Queensland Sentencing Advisory Council

Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

Background paper

A review of the serious violent offences scheme

The Queensland Sentencing Advisory Council's inquiry into the operation and efficacy of the serious violent offences (SVO) scheme, August 2021

Background paper 2

This background paper on minimum non-parole period schemes is one in a series of background papers being released by the Queensland Sentencing Advisory Council as part of its current review of the serious violence offences (SVO) scheme in Part 9A of the *Penalties and Sentences Act 1992* (Qld). The Council's review has been initiated in response to Terms of Reference issued by the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Honourable Shannon Fentiman MP, in April 2021.

The background papers have been prepared to provide those who may wish to contribute to the review with more detailed information on specific aspects of the Terms of Reference than that contained in the Council's Issues Paper released for public consultation.

Submissions to the review in response to the Council's Issues Paper are welcomed. Information about how to make a submission is available on the Council's website at: www.sentencingcouncil.qld.gov.au. Feedback on the background papers can be provided by email to info@sentencingcouncil.qld.gov.au.

Background paper: Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

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

Content from this paper should be attributed as Background Paper 2: Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions, September 2021.

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- 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

Queensland Sentencing Advisory Council

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

*Chair, Aboriginal and Torres Strait Islander Advisory Panel

Contributors

Authors	Lauren Banning
	Victoria Moore
	Vinton Pedley
Project board	Dan Rogers (Project Sponsor)
	Anne Edwards (Senior Supplier)
	Philip McCarthy QC (Senior User)
	Warren Strange (Senior User)
	Helen Watkins (Senior User)

Abbreviations

A Crim R	Australian Criminal Reports
A-G	Attorney-General
AJ	Acting Justice
CJ	Chief Justice
Cth	Commonwealth
DPP	Director of Public Prosecutions
JA	Justice of Appeal
J/JJ	Justice/Justices
MVR	Motor Vehicle Reports
NPP	non-parole period
NSWLRC	New South Wales Law Reform Commission
NTCCA	Northern Territory Court of Criminal Appeal
PSA	*Penalties and Sentences Act 1992* (Qld)
QCA	Queensland Court of Appeal
Qd R	Queensland Reports
RRO	Recognizance release order
RSC	Revised Statutes of Canada
s/ss	section/sections
SASCFC	Supreme Court of South Australia – Full Court
SC	Sessional volumes, Canada
SL	subordinate legislation
SNPP	standard non-parole period
SVO	serious violent offence under the SVO scheme
SVO Amendment Act	*Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld)
SVO scheme	serious violent offence scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld)
TASSC	Supreme Court of Tasmania
VR	Victorian Reports
VSAC	Victorian Sentencing Advisory Council
VSC	Supreme Court of Victoria
VSCA	Supreme Court of Victoria, Court of Appeal

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Acknowledgments

The Council wrote to key contacts in Australia and internationally from departments of justice and Attorneys-General, prosecution services, legal aid commissions and sentencing councils seeking their assistance in responding to a series of questions regarding the existence of mandatory and presumptive non-parole period schemes in their respective jurisdictions and relevant case law.

Responses were received from the following jurisdictions:

- New South Wales: NSW Law Reform Commission and Sentencing Council Secretariat, Department of Communities and Justice.
- New Zealand: Criminal Team, Crown Law.
- South Australia: the Honourable Vickie Chapman MP, Deputy Premier and Attorney-General, Government of South Australia – providing information collated by the South Australian Attorney-General's Department, including contributions from the Office of the Director of Public Prosecutions in South Australia – and Legal Services Commission of South Australia.
- Victoria: Victorian Sentencing Advisory Council and Law Institute of Victoria.
- Western Australia: Legal Aid Western Australia, Office of the Director of Public Prosecutions for Western Australia.

The Council thanks those who responded for the information provided, which was of great assistance to us in preparing this cross-jurisdictional analysis.

1 Introduction

1.1 Background

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

This paper has been prepared in response to a request in Terms of Reference issued by the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Honourable Shannon Fentiman MP, asking the Council to 'examine the approach to similar sentencing provisions involving minimum non-parole periods for serious criminal offences in other Australian and international jurisdictions' in providing advice on potential reforms to the Queensland serious violent offences (SVO) scheme.

1.2 Exclusions

The paper does not include information about the law as it applies to children (individuals aged under 18 years). In almost all cases, the law that applies will be different to that which applies to adults.

