to serve the suspended term of imprisonment in prison.  |
| <b>Parity (principle of parity)</b>                   | Consistency between sentencing decisions involving co-offenders, which supports the principle of equality before the law.  |
| <b>Parole</b>   | The conditional release of a person from prison. When a person is released on parole, they serve the unexpired portion of their prison sentence in the community under supervision.  |
| <b>Parole eligibility date</b>                        | The earliest date on which a prisoner may apply for release on parole.   |
| <b>Parole release date</b>                            | The date on which a prisoner must be released on parole. A court can only set a parole release date if certain criteria are met. A parole release date cannot be set in certain circumstances, including if the sentence is greater than 3 years or if the person is being sentenced for a serious violent offence or a sexual offence.  |
| <b>Partially suspended sentence</b>                   | Imprisonment of up to 5 years, with some actual prison time followed by release from prison with the remaining period of imprisonment suspended for a set period (called an 'operational period'). If the offender commits a further offence punishable by imprisonment during the operational period, they must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence.   |
| <b>Plea</b>   | The response by the accused to a criminal charge — 'guilty' or 'not guilty'.   |
| <b>Precedent</b>                                      | A sentencing decision that sets down a legal principle to be followed in similar cases in the future.  |
| <b>Pre-sentence report</b>                            | A pre-sentence report (PSR) is a document prepared for a court, normally at the court's request, with a view to providing information about an offender and to assist the court in determining the most appropriate manner in which to deal with an offender.  |
| <b>Probation</b>                                      | An order between 6 months and 3 years with or without a conviction being recorded served in the community with monitoring and supervision by an authorised corrective services officer. The person must agree to the order being made and to comply with the requirements of the order. When making a probation order, the court must set mandatory requirements, such as reporting to and receiving visits from an authorised corrective services officer, and can also make additional requirements. Probation can also be combined with a term of imprisonment of up to 12 months, in which case a conviction must be recorded and the minimum term of the order is 9 months. |
| <b>Proportionality (principle of proportionality)</b> | A sentence must be appropriate or proportionate to the seriousness of the crime.   |
| <b>Prosecution</b>                                    | A legal proceeding by the State of Queensland against an accused person for a criminal offence. Prosecutions are brought by the Crown (through the ODPP or police prosecutors).  |
| <b>Recognisance/recognizance</b>                      | These mean the same thing — recognisance orders, also sometimes referred to as 'good behaviour bonds', are 'recognizance orders' in the Commonwealth legislation. It is a promise made by an offender to appear in court, pay a certain amount of money, keep the peace and be of good behaviour for a specified period.   |

|  |   |
|--|---|
| <b>Remand</b>  | To place an accused person in custody awaiting further court hearings dealing with the charges against them. A person who has been denied bail, or not sought it, will be placed on remand. This is also known as 'pre-sentence custody'.   |
| <b>Sentence</b>  | The penalty the court imposes on an offender.   |
| <b>Sentencing principles</b>   | Principles developed under the common law, which serve as guideposts to assist judges and magistrates to reach a decision concerning the most appropriate sentence to impose. They include parity, parsimony, proportionality, totality, and the De Simoni principle.   |
| <b>Sentencing purposes</b>   | The legislated purposes for which a sentence may be imposed. In Queensland there are five sentencing purposes for the sentencing of adults: punishment, deterrence, rehabilitation, denunciation, and community protection.   |
| <b>Serious violent offence</b>   | If a court convicts a person of an offence declared to be a serious violent offence, the offender is unable to apply for parole until they have served 80 per cent of their sentence or 15 years in prison, whichever is less. A number of offences are identified in legislation as being 'serious violent offences', such as violent offences (including manslaughter but not murder) and child sexual offences.                            |
| <b>Significance/significant/<br/>statistically significant/<br/>statistical significance</b> | These terms are used in relation to research findings in this report. Statistical significance is the likelihood that a relationship or difference between variables or groups is not caused by chance.   |
| <b>Substitutional sanctions</b>  | Substitutional sanctions empower a court, on imposing a term of imprisonment, to alter the form of imprisonment (such as ordering it to be served by way of intensive correction in the community under an intensive correction order) or to order that the sentence not be served unless the person fails to comply with the conditions of the order (such as suspended sentences). See also 'alternative sanctions'.                        |
| <b>Supreme Court</b>   | The highest state court in Queensland. It comprises the trial division and the Court of Appeal. All trials and sentencing hearings for murder and manslaughter take place in the Supreme Court trial division.  |
| <b>Suspended sentence</b>  | A sentence of imprisonment of 5 years or less suspended in whole (called a 'wholly suspended sentence') or in part (called a 'partially suspended sentence') for a period (called an 'operational period'). If further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence. |
| <b>Totality (principle of totality)</b>  | When an offender is convicted of more than one offence, the total sentence must be just and appropriate to the offender's overall criminal behaviour.   |
| <b>Wholly suspended sentence</b>   | A sentence of imprisonment of up to 5 years but with no actual time served in prison as part of the sentence, unless the person commits a further offence during the operational period. If further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended (unless unjust to do so), plus any other penalties issued for the new offence.                              |

## Bibliography

- ACT Government, Justice and Community Safety Directorate, *Annual Report 2017–18* (2018)
- ACT Government, *Justice Reform Strategy – Second Stage Report* (2016)
- ACT Law Reform Advisory Council (LRAC), *A Report on Suspended Sentences in the ACT* (Report No. 1, October 2010)
- ACT Standing Committee on Justice and Community Safety, *Inquiry into Sentencing* (Report No. 4, 2015)
- Antolak-Saper, Natalie, 'The Relevance of Bail Conditions to the Sentencing of Offenders (2017) 19 *Flinders Law Journal* 89
- Anthony, Thalia, Lorna Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39 *Melbourne University Law Review* 74
- Aos, Steve, Marna Miller and Elizabeth Drake, 'Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates Individual State Developments' (2006) 19 *Federal Sentencing Reporter* 275
- Ares, Charles E, Anne Rankin and Herbert Sturz, 'The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole' (1963) 38 *New York University Law Review* 67
- Attorney-General and Minister for Justice (Queensland), Yvette D'Ath, 'Budget Rules in Favour of Justice for All Queenslanders' (Media Statement, 11 June 2019)
- Auditor-General (Victoria), *Managing Community Correction Orders* (2017)
- Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (3<sup>rd</sup> ed, 2011)
- Australian Bureau of Statistics, *Criminal Courts, Australia, 2012–13* (Catalogue No. 4513.0, 27 March 2014)
- Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18* (Catalogue No. 4513.0, 28 February 2019)
- Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2019* (Catalogue No. 4512.0, 6 June 2019)
- Australian Bureau of Statistics, *Recorded Crime – Offenders 2017–18* (Catalogue No. 4519.0, 15 March 2019)
- Australian Bureau of Statistics, *Regional Population Growth, Australia, 2017–18* (Catalogue No. 3218.0, 27 March 2019)
- Australian Bureau of Statistics, *Prisoners in Australia 2018* (Catalogue No. 4517.0, 6 December 2018)
- Australian Capital Territory, *Justice Reform Strategy – Second Stage Report* (2016)
- Australian Capital Territory, Justice and Community Safety and Directorate, *Annual Report 2017–18* (2018) 91
- Australian Capital Territory, Legislative Assembly for the Australian Capital Territory, *Government Response to the Standing Committee on Justice and Community Safety's Report on the Inquiry Into Sentencing* (2016)
- Australian Capital Territory Standing Committee on Justice and Community Safety, *Inquiry Into Sentencing Report Number 4* (2015)
- Australian Government, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016)
- Australian Government, Productivity Commission, *Report on Government Services 2011* (2011)
- Australian Government, Productivity Commission, *Report on Government Services 2018* (2018)
- Australian Government, Productivity Commission, *Report on Government Services 2019* (2019)

- Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (2019)
- Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No. 133, 2017)
- Australian Law Reform Commission, *Same Crime: Same Time: Sentencing of Federal Offenders Report* (Report No. 103, 2006)
- Bartels, Lorana, 'Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania' (2009) 21 *Current Issues in Criminal Justice* 219
- Bartels, Lorana, *Literature Review on Intensive Supervision Orders – A Report Prepared for the ACT Justice and Community Safety Directorate* (University of Canberra, 2014)
- Bessant, Judith, 'Australia's Mandatory Sentencing Laws, Ethnicity and Human Rights' (2001) 8 *International Journal on Minority & Group Rights* 369
- Bond, Christine, Robyn Holder, Samantha Jeffries and Chris Fleming, *Evaluation of the Specialist Domestic and Family Violence Court Trial in Southport: Final Report* (Griffith Criminology Institute, 2017)
- Cale, Jesse, Fiona Hilferty, Lise Lafferty, Fred Zmudzki and Kylie Valentine, *Evaluation of Home Detention in South Australia: Research Report 1 (Baseline Analysis)* (Prepared for Department of Correctional Services, South Australia, 2017)
- Carr, Nicola and Niamh Maguire, 'Pre-sentence Reports and Individualised Justice: Consistency, Temporality and Contingency' (2017) 14 *Irish Probation Journal* 52
- Caxton Legal Centre Inc, Submission No. 47 to Australian Law Reform Commission, Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, 4 September 2017
- Colvin, Eric, 'Sentencing Principles in the High Court and PSA' (2003) 3 *Queensland University of Technology Law and Justice Journal* 86
- Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (2018)
- Connell, Darragh K, 'Serving the Community: Lessons from the UK Experience of Community Orders' (2013) 12 *Hibernian Law Journal* 27
- Corrective Services Ministers' Conference and Conference of Correctional Administrators, Standard Guidelines for Corrections in Australia (Revised 2012) 'Standard Guidelines for Community Corrections'
- Crime and Misconduct Commission, *An Alternative to Pursuit – A Review of the Evade Police Provisions* (2011)
- Department of Justice and Regulation (Victoria), *Annual Report 2017–18* (2018)
- Department of the Premier and Cabinet, *Criminal Justice Evaluation Framework: Guidelines for Evaluation Criminal Justice Initiatives* (undated), Queensland Government
- Didwania, Stephanie Holmes, *The Immediate Consequences of Federal Pretrial Detention* (2019)
- District Court of Queensland, *Practice Direction No. 3 of 2002 – Disposal of Charges of Summary Offences, Sections 651 and 652 Criminal Code*, 12 September 2002
- District Court of Queensland, *Practice Direction No. 5 of 2016 – Appeals*, 20 May 2016
- Dobbie, Will, Jacob Goldin and Crystal S. Yang, 'The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges' (2018) 108(2) *American Economic Review* 201
- Doob, Anthony N and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2/3) *Osgoode Hall Law Journal* 287
- Drake, Elizabeth, Steve Aos and Marna Miller, 'Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State' (2009) 4 *Victims and Offenders* 170

- Du Mont, Sophie and Harvey Redgrave, *Where Did It All Go Wrong? A Study into the Use of Community Sentences in England and Wales* (Crest Advisory, 2017)
- Evans, Jeff and Chuck Schaefer, *Ten Tasks of Change: Demystifying Changing Organisations* (Jossey-Bass/Pfeiffer, 2001)
- Freiberg, Arie, *Pathways to Justice Sentencing Review 2002* (Victoria, Department of Justice, 2002)
- Freiberg, Arie, Jason Payne, Karen Gelb, Anthony Morgan, Toni Makkai, *Queensland Drug and Specialist Courts Review: Final Report* (Court Services Queensland, 2016)
- Freiberg, Arie, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014)
- Freiberg, Arie and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (1999)
- Galouzis, Jennifer and Simon Corben, 'Judicial outcomes of Remand Inmates in New South Wales' (2016) *Research Bulletin No. 34*
- Galloway, Kate and Allan Ardill, 'Queensland: A Return to the Moonlight State' (2014) 39 *Alternative Law Journal* 3
- Gelb, Karen, Nigel Stobbs and Russell Hogg, *Community Based Sentencing Orders and Parole: Literature Review* (QUT for Queensland Sentencing Advisory Council, 2019)
- Gill, Charlotte E, Jordan Hyatt, & Lawrence W Sherman, *Probation Intensity Effects on Probationers' Criminal Conduct* (Campbell Systematic Reviews, 2009)
- Gill, Charlotte E, 'The Effects of Sanction Intensity on Criminal Conduct: A Randomized Low-intensity Probation Experiment' (2010), Degree of Doctor of Philosophy thesis, University of Pennsylvania
- Gobeil, Renée, Kelley Blanchette and Lynn Stewart, 'A Meta-Analytic Review of Correctional Interventions for Women Offenders: Gender-Neutral Versus Gender-Informed Approaches' (2016) 43(3) *Criminal Justice and Behavior* 301
- Gray, Anthony, 'Mandatory Sentencing Around the World and the Need for Reform' (2017) 20(3) *New Criminal Law Review* 391
- Great Britain Home Office, *Justice for All — A White Paper on the Criminal Justice System* (The Stationary Office, 2002)
- Halliday, John, Cecilia French and Christina Goodwin, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001)
- Heaton, Paul, Sandra Mayson and Megan Stevenson, 'The Downstream Consequences of Misdemeanor Pretrial Detention' (2017) 69(3) *Stanford Law Review* 711
- Henning, Terese, 'Hidden Factors in the Assessment of Offenders for Community Service Orders in Tasmania' 8(3) *Current Issues in Criminal Justice* 287
- Hepburn, John and Marie Griffin, *An Analysis of Risk Factors Contributing to the Recidivism of Sex Offenders on Probation* (US Department of Justice, 2004)
- House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015)
- Hutton, Neil, 'Articulating the Custody Threshold?' (2019) 82 *Law and Contemporary Problems* 1
- Hyatt, Jordon M and Geoffrey C Barnes, 'An Experimental Evaluation of the Impact of Intensive Supervision on the Recidivism of High-risk Probationers' (2014) 63(1) *Crime and Delinquency* 3
- Irwin-Rogers, Keir and Julian V Roberts, 'Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017' (2019) 82 *Law and Contemporary Problems* 137
- Johnson, Guy, Rosanna Scutella, Yi-Peng Tseng and Gavin Wood, *Entries and Exits from Homelessness: A Dynamic Analysis of the Relationship Between Structural Conditions and Individual Characteristics* (AHURI Final Report No. 248, Australian Housing and Urban Research Institute Limited, Melbourne, 2015)