The Terms of Reference do not require the Council to consider broadly the issue of mandatory sentencing. Therefore, special provisions that operate under mandatory sentencing regimes have been excluded from consideration, except to the extent that these impact on the minimum non-parole periods that apply.

Indefinite detention, as a distinct form of sentencing order, is not considered as the arrangements that apply to this form of sentence are quite different.

Life sentences, for which minimum non-parole periods are often specified, have been excluded for similar reasons. In Queensland, the SVO scheme does not apply to life sentences.[1]

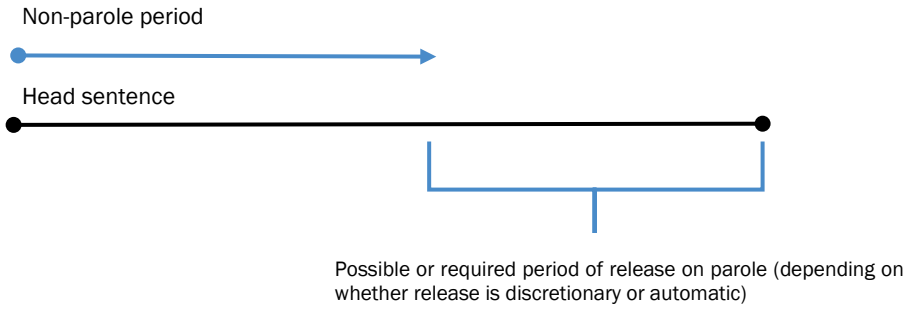
Post-sentence orders, in general, have not formed part of the Council's analysis unless these orders are made, or offenders who may be subject to them are identified, at the time of sentence.

1.3 Parole and the non-parole period

Parole is 'a form of conditional release of offenders sentenced to a term of imprisonment which allows an offender to serve the whole or part of their sentence in the community, subject to conditions'.[2]

The non-parole period is the period during which an offender sentenced to imprisonment must remain in custody before being eligible for release or released into the community on parole.[3] The maximum term of imprisonment to be served is called the 'head sentence' (comprised of the non-parole period and parole period). The relationship between the head sentence and the non-parole period is illustrated in Figure 1. In Queensland, the non-parole period is the period before a prisoner reaches their parole eligibility or fixed parole release date.

Figure 1: Head sentence and the non-parole period in sentencing



1 Murder attracts a minimum non-parole period of 20 years, or 25 years if the victim is a police officer, and 30 years if the person is convicted of multiple counts of murder or it is a second conviction for murder. A sentence of life imprisonment is otherwise subject to a 15-year minimum non-parole period: *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code') s 305 and *Corrective Services Act 2006* (Qld) s 181. Offenders convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation must serve an additional 7 years before being eligible for parole: *Corrective Services Act 2006* (Qld) s 181(2A).

2 Arie Freiberg et al, 'Parole, Politics and Penal Policy' (2018) 18(1) *QUT Law Review* 191.

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

2 Australian non-parole period schemes

2.1 Overview

2.1.1 General provisions applying to the setting of a parole eligibility or release date

States and territories have adopted different legislative approaches to the setting of the non-parole period. Some jurisdictions identify a minimum statutory ratio of the non-parole period to the head sentence (and the reverse in NSW), while others leave this to be determined by the court as a matter of discretion.

In Queensland, unless a court sets an earlier, or later, parole eligibility date, as is permitted by section 160C of the *Penalties and Sentences Act 1992* ('PSA'), offenders sentenced to imprisonment for a period of more than 3 years, or of any length if sentenced for a sexual offence, are eligible for parole after serving half their sentence in custody.[4] There are exceptions to this, including for life sentences[5] for suspended sentences[6] and for offenders declared convicted of a serious violent offence under the SVO scheme.[7] Aside from these legislative exceptions, the discretion to set an appropriate parole eligibility date is 'relevantly unfettered'[8] and the Court of Appeal has found 'there can be no mathematical approach to setting such a date'.[9]

Shorter sentences of 3 years or less (with some exceptions, including sentences imposed for a sexual offence or declared serious violent offence) in Queensland are subject to court-ordered parole.[10] A court may set any date as the date of release on parole, including the day of sentence.[11] For offenders subject to court ordered parole, their release is determined by the court rather than by the Parole Board Queensland.

As is the case in Queensland, for Commonwealth offences, and in the ACT and Victoria, in general, there is no set statutory ratio between the non-parole period and the head sentence. There are a number of legislated exceptions to this discussed in this paper.

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

In a number of these jurisdictions, a court is either not permitted to set a non-parole period that is less than the statutory ratio specified,[12] or is allowed to depart from this only if special circumstances apply.[13]

2.1.2 Nature of the parole period and eligibility schemes as mandatory vs discretionary

Sentencing and parole schemes across Australia differ as to the level of discretion available to a court in deciding the appropriate sentence and non-parole period (or parole eligibility date). Under some provisions, courts have no discretion and are limited to a 'one size fits all' approach. Under others, courts have broad discretion to decide the sentence and appropriate non-parole period, within the limits of the law, while acting in accordance with relevant legislation and legal principles. Examples are provided in Table 1 below.

4 *Corrective Services Act 2006* (Qld) s 184.
5 Ibid ss 181 and 181A.
6 Apart from where an offender is ordered to serve the whole or part of the term of imprisonment suspended on breach: ibid s 184(1)(c).
7 Ibid s 182.
8 *R v Amato* [2013] QCA 158 ('*Amato*') at [20] (Fraser JA, Holmes JA and Mullins J agreeing) citing *R v Kitson* [2008] QCA 86 at [16].
9 *R v Hitchcock* [2019] QCA 60 at [18] (Sofronoff P, Fraser and Philippides JJA agreeing) referring with approval to comments made by Fraser JA in *Amato* at [20] citing *R v Ruha* (2010) 198 A Crim R 430 at [47] as authority.
10 *Penalties and Sentences Act 1992* (Qld) s 160B.
11 Ibid s 160G.
12 For example, see *Sentencing Act 1995* (NT) ss 53 and 54 and *Sentencing Act 1997* (Tas) s 17(3).
13 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

Table 1: Sentencing frameworks in Australia by scheme type and level of discretion

Lowest level of discretion

Highest level of discretion

Penalty type	Description	Examples
Fixed penalties (no discretion)	Parliament specifies a set penalty for the offence. The court has no discretion and is limited to a 'one size fits all' approach.	**Qld**: Mandatory SVO declaration for sentences of 10 years or more for schedule 1 offence (parole eligibility after serving 80% of sentence); NPP for unlawful striking causing death where imprisonment imposed.
Mandatory minimum schemes	Parliament specifies a range with a maximum and minimum penalty. Court can set a higher penalty than the minimum, but not a lower one. The court has a narrow discretion about the factors that it can take into account, as long as it imposes a sentence that is within the statutory range.	**Commonwealth**: 'Three-quarters rule' for national security offences. **NT**: 70 % mandatory minimum NPP scheme for prescribed offences. **Tas**: NPP, if fixed, must not be less than 50% of the head sentence. **WA**: Mandatory minimum sentences.
Presumptive minimum schemes	This is similar to a mandatory minimum, in that Parliament specifies a range. This is different to a mandatory minimum in that Parliament allows the court to impose a sentence below that range in defined circumstances.	**NSW:** Balance of sentence not to exceed one-third of the NPP, unless there are special circumstances. **NT**: Level 5 sexual offences, a court must order set minimum penalties, unless there are exceptional circumstances. **Vic**: NPPs for standard sentence offences, statutory minimum sentences.
Structured discretion	Parliament specifies a maximum penalty and provides a set of general guidelines in sentencing legislation. The court can impose any sentence below the statutory maximum, subject to legislation, common law principles and appellate review. The court can take a wide variety of factors into account.	**Qld**: Sentencing violent and sexual offences under section 9 of the PSA, discretionary SVO declarations. **NSW**: Standard NPP scheme. **NT**: For non-level 5 sexual offences the court must record a conviction and impose actual imprisonment or a partially suspended sentence. **Vic**: Category 1 and 2 offences, standard sentencing scheme.
Broad discretion	The court has broad discretion to take any factors into account, as required or permitted by law, and impose any sentence (but no greater than the maximum penalty for the offence).	**ACT:** Setting of NPP for sentences of 12 months or longer. **Qld:** Setting of parole eligibility date for sentence of more than 3 years (other than where SVO declaration made).