Jones, Clarke R, *Obstacles to Parole and Community-Based Sentencing Alternatives for Aboriginal and Torres Strait Islander Offenders* (Report for the Australasian Institute of Judicial Administration, 2019)

Judicial College of Victoria, *Overview of Sentencing Amendment (Community Correction Reform) Act 2011* (no date)

<[http://www.judicialcollege.vic.edu.au/sites/default/files/Overview%20of%20Sentencing%20Amendment\\_150407\\_la.pdf](http://www.judicialcollege.vic.edu.au/sites/default/files/Overview%20of%20Sentencing%20Amendment_150407_la.pdf)>

Judicial Commission of NSW, *Sentencing Bench Book* (last updated September 2018)

Krasnostein, Sarah and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265

Law Commission (England and Wales), *The Sentencing Code: Summary of Report* (2018)

Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014)

Law Council of Australia, *The Justice Project Final Report – Part 2* (2018)

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

Legal Affairs and Community Safety Committee, Parliament of Queensland, *Review of the Auditor-General's Report to Parliament 13: 2012–13, Drink Safe Precincts Trial* (Report No. 38, 2013)

Legislative Assembly – 5 November 1992 151 Hon D M Wells. See also Hansard – 6 August 1992 – Hon D M Wells 6303 Second Reading

Legislative Assembly for the ACT, *Government Response to the Standing Committee on Justice and Community Safety's Report on the Inquiry into Sentencing* (2016)

Lewin, Kurt, 'Frontiers in Group Dynamics: Concept, Method and Reality in Social Science: Social Equilibria and Social Change' (1947) 1(1) *Human Relations* 5

Lowenkamp, Christopher T. and Edward J. Latessa, 'Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders' (2004) *Topics in Community Corrections – 2004*

Lowenkamp, Christopher T, Marie VanNostrand and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013)

McInnis, Lia and Craig Jones, 'Trends in the Use of Suspended Sentences in NSW' (Bureau Brief Issues Paper No. 47, NSW Bureau of Crime Statistics and Research, 2010)

Magistrates Courts of Queensland, *Annual Report 2017–18* (2018)

Magistrates Courts of Queensland, *Practice Direction No. 1 of 2016 (Amended) – Queensland Magistrates Early Referral into Treatment (QMERIT) Program*, 27 January 2016 (amended 19 March 2018)

Magistrates Courts of Queensland, *Practice Direction No. 2 of 2016 (Amended) – Queensland Murri Court*, 13 April 2016 (amended 16 May 2017)

Magistrates Courts of Queensland, *Practice Direction No. 8 of 2017 – Court Link*, 29 November 2017

Mair, George and Helen Mills, *The Community Order and the Suspended Sentence Order Three Years On: The Views and Experiences of Probation Officers and Offenders* (Centre for Crime and Justice Studies, 2009)

Mayor's Office for Policing and Crime (UK), *Alcohol Abstinence Monitoring Requirement Toolkit* (Version 2, 2014)

Menéndez, Patricia and Don Weatherburn, 'The Effect of Suspended Sentences on Imprisonment' (Bureau Brief Issues Paper No. 97, NSW Bureau of Crime Statistics and Research, 2014)

Minister for Corrections (Victoria), Gayle Tierney, 'Stronger Community Corrections System to Keep Victorians Safe' (Media Release, 16 January 2017)

Minister for Police and Corrective Services (Queensland), Mark Ryan, Media Release, 'Queensland Government Invests in Jobs and Part of Criminal Justice Reform', 11 June 2019.

- Morgan, Neil, 'Mandatory Sentences in Australia: Where Have We Been and Where are We Going?' (2000) 24 *Criminal Law Journal* 164
- Morgan, Neil, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141
- Moynihan, Martin, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2009)
- National Association of Drug Courts Professionals, *Adult Drug Court Best Practice Standards: Volume 1* (2018 rev)
- National Association of Drug Courts Professionals, *Principles of Evidence-Based Sentencing and Other Court Dispositions for Substance Abusing Individuals* (no date) < <https://www.dwicourts.org/wp-content/uploads/NADCP%20Principles%20of%20Evidence-Based%20Sentencing.pdf>>
- National Commission of Audit, *Towards Responsible Government: The Report of the National Commission of Audit, Phase Two* (Commonwealth of Australia, 2014)
- Norman, Michael and Robert Wadman, 'Utah Presentence Investigation Reports: User Group Perceptions of Quality and Effectiveness' (2000) 64(1) *Federal Probation* 7
- NSW Council of Social Services, *Submission No. 45 to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017)
- NSW Law Reform Commission, *Parole Question Paper 1: The Design and Objectives of the Parole System* (2013)
- NSW Law Reform Commission, *Parole* (Report No. 142, 2015)
- NSW Law Reform Commission, *Sentencing* (Report No. 139, 2013)
- NSW Government, New South Wales Sentencing Council, *2016 Annual Report – Sentencing Trends and Practices*
- NSW Sentencing Council, *Intensive Correction Orders: Statutory Review Report* (2016)
- NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2017* (2018)
- NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2016* (2017)
- NSW Sentencing Council, *Suspended Sentences: A Background Report by the NSW Sentencing Council* (2011)
- Office of the Director of Public Prosecutions, *Director's Guidelines* (as at 30 June 2018) (2018)
- Olson, David and Arthur Lurigio, 'Predicting Probation Outcomes: Factors Associated with Probation Rearrest, Revocations, and Technical Violations during Supervision' (2000) 2(1) *Justice Research and Policy* 73
- Ottone, Sarah and Christine Scott-Hayward, 'Pretrial Detention and the Decision to Impose Bail in Southern California' (2018) 19(2) *Criminology, Criminal Justice, Law & Society* 24
- Pease, Ken, 'Community Service Orders' (1985) 6 *Crime and Justice: An Annual Review of Research* 51
- Phillips, Mary T, *A Decade of Bail Research in New York City* (NYC Criminal Justice Agency Inc., 2012)
- Poletti, Patricia and Sumitra Vignaendra, 'Trends in the Use of s 12 Suspended Sentences' (Sentencing Trends & Issues No. 34, Judicial Commission of NSW, 2005)
- Prosci, 'The Prosci ADKAR Model', *Prosci* (Web Page) <<https://www.prosci.com/adkar>>
- Queensland Audit Office, *Criminal Justice System – Prison Sentences* (Report 4: 2016–17, State of Queensland, 2016)
- Queensland Audit Office, *Criminal Justice System – Reliability and Integration of Data* (Report 14: 2016–17, State of Queensland, 2017)
- Queensland Audit Office, *Drink Safe Precincts Trial* (Report to Parliament 13: 2012–13, State of Queensland, 2013)