2.1.3 Statutory ratios between non-parole periods and head sentences

Table 2 presents an overview of legislative non-parole period schemes in Australia and whether a statutory ratio applies between the non-parole period and head sentence generally, or for specific types of offences or offenders.

These schemes are discussed in more detail in the following sections of this paper.

Table 2: Legislative provisions in Australian jurisdictions in relation to the statutory ratios between non-parole periods and head sentences

Jurisdiction	Details
ACT	• For sentences of imprisonment of 12 months or longer (excluding a life sentence) the court must set an NPP, unless the court considers it would be inappropriate to do so.[14] • No statutory ratio.[15]
Commonwealth	• NPP generally only if head sentence (or aggregate) is greater than 3 years[16] (recognizance release order for sentences of 3 years or less).[17] • Generally no fixed ratio or proportion between the head sentence imposed on a federal offender and the period, or minimum period, to be served. • 75% minimum NPP for certain national security offences.[18]
NSW	• For sentences of imprisonment of 6 months or longer the balance of the sentence must not exceed one-third of the NPP (meaning NPP is effectively 75% or more of the total sentence length) unless there are special circumstances.[19] • For sentences of 3 years or less, a court can make statutory parole orders to release the person,[20] while for sentences over 3 years the NPP signifies parole eligibility only. • Standard non-parole scheme (SNPP) applies to a range of serious offences. SNPPs are legislated and operate as a 'guidepost' in sentencing. The ratio between the SNPP and the maximum penalty varies by offence.
Northern Territory	• For sentences of imprisonment of 12 months or longer, NPP of not less than 70% of the head sentence for offences of sexual intercourse without consent, certain other sexual offences and violent offences, and certain offences committed against people under 16 years of age.[21] • NPP of not less than 50% of the head sentence for other offences where a court sentences an offender to be imprisoned for 12 months or longer.[22] • A court can also decline to fix a NPP if the court considers the fixing of a NPP is inappropriate.[23]
Queensland	• NPP of 50% of the head sentence, where the head sentence exceeds three years and the court does not set a parole eligibility date (or in other specified circumstances, such as imprisonment arising from the breach of a suspended sentence, cancelled parole or imprisonment for a sexual offence where the head sentence is not more than 3 years).[24] • NPP is 80% of the head sentence for listed Schedule 1 serious violent offences — mandatory where the sentence is 10 years or more, discretionary where the sentence is less than 10 but more than 5 years.[25] Can also apply to a sentence of any length, and to a non-schedule 1 offence convicted on indictment of an offence — (i) that

14 *Crimes (Sentencing) Act 2005* (ACT) s 65.
15 The 'usual [percentage] range of 50-75%' has been noted in a number of Court of Appeal decisions: see *Zdravkovic v The Queen* [2016] ACTCA 53 at [74] (Murrell CJ, Elkaim and Ross JJ) citing observations made in *Barrett v The Queen* [2016] ACTCA 38 at [52]; *Taylor v the Queen* [2014] ACTCA 9 at [20] (Murrell CJ, Refshauge and Penfold JJ agreeing generally as to reasons).
16 *Crimes Act 1914* (Cth) ss 19AB, 19AD.
17 Ibid ss 20(1)(b), 19AC and 19AE.
18 Ibid s 19AG.
19 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, unless there are special circumstances for the balance of the sentence to be more. A court can also decline to set a non-parole period: s 45.
20 *Crimes (Administration of Sentences) Act 1999* (NSW) s158(1).
21 *Sentencing Act 1995* (NT) ss 55 and 55A.
22 Ibid ss 53 and 54, but not less than 8 months. This requirement also applies to life sentences, but does not apply if the sentence is suspended in whole or part.
23 Ibid ss 53(1), 54(3), 55(2), 55A(2).
24 *Corrective Services Act 2006* (Qld) s 184.
25 *Penalties and Sentences Act 1992* (Qld) pt 9A, ss 161A–161C; *Corrective Services Act 2006* (Qld) s 182.

Jurisdiction	Details
	involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or (ii) that resulted in serious harm to another person; and (b) sentenced to a term of imprisonment for the offence.[26]
South Australia	• The court must set an NPP[27] for sentences of imprisonment of 12 months or longer, unless the court considers it would be inappropriate to do so.[28] • Minimum NPP of four-fifths (80%) of the head sentence for serious offences against the person,[29] or for a serious offence where the offender is, or has been, declared to be a serious repeat offender[30] unless there are exceptional circumstances.[31]
Tasmania	• NPP of not less than 50% of the head sentence.[32]
Victoria	• No statutory ratio between the NPP and head sentence. • The court must set a NPP for sentences of 2 years or more that must be at least 6 months less than the head sentence, and may fix a non-parole period for sentences of 1 year or more, but less than 2 years.[33] • Mandatory minimum NPP for some offences, with no legislative requirement for the head sentence.[34] • For standard sentence offences: – NPP must be at least 60% of the head sentence when less than 20 years – NPP must be at least 70% of the head sentence when 20 years or more – NPP must be 30 years if life imprisonment imposed, unless the court finds it is in the interests of justice not to do so.[35]
Western Australia	• NPP generally 50% of the head sentence, where the head sentence is 4 years or less, or • Two years less than the head sentence if the head sentence is greater than 4 years.[36] • Minimum NPP of 75% for grievous bodily harm committed in the course of an aggravated home burglary.[37]

2.1.4 Minimum and standard non-parole period schemes

Table A1-1 in Appendix 1 sets out minimum non-parole schemes that apply across Australia to adult offenders. It does not include mandatory sentencing schemes that apply to the setting of the head sentences, unless these also include a mandatory or presumptive non-parole component. This means that some schemes discussed in this paper in the interests of completeness, are not included in this table.

26 Ibid s 161B(4).
27 While there is no statutory minimum sentencing ratio, the South Australia Criminal Court of Appeal has noted the non-parole periods have 'tended to range between 50% and 75% of the head sentence': *R v Devries* [2018] SASCFC 101 at [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34 at [4] (Kourakis CJ).
28 *Sentencing Act 2017* (SA) s 47.
29 *Criminal Law (Sentencing Act) 1988* (SA) s 47(5)(d).
30 Ibid ss 53 and 54.
31 Ibid ss 48(2) and 54(2). In the case of the serious repeat offender provisions, the person must also satisfy the court it is not appropriate that they be sentenced as a serious repeat offender.
32 *Sentencing Act 1997* (Tas) s 17(3).
33 *Sentencing Act 1991* (Vic) s 11.
34 Ibid pt 3, ss 9A-10A.
35 Ibid s 11A.
36 *Sentencing Act 1995* (WA) s 93 (for aggregate sentences see s 94).
37 *Criminal Code Act Compilation Act 1913* (WA) sch ('*Criminal Code*') ss 297(5)(a)(i)–(ii).

2.2 Australian Capital Territory

In the ACT, if a court sentences an offender to a term of imprisonment of 12 months or longer, or two or more terms of imprisonment that total 12 months or longer (other than a life sentence),[38] a court must set a non-parole period (NPP).[39] However, the court may decide not to set an NPP, if it considers that it would be inappropriate to do so, having regard to the nature of the offence or offences and the offender's antecedents.[40] When a court sets a NPP it must state when the NPP starts and ends.[41]

While there is no legislated ratio between the NPP and head sentence, the ACT Court of Appeal has on a number of recent occasions affirmed that for NPPs the 'usual [percentage] range of 50-75%' applies when sentencing an offender to a term of imprisonment of 12 months or longer.[42]

2.3 Commonwealth

2.3.1 General provisions applying to parole

The fixing of minimum periods of imprisonment to be served by a federal offender is governed by Part IB of the *Crimes Act 1914* (Cth) (*'Crimes Act'*), together with common law principles applied by section 80 of the *Judiciary Act 1903* (Cth).[43]

With the exception of the provisions discussed below, there is no fixed ratio or proportion between the head sentence imposed on a federal offender and the period, or minimum period, to be served.[44] A court in some circumstances can order a federal offender sentenced to imprisonment to be released immediately (meaning the person does not have to serve any period (or further period) in custody subject to entering into and complying with a recognizance).[45] In other cases, it may require the person to serve the whole period of the sentence in custody. But in most cases the court will order that a period, or minimum period, be served, exercising its discretion.