- Queensland Commission of Audit, *Final Report* (2013)
- Queensland Corrective Services, *Court Ordered Parole in Queensland* (Research Paper No. 4, June 2013)
- Queensland Corrective Services, Submission No. 27 to Queensland Crime and Corruption Commission, *Taskforce Flaxton – An Examination of Corruption Risks in Corrective Services Facilities*, 20 April 2018
- Queensland Corrective Services, *Annual Report: 2017–18* (2018)
- Queensland Government, *Response to Queensland Parole System Review Recommendations* (2016)
- Queensland Government, *Safe Night Out Strategy* (June 2014)
- Queensland Government, *Queensland Budget 2019–20: Budget Measures – Budget Paper No. 4* (2019)
- Queensland Government, Department of Corrective Services, *Legislation Review – Corrective Services Act 2000, Community Based Release: Consultation Paper* (2005)
- Queensland Government, Department of the Premier and Cabinet, *Queensland Legislation Handbook* (2014)
- Queensland Government, Office of Economic and Statistical Research, *Australian Standard Offence Classification (Queensland Extension) (QASOC)* (2008)
- Queensland Government, Queensland Treasury and Trade, *Queensland Government Program Evaluation Guidelines* (2014)
- Queensland Government Statistician's Office, *Factors Associated with the Outcome of Community Based Orders* (2019, in press)
- Queensland Law Society, *Mandatory Sentencing Laws Policy Position*, 4 April 2014
- Queensland Organised Crime Commission of Inquiry, *Final Report* (2015)
- Queensland Parole System Review, *Queensland Parole System Review: Final Report* (2016)
- Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Summary Report* (2019)
- Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Draft Report* (2019)
- Queensland Productivity Commission, *Service Delivery in Remote and Discrete Aboriginal and Torres Strait Islander Communities: Final Report* (2018)
- Queensland Sentencing Advisory Council, *Annual Report 2017–18* (2018)
- Queensland Sentencing Advisory Council, *Classification of Child Exploitation Material for Sentencing Purposes – Final Report* (2017)
- Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child – Final Report* (2018)
- Queensland, Taskforce on Organised Crime Legislation, *Report of the Taskforce on Organised Crime Legislation* (2016)
- Rahman, Sarah, 'The marginal effect of bail decisions on imprisonment, failure to appear and crime' (Crime and Justice Bulletin No. 224. NSW Bureau of Crime Statistics and Research, 2019)
- Roberts Julian V and Lyndon Harris, 'Reconceptualising the Custody Threshold in England and Wales' (2017) 28 *Criminal Law Forum* 477
- Robertson, John and Geraldine Mackenzie, Thomson Reuters, *Queensland Sentencing Manual* (at 15 February 2016)
- Rogers, Keir Irwin and Julian V Roberts, 'Swimming Against the Tide: The Suspended Sentence Order in England and Wales 2000-2017' (2019) 82 *Law and Contemporary Problems*
- Roth, Kendra, 'Judicial Sentencing for Sexual Assault: Why Mandatory Minimum Penalties Are Not the Answer' (2017) *The Liberty Lawyer* 10

- Ryan, Mark MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, Ministerial Guidelines to Parole Board Queensland, 3 July 2017
- Sacks, Meghan and Alissa R Ackerman, 'Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment' (2014) 25(1) *Criminal Justice Policy Review* 59
- Schulenberg, Jennifer L and Sam Houston, 'Predicting Noncompliant Behavior: Disparities in the Social Locations of Male and Female Probationers' (2007) 9(1) *Justice Research and Policy* 25
- Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016)
- Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*, 2016
- Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, 2013
- Sentencing Advisory Council (Victoria), *Community Correction Orders Monitoring Report* (2014)
- Sentencing Advisory Council (Victoria), *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)* (2015)
- Sentencing Advisory Council (Victoria), *Community Correction Orders Third Monitoring Report (Post-Guideline Judgment)* (2016)
- Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders* (2017)
- Sentencing Advisory Council (Victoria), *Sentencing Outcomes in the Higher Courts* (2018)
- Sentencing Advisory Council (Victoria), *Sentencing Outcomes in the Magistrates' Court* (2018)
- Sentencing Advisory Council (Victoria), *Serious Offending by People Serving a Community Correction Order: 2016–17* (2018)
- Sentencing Advisory Council (Victoria), *Serious Offending by People Serving a Community Correction Order: 2017–18* (2019)
- Sentencing Advisory Council (Victoria), *Suspended Sentences – Interim Report* (2005)
- Sentencing Advisory Council (Victoria), *Suspended Sentences and Intermediate Sentencing Orders Final Report Part 1* (2006)
- Sentencing Advisory Council (Victoria), *Suspended Sentences and Intermediate Sentencing Orders, Final Report Part 2* (2008)
- Sentencing Advisory Council (Victoria), *Suspended Sentences and Intermediate Sentencing Orders – Suspended Sentences Final Report – Part 2* (2008)
- Sentencing Advisory Council (Victoria), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Report* (2017)
- Sentencing Advisory Council (Tasmania), *Phasing Out of Suspended Sentences* (Final Report No. 6, 2016)
- Sentencing Advisory Council (Tasmania), *Phasing Out of Suspended Sentences: Background Paper* (2015)
- Sentencing Advisory Council (Tasmania), *Mandatory Treatment for Sex Offenders* (Research Paper No. 1, 2016)
- Sentencing Guidelines Council for England and Wales, *New Sentences: Criminal Justice Act 2003 – Guideline* (2004)
- Sentencing Taskforce, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (VGPO, 1989)
- Shaw, Danny, 'Why Are the Numbers of Community Sentences Falling?', *BBC News* (online, 16 January 2018) < <https://www.bbc.com/news/uk-42664042> >

- Smallbone, Stephen and Meredith McHugh, *Outcomes of Queensland Corrective Services Sexual Offender Treatment Programs* (2010)
- Solonec, Tammy, “‘Tough on Crime’: Discrimination by Another Name — the Legacy of Mandatory Sentencing in Western Australia” (2015) 8 *Indigenous Law Bulletin* 7
- Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015)
- Spencer, Pauline, ‘From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream’ (2014) 39(4) *Alternative Law Journal* 222
- Stevenson, Mega T, ‘Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes’ (2018) 34(4) *The Journal of Law, Economics, and Organisation* 511
- Supreme Court Library of Queensland, *Queensland Sentencing Information System: User Guide* (no date)
- Supreme Court of Queensland, *Practice Direction No. 1 of 2001— Disposal of Charges of Summary Offences Section 651 and Section 652 Criminal Code*, 23 February 2001
- Tata, Cyrus, ‘How Can Prison Sentencing be Reduced in Scotland?’ (2016) 4(1) *Scottish Justice Matters* 23
- Tata, Cyrus, Nicola Burns, Simon Halliday, Neil Hutton and Fergus McNeill, ‘Assisting and Advising the Sentencing Decision Process: The Pursuit of ‘Quality’ in Pre-Sentence Reports’ (2008), 48 *British Journal of Criminology* 835
- Thomas, David A, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann Educational – Cambridge Studies in Criminology, 2<sup>nd</sup> ed, 1979)
- Tonry, Michael, ‘The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings’ (2009) 38 *Crime and Justice* 65
- Turner, Nick, ‘Suspended Sentences in Victoria: A Statistical Profile’ (Sentencing Advisory Council, Victoria, 2007)
- United Kingdom Ministry of Justice, *2013 Compendium of Re-Offending Statistics and Analysis* (2013)
- United Kingdom Ministry of Justice, *Re-offending by Offenders on Community Orders* (2015)
- United Kingdom Ministry of Justice, *Criminal Justice Statistics — Quarterly update: the Year Ending June 2018* (2018)
- United Kingdom Ministry of Justice, *Proven Reoffending Statistics Quarterly Bulletin, April 2017 to June 2017* (2019)
- United Kingdom Ministry of Justice, *Offender Management Statistics Bulletin, England and Wales, Quarterly data July to September 2018* (2019)
- University of Leicester, *Measures of Variability: The Range, Inter-Quartile Range and Standard Deviation* (2009)
- van Wingerden, Sigrid, Johan van Wilsem and Martin Moerings, ‘Pre-sentence Reports and Punishment: A Quasi-Experiment Assessing the Effects of Risk-Based Pre-sentence Reports on Sentencing’ 11(6) *European Journal of Criminology* 723
- Victorian Alcohol and Drug Association, Submission No. 92 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, March 2013
- Victorian Auditor-General, *Managing Community Correction Orders: Victorian Auditor-General’s Report* (2017)
- Victorian Government, *Victorian Budget 18/19, Budget Paper 3 — Service Delivery* (2018)
- Victorian Government, *Victorian Budget 19/20, Budget Paper 3 — Service Delivery* (2019)
- von Hirsh, Andrew, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009)

Walsh, Tamara, 'Defendants' and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93

Walsh, Tamara, Submission No. 51 to the Australian Law Reform Commission, *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (2017)

Warner, Kate, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002)

Warner, Kate, Julie Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, *Public Judgement on Sentencing: Final results of the Tasmania Jury Study* (Trends and Issues in Crime and Criminal Justice No. 407, Australian Institute of Criminology, 2011)

Weatherburn, Don, 'Rack 'em, Pack 'em and Stack 'em: Decarceration in the Age of Zero Tolerance' (2016) 28(2) *Current Issues in Criminal Justice* 137

Weatherburn, Don and Lily Trimboli, 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (Crime and Justice Bulletin No. 112, NSW Bureau of Crime Statistics and Research, 2008)

Webster, Vicky and Martin Webster (eds) 'Successful Change Management – Kotter's 8-Step Change Model' *Leadership Thoughts* (Web Page) <<https://www.leadershipthoughts.com/kotters-8-step-change-model/#successfulchangemanagement>>

Weldon, Ian, LexisNexis Butterworths, *Criminal Law Western Australia* (online at June 2017)

Western Australia, Department of the Attorney-General, *Statutory Review of the Sentencing Act 1995 (WA)* (2013)

Williams, Marian R, 'The Effect of Pretrial Detention on Imprisonment Decisions' (2003) 28(2) *Criminal Justice Review* 299

Willis, Glenda and Troy Ward, 'Risk Management versus the Good Lives Model: The Construction of Better Lives and the Reduction of Harm' in Isabelle Dréan-Revette and Martine Evans (eds), *Transnational Criminology Manual – Volume 3* (Wolf Legal Publishing, 2010) 763