The setting of non-parole periods is to be approached on an individualised basis, and not by reference to suggestions about established 'norms' about the period or minimum period to be served for an offence under Commonwealth law.[46]

The Commonwealth DPP (CDDP), in a sentencing guide developed for practitioners, has identified that while 'sentencing courts must endeavour to ensure reasonable consistency in the sentencing of federal offenders' in practice, there is 'considerable variation, both within and between jurisdictions, in the ratio between the length of the head sentence … and the period fixed as the period, or minimum period to be served':[47]

> Broadly speaking, the ratio in most cases is between one-third and three-quarters. Ratios at the lower end are found more commonly where the head sentence is shorter and a release period is fixed. Where the head sentence is greater than 3 years, and a minimum term is imposed, ratios are typically between 50% and 75%. The ratio tends to be greater (sometimes higher than 80%) for very serious offending, when the head sentence or total effective sentence is particularly long.[48]

The CDPP cautions that this summary of the position 'is not only very general but no more than descriptive'.[49]

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38 *Crimes (Sentencing) Act 2005* (ACT) s 64(2)(f).
39 Ibid s 65.
40 Ibid s 65(4).
41 Ibid s 65(3).
42 *Zdravkovic v The Queen* [2016] ACTCA 53 at [74]; *Barrett v The Queen* [2016] ACTCA 38 at [52]; *Taylor v the Queen* [2014] ACTCA 9 (Taylor) at [20].': *Henry v The Queen* [2019] ACTCA 5 (28 February 2019).
43 Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (4th ed, 2021) 155 [665].
44 Ibid 155 [666].
45 Ibid.
46 *Hili v R* (2010) 242 CLR 520, 528 [25] and 532–534 [36]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
47 Commonwealth Director of Public Prosecutions (n 43) 157–8 [672].
48 Ibid.
49 Ibid.

2.3.2 Minimum non-parole period and sentencing schemes under Commonwealth legislation

The 'three-quarters rule' for national security offences

Special minimum parole provisions were introduced into the *Crimes Act* in 2004[50] applying to Commonwealth national security offences. Known as 'the three-quarters rule',[51] this provision requires a court to fix a single NPP of at least three-quarters of the head sentence whenever a person is convicted of a 'minimum non-parole period offence', or of the aggregate term if the person is sentenced for two or more of those offences.[52] For the purposes of calculating the minimum term, a life sentence is taken to be a sentence of imprisonment for 30 years (translating to a minimum NPP of 22 years, 6 months for life sentences).[53]

The court can depart from the three-quarters rule by setting a shorter NPP, but only if the person being sentenced is aged under 18 years where exceptional circumstances exist.[54] In determining if exceptional circumstances exist, the court must have regard to the protection of the community as the paramount consideration, and the best interests of the person as a primary consideration.[55]

A 'minimum non-parole period offence' is defined to mean:

- a terrorism offence (as defined in s 3(1) of the *Crimes Act*);
- an offence against Division 80 of the *Criminal Code* (Cth) (treason, urging violence, advocating terrorism, etc); or
- an offence against sections 91.1(1) or 91.2(1) of the *Criminal Code* (Cth) (intentional espionage offences).

The three-quarters requirement applies only if the offender is sentenced to imprisonment,[56] and does not affect the availability of other sentencing options. Nor does it affect the obligation of the court in fixing the head sentence to impose a sentence 'that is of a severity appropriate in all the circumstances of the offence' in accordance with section 16A(1) of the *Crimes Act*.[57] A court is not to reduce the head sentence to compensate for, or offset, the effect of this provision.[58] Options for the service of a sentence that might otherwise have been available under section 20AB of the Act, such as home detention or periodic detention, are excluded.[59]

The Commonwealth DPP has identified that the operation of the 'three-quarter rule' as enacted gives rise to a number of anomalous consequences:

- An offender sentenced to imprisonment for more than 30 years, but less than life imprisonment, will be subject to a higher minimum NPP than a person who receives a life sentence. A court is not permitted to impose a life sentence rather than a determinate sentence of more than 30 years simply to attract the lower minimum NPP.[60]
- The court must impose an NPP even if would otherwise have had a discretion to make or confirm a recognizance release order (RRO), or to decline to fix an NPP. This means that the provision may result in a short non-parole period being fixed when a RRO would otherwise have been made.