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

## Case law

*AB v The Queen* (1999) 198 CLR 111

*Adams v Carr* (1987) 47 SASR 205

*Addo v Senior Constable Jacovos* [2016] QDC 271

*Alimudin v McCarthy* (2008) NTLR 102

*Allen v Commissioner of Police* [2019] QDC 34

*Atanackovic v The Queen* (2015) 45 VR 179

*Attorney-General (Qld) v Kanaveilomani* [2015] 2 Qd R 509

*Attorney-General for the State of Queensland v Brown* [2012] QSC 68

*Attorney-General for the State of Queensland v FJA* [2018] QSC 291

*Barbaro v The Queen* (2014) 253 CLR 58

*Baumer v The Queen* (1988) 166 CLR 51

*Boulton v The Queen* (2014) 46 VR 308

*Bugmy v The Queen* (2013) 249 CLR 571

*Campbell v Galea* [2019] QDC 53

*Castle v Director Public Prosecutions (Cth)* [2019] QDC 49

*CDE v The Queen* [2017] QDCPR 2  
*Channon v The Queen* (1978) 20 ALR 1  
*Cobiac v Liddy* (1969) 119 CLR 257  
*Commissioner of Police Service v Magistrate Spencer* [2014] 2 Qd R 23  
*Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568  
*Coolwell v Commissioner of the Queensland Police Service* [2010] QDC 487  
*Cronin v Commissioner of Police* [2016] QDC 63  
*Crump v New South Wales* (2012) 247 CLR 1  
*Dinsdale v The Queen* (2000) 202 CLR 321  
*Director of Public Prosecutions (Cth) v Carter* [1998] 1 VR 601  
*Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1  
*Director of Public Prosecutions (Cth) v Moroney* [2009] VSC 584  
*Director of Public Prosecutions of the State of Victoria v Dalglish (a Pseudonym)* (2017) 262 CLR 428  
*Director of Public Prosecutions v Buhagiar and Heathcote* [1998] 4 VR 540  
*Doig v The Commissioner of Police* [2016] QDC 320  
*Elliot v Harris (No 2)* (1976) 13 SASR 516  
*Elliott v The Queen* (2007) 234 CLR 38  
*Flett v SA Police* (SASC, King AJ, 5 August 1997)  
*Forbes v Jingle* [2014] QDC 204  
*Foster v Shaddock* [2017] 1 Qd R 201  
*Gordon & Camp v Whybrow* [1998] QCA 52  
*Green v The Queen* [1999] NSWCCA 97  
*Griffin v Police* [2005] SASC 337  
*Hampton v The Queen* (2014) 243 A Crim R 193  
*Hili v The Queen* (2010) 242 CLR 520  
*Hoare v The Queen* (1989) 167 CLR 348  
*House v The King* (1936) 55 CLR 499  
*Jovanovic v The Queen* (1999) 106 A Crim R 548  
*Karpinski v R* (2011) 32 VR 85  
*Kim v Arbuckle* [2009] QDC 267  
*Kleinig v The Commissioner of Police* [2015] QDC 304  
*Kues-Sales v Commissioner of Police* [2016] QDC 53  
*Lowe v The Queen* (1984) 154 CLR 606  
*Mallory v Commissioner of Police* [2017] QDC 54  
*Markarian v The Queen* (2005) 228 CLR 357  
*Moran v Queensland Police Service* [2019] QDC 105  
*Morison v Behrooz* (2005) 155 A Crim R 110  
*Muldrock v The Queen* (2011) 244 CLR 120

*O'Neil v Police* [2018] SASC 137  
*Prior v The Queen* [2012] QDC 169  
*Putland v The Queen* (2004) 218 CLR 174  
*R v ABE* [2019] QCA 83  
*R v Arts* [1998] 2 VR 261  
*R v Aston (No 2)* [1991] 1 Qd R 375  
*R v Auberson* [1996] QCA 321  
*R v Bliss* [2015] QCA 53  
*R v BLJ* [2018] 3 Qd R 255  
*R v Bobonica* [2009] QCA28  
*R v Bojovic* [2000] 2 Qd R 183  
*R v Bond* [2009] QDC 28  
*R v Breasley* [1974] NSWLR 736  
*R v Brown; Ex parte Attorney-General (Qld)* [1994] 2 Qd R 182  
*R v Brunning* [2018] QCA 263  
*R v Bruschi* (1986) 11 FCR 582  
*R v Buckman* (1988) 47 SASR 303  
*R v Bugmy* [2004] NSWCCA 258  
*R v Bush (No 2)* [2018] QCA 46  
*R v Byrnes; Ex parte Attorney-General (Qld)* [2011] QCA 40  
*R v CAI* [2008] QCA 359  
*R v Carrall* [2018] QCA 355  
*R v Carter* [2016] QSC 86  
*R v Castner* [2018] QCA 265  
*R v CBG* [2013] QCA 44  
*R v Chan* [2017] QCA 8  
*R v Clark* [2016] QCA 173  
*R v Collins* [2000] 1 Qd R 45  
*R v Connolly* [2016] QCA 132  
*R v Crofts* [1999] 1 Qd R 386  
*R v Crossley* (1999) 106 A Crim R 80  
*R v Crouch* [2016] QCA 81  
*R v Cunningham* [2008] QCA 289  
*R v Daly* (2004) 147 A Crim R 440  
*R v Dang* [1999] QCA 414  
*R v Dell* (2016) 126 SASR 571  
*R v Dowell; Ex parte Attorney-General (Qld)* [2013] QCA 8  
*R v Edward* [1997] QCA 425

*R v Elhusseini* [1988] 2 Qd R 442  
*R v Eveleigh* [2003] 1 Qd R 398  
*R v Fabre* [2008] QCA 386  
*R v Farr* [2018] QCA 41  
*R v Ford* [1969] 3 All ER 782  
*R v Fox* [1998] QCA 121  
*R v Fullalove* (1993) 68 A Crim R 486  
*R v George* [2001] QCA 135  
*R v Goodall* [2013] QCA 72  
*R v Gray* [2016] QCA 322  
*R v Guthrie* (2002) 135 A Crim R 292  
*R v Hall* [2018] 3 Qd R 628  
*R v Ham* [2016] QDC 255  
*R v Hamilton* [2000] QCA 286  
*R v Hamilton* [2009] QCA 391  
*R v Hansen* [2018] QCA 153  
*R v Hargraves* [2010] QSC 188  
*R v Heta* [1997] QCA 179  
*R v Hill* [2017] QCA 177  
*R v Hill; Ex parte Director of Public Prosecutions (Cth)* (2011) 212 A Crim R 359  
*R v Hoerler* (2004) 147 A Crim R 520  
*R v Holton* [1998] 1 Qd R 667  
*R v Hood* [2005] 2 Qd R 54  
*R v Hosking* (2017) 128 SASR 37  
*R v Ianculescu* [2000] 2 Qd R 521  
*R v Ireland* (1987) 49 NTR 10  
*R v Ireland* (2012) 114 SASR 438  
*R v Jamieson* [2016] QCA 11  
*R v Jones* [1998] 1 Qd R 672  
*R v Jones* [2011] QCA 147  
*R v Jurisic* (1998) 45 NSWLR 209  
*R v Kirby* (2009) 193 A Crim R 357  
*R v Kiripatea* [1991] 2 Qd R 686  
*R v Lane* [2005] NTCCA 16  
*R v Lindley* [2019] QCA 020  
*R v Lloyd* [2011] QCA 12  
*R v Lynch* [2011] QCA 309  
*R v M (CA)* [1996] SCR 500

*R v M; Ex parte Attorney-General (Qld)* [2000] 2 Qd R 543  
*R v Macklin* [2016] QCA 244  
*R v Marsden* [2003] QCA 473  
*R v Maxfield* [2002] 1 Qd R 417  
*R v McAnally* [2016] QCA 329  
*R v McCusker* [2015] QCA 179  
*R v McDougall* [2007] 2 Qd R 87  
*R v McGuire* [2017] QCA 250  
*R v Minor* (1992) 2 NTLR 183  
*R v Mohammed* [2018] QCA 289  
*R v Moore, Ex parte Attorney-General (Qld)* (2002) 128 A Crim R 527  
*R v Moylan* [1969] 3 All ER 783  
*R v Muller* [2006] 2 Qd R 126  
*R v Newman* (2004) 145 A Crim R 361  
*R v Newman* [2008] QCA 147  
*R v Niass* (New South Wales Court of Criminal Appeal, 16 November 1988)  
*R v Nolan* [2009] QCA 129  
*R v Norden* [2009] 2 Qd R 455  
*R v NT* [2018] QCA 106  
*R v PAZ* [2018] 3 Qd R 50  
*R v Pham* (2015) 256 CLR 550  
*R v Pham* [1996] QCA 3  
*R v Phillips; Ex parte Attorney-General of Queensland* [2001] QCA 544  
*R v Pogson* (2012) 82 NSWLR 60  
*R v Proulx* [2000] 1 SCR 61  
*R v Pullen* [2018] NSWCCA 264  
*R v Quick; Ex parte Attorney-General (Qld)* (2006) A Crim R 588  
*R v Renzella* [1997] 2 VR 88  
*R v Riseley; Ex parte Attorney-General (Qld)* [2009] QCA 285  
*R v Ritzau* [2017] QCA 17  
*R v Rooney* [2016] QCA 48  
*R v Ross* [1996] QCA 411  
*R v RY; Ex parte Attorney-General (Qld)* [2006] QCA 437  
*R v Ryan and Vosmaer; Ex parte Attorney-General (Qld)* [1989] 1 Qd R 188  
*R v Sabine* [2019] QCA 36  
*R v Saebar* [2011] QCA 142  
*R v SCU* [2017] QCA 198  
*R v SCZ* [2018] QCA 81

*R v Shambayati* (1999) 105 A Crim R 373  
*R v Shillingsworth* [2002] 1 Qd R 527  
*R v Skedgwell* [1999] 2 Qd R 97  
*R v Skinner; Ex parte Attorney-General (Qld)* [2001] 1 Qd R 322  
*R v Smith* [2015] 1 Qd R 323  
*R v Smith* [2018] QCA 228  
*R v Smith* [2019] QCA 33  
*R v Stevens* [2006] QCA 361  
*R v Streatfield* (1991) 53 A Crim R 320  
*R v Taylor* (1999) 106 A Crim R 578  
*R v Tootell; Ex parte Attorney-General (Qld)* [2012] QCA 273  
*R v Tootoo* (2000) 115 A Crim R 90  
*R v Tracey* [2010] QCA 97  
*R v Tran; Ex parte Attorney-General (Qld)* (2002) 128 A Crim R 1  
*R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 022  
*R v Vidler* [2018] QCA 232  
*R v Walsh* (Court of Criminal Appeal Queensland, Connolly, Williams and Ambrose JJ, 12 June 1986)  
*R v Wano; Ex parte Attorney-General (Qld)* [2018] QCA 117  
*R v Waszkiewicz* [2012] QCA 22  
*R v Waters* [1998] 2 Qd R 442  
*R v Weeding* [2007] QCA 311  
*R v Wells* [2018] QCA 236  
*R v Whyte* (2002) 55 NSWLR 252  
*R v Wurramara* [1999] NTCCA 45  
*Reilly v The Queen* [2010] VSCA 278  
*Ryan v The Queen* (2001) 206 CLR 267  
*Sbresni v Commissioner of Police* [2016] QDC 18  
*Sherritt v The Queen* [2015] VSCA 1  
*Skinner v The Commissioner of Police* [2016] QDC 138  
*Soanes v The Commissioner of Police* [2013] QDC 26  
*Sweeney v Corporate Security Group* (2003) 86 SASR 324  
*Sweeney v Queensland Parole Board* [2011] QSC 223  
*Sysel v Dinon* [2003] 1 Qd R 212  
*Vaughan v Parole Board Queensland* [2019] QSC 10  
*Veen v The Queen (No 2)* (1988) 164 CLR 465  
*Villiers v Attorney-General of Queensland* [1999] QCA 244  
*Weininger v The Queen* (2003) 212 CLR 629  
*Whelan v The Queen* [2012] NSWCCA 147

*Wiggins v The Commissioner of Police* [2013] QDC 286  
*Williams v Queensland Community Corrections Board* [2001] 1 Qd R 557  
*Wilson v Police* [2013] SASC 48  
*Wong v The Queen* (2001) 207 CLR 584

## Legislation

### Queensland

*Acts Interpretation Act 1954* (Qld)  
*Bail Act 1980* (Qld)  
*Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld)  
*Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld)  
*Corrective Services Act 2006* (Qld)  
*Corrective Services (Parole Board) and Other Legislation Amendment Act 2017* (Qld)  
*Criminal Code Act 1899* (Qld)  
*Criminal Code (Child Pornography and Abuse) Amendment Act 2005* (Qld)  
*Criminal Law Amendment Act 2000* (Qld)  
*Criminal Law Amendment Act 1997* (Qld)  
*Criminal Law and Other Legislation Amendment Act 2013* (Qld)  
*Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld)  
*Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld)  
*Criminal Law (Domestic Violence) Amendment Act 2015* (Qld)  
*Criminal Law (Domestic Violence) Amendment Act 2016* (Qld)  
*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)  
*District Court of Queensland Act 1967* (Qld)  
*Domestic and Family Violence Protection Act 1989* (Qld)  
*Domestic and Family Violence Protection Act 2012* (Qld)  
*Drugs Misuse Act 1986* (Qld)  
*Evidence Act 1977* (Qld)  
*Health and Other Legislation Amendment Act 2016* (Qld)  
*Human Rights Act 2019* (Qld)  
*Justices Act 1886* (Qld)  
*Justices Act Amendment Act 1975* (Qld)  
*Legislative Standards Act 1992* (Qld)  
*Oaths Act 1867* (Qld)  
*Penalties and Sentences Act 1992* (Qld)  
*Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2018* (Qld)  
*Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2019* (Qld)  
*Penalties and Sentences Regulation 2015* (Qld)  
*Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld)

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

*Police Powers and Responsibilities Act 2000 (Qld)*

*Police Powers and Responsibilities and Another Act Amendment Act 2002 (Qld)*

*Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Act 2013 (Qld)*

*Safe Night Out Legislation Amendment Act 2014 (Qld)*

*Serious and Organised Crime Legislation Amendment Act 2016 (Qld)*

*State Penalties Enforcement Act 1999 (Qld)*

*Summary Offences Act 2005 (Qld)*

*The Criminal Code and the Justices Act Amendment Act 1975 (Qld)*

*Transport Operations (Passenger Transport) Act 1994 (Qld)*

*Transport Operations (Road Use Management) Act 1995 (Qld)*

*Youth Justice Act 1992 (Qld)*

*Youth Justice and Other Legislation Amendment Act 2014 (Qld)*

*Youth Justice and Other Legislation Amendment Act (No. 1) 2016 (Qld)*

*Weapons Act 1990 (Qld)*

*Weapons and Other Legislation Amendment Act 2012 (Qld)*

*Weapons Categories Regulation 1997 (Qld)*

## **New South Wales**

*Crimes Act 1900 (NSW)*

*Crimes (Administration of Sentences) Act 1999 (NSW)*

*Crimes (Administration of Sentences) Regulation 2014 (NSW)*

*Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (NSW)*

*Crimes (Sentencing Procedure) Act 1999 (NSW)*

*Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 (NSW)*

*Criminal Procedure Act 1986 (NSW)*

*Parole Legislation Amendment Act 2017 (NSW)*

## **Australian Capital Territory**

*Corrections Management Act 2007 (ACT)*

*Crimes (Sentence Administration) Act 2005 (ACT)*

*Crimes (Sentence Administration) Regulation 2006 (ACT)*

*Crimes (Sentencing) Act 2005 (ACT)*

## **Victoria**

*Charter of Human Rights and Responsibilities Act 2006 (Vic)*

*Corrections Act 1986 (Vic)*

*Corrections Regulations 2019 (Vic)*

*Criminal Procedure Act 2009 (Vic)*

*Disability Act 2006 (Vic)*

*Interpretation of Legislation Act 1984 (Vic)*

*Justice Legislation Amendment Act 2010 (Vic)*

*Justice Legislation Miscellaneous Amendment Act 2018 (Vic)*

*Monetary Units Act 2004 (Vic)*

*Sentencing Act 1991 (Vic)*

*Sentencing Amendment Act 2010 (Vic)*

*Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013 (Vic)*

*Sentencing Amendment (Community Correction Reform) Act 2011 (Vic)*

*Serious Offenders Act 2018 (Vic)*

*Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*

### **Western Australia**

*Bail Act 1982 (WA)*

*Sentencing Act 1995 (WA)*

*Sentence Administration Act 2003 (WA)*

*Sentencing Legislation Amendment Act 2004 (WA)*

*Sentencing Legislation Amendment Act 2016 (WA)*

*Sentencing Legislation Amendment and Repeal Act 2003 (WA)*

### **Northern Territory**

*Correctional Services Act 2014 (NT)*

*Sentencing Act 1995 (NT)*

### **South Australia**

*Correctional Services Act 1982 (SA)*

*Criminal Law (Sentencing) Act 1988 (SA)*

*Offenders Probation Act 1913 (SA)*

*Sentencing Act 2017 (SA)*

*Statutes Amendment (Home Detention) Act 2016 (SA)*

### **Tasmania**

*Corrections Act 1997 (Tas)*

*Criminal Code Act 1924 (Tas)*

*Sentencing Act 1997 (Tas)*

*Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017 (Tas)*

### **Commonwealth**

*Crimes Act 1914 (Cth)*

*Crimes Regulations 1990 (Cth)*

*Director of Public Prosecutions Act 1983 (Cth)*

*Judiciary Act 1903 (Cth)*

*Migration Act 1958 (Cth)*

## International

*Criminal Code* R.S.C 1985, c. C-46

*Criminal Justice Act 2003* (UK)

*Parole Act 2002* (NZ)

*Powers of Criminal Courts (Sentencing) Act 2000* (UK)

*Sentencing Act 2002* (NZ)

## Other

Explanatory Memorandum, Justice Legislation Miscellaneous Amendment Bill 2018 (Vic)

Explanatory Memorandum, Sentencing Amendment (Community Correction Reform) Bill 2011 (Vic)

Explanatory Note, Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW)

Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld)

Evidence to Standing Committee on Justice and Community Safety, ACT Legislative Assembly, Canberra, 26 May 2014, 146 (Dr Lorana Bartels, Associate Professor of Law, University of Canberra)

NSW, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017', 11 October 2017, 1 (Mark Speakman, Attorney-General)

NSW, *Parliamentary Debates*, Legislative Council, 'Second Reading — Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010, 22 June 2010, 24426 (John Hatzistergos, Attorney-General)

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

Queensland, *Parliamentary Debates*, Legislative Assembly, 'Introduction — The Criminal Code and the Offenders Probation and Parole Amendment Bill', 29 July 1971, 43 (Peter Delamothe, Minister for Justice)

Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Penalties and Sentences Bill', 6 August 1992, 6302 (Dean Wells, Attorney-General and Minister for Justice)

Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Penalties and Sentences Bill' (speech from previous date incorporated into *Hansard*), 5 November 1992, 150 (Dean Wells, Attorney-General and Minister for Justice)

Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Corrective Services Bill 2006', 29 March 2006, 940 (Judy Spence, Minister for Police and Corrective Services)

South Australia, House of Assembly, *Parliamentary Debates*, 'Second Reading — Criminal Law (Sentencing) (Home Detention) Amendment Bill', 3 November 2016, 7621 (Dan Van Holst Pellekaan, Member for Stuart)

Tasmania, *Parliamentary Debates*, House of Assembly, 'Second Reading — Sentencing Amendment (Phasing out of Suspended Sentences) Amendment Bill 2017', 19 October 2017 (Elise Archer, Minister for Justice)

Victoria, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Sentencing Amendment (Community Correction Reform) Bill 2011', 15 September 2011, 3291 (Robert Clark, Attorney-General)

Victoria, *Parliamentary Debates*, Legislative Assembly, 'Statement of Compatibility: Sentencing Amendment (Community Correction Reform) Bill 2011', 15 September 2011, 3289 (Robert Clark, Attorney-General)

Victoria, *Parliamentary Debates*, Legislative Assembly, 'Second Reading — Justice Legislation Amendment Bill 2010', 11 March 2010, 871 (Rob Hulls, Attorney-General)