The court cannot impose a straight sentence (without fixing an NPP) when it could otherwise have done so under other provisions of the *Crimes Act* (ss 19AB(3), 19AC(1) or (2) or 19AD(2)(f)).[61]

Minimum head sentences and non-parole period for people smuggling offences

Section 236B of the *Migration Act 1958* (Cth) (*'Migration Act'*) provides for a mandatory term of imprisonment, a mandatory minimum duration of that term, and a mandatory minimum NPP for listed people-smuggling offences.[62]

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50 Section 19AG of the *Crimes Act 1914* (Cth) inserted by *Anti-terrorism Act 2004* (Cth) Schedule 1, item 1C.
51 Commonwealth Director of Public Prosecutions (n 43) 171 [733].
52 *Crimes Act 1914* (Cth) s 19AG(2).
53 Ibid s 19AG(3)(a).
54 Ibid s 19AG(4A).
55 Ibid s 19AG(4B).
56 Section 19AG applies if a person is convicted of one of the listed offences and a court imposes a 'sentence' — defined in s 16 of the Act to mean a sentence of imprisonment.
57 Commonwealth Director of Public Prosecutions (n 43) 239 [1047].
58 Ibid citing *Lodhi v R* [2007] NSWCCA 360, [255]–[262] as authority. However, see Williams J in *R v Kruezi* [2020] QCA 222 at [62] referring to observations of the sentencing judge that the defendant in *Lodhi* was convicted following a trial and therefore 'there was no occasion to lower the head sentence'.
59 *Crimes Act 1914* (Cth) s 20AB(6).
60 Commonwealth Director of Public Prosecutions (n 43) 173 [740] citing *Alou v R* (2019) 101 NSWLR 319, [188], [194].
61 Ibid.
62 For a detailed discussion of these provisions, see Commonwealth Director of Public Prosecutions (n 43) section 8.2 'People smuggling offences'.

These mandatory requirements apply if a person is convicted of an offence against one or more of the following provisions of the *Migration Act*:

- section 233B (aggravated people smuggling, involving cruel, inhuman or degrading treatment, or conduct giving rise to a danger of death or serious harm to the person);
- section 233C (aggravated people smuggling, involving a group of at least 5 unlawful non-citizens); or
- section 234A (offence relating to forged or false documents, or false or misleading statements or documents, relating to a group of 5 or more non-citizens or a member of such a group).

All these offences are punishable by a maximum of 20 years' imprisonment or a fine of 2,000 penalty units or both.

If a person is convicted of an offence against section 233B, or a repeat offence[63] for a relevant people smuggling offence, the court is required to impose a sentence of at least 8 years,[64] with a non-parole period of at least 5 years[65] — representing just over 60 per cent of the minimum head sentence.

For a person convicted of an offence against either of the other listed sections (other than a repeat offence) the court is required to impose a sentence of at least 5 years[66] with a non-parole period of at least 3 years[67] — in this case being 60 per cent of the minimum head sentence.

These provisions prevail over those in section 17A of the *Crimes Act* that require a court to consider all other available sentences and to be satisfied before imposing a sentence of imprisonment that no other sentence is appropriate in all the circumstances of the case.[68]

The prescribing of these forms of mandatory terms of imprisonment has been found by the High Court not to be inconsistent with Chapter III of the Constitution and consequently, constitutionally valid.[69]

Mandatory minimum sentences for persons convicted of specified Commonwealth child sex offences or child sexual abuse offence

Amendments to the *Crimes Act* and the *Criminal Code* (Cth) in 2020 introduced a number of requirements applying to the sentencing of offenders convicted of Commonwealth child sex offences and child sexual abuse offences, including:

1. Mandatory minimum sentences of imprisonment for 15 specified high-level Commonwealth child sex offences committed on or after 23 June 2020.[70]
2. Mandatory sentences of imprisonment for repeat child sex abuse offences of a specified minimum length on conviction for a specified Commonwealth child sex abuse offence on or after 23 June 2020 if the offender has previously been convicted (at any time) of a child sexual abuse offence, whether under the law of the Commonwealth or a state or territory.[71]

A court may reduce the minimum sentences set by legislation by up to 25 per cent if it considers it appropriate taking into account either a plea of guilty, or cooperation with law enforcement authorities in the investigation of the offence or a Commonwealth child sex offence, or by up to 50 per cent if both circumstances apply.[72]

The mandatory minimum sentences do not apply if the person was aged under 18 years at the time of the offence.[73]

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63 A 'repeat offence' refers to a conviction for an offence under sections 233B, 233C or 234A by a person who, on the same or a previous occasion, has been convicted of or found to have committed another such offence, or who has, after 27 September 2001, been convicted or found to have committed an offence under ss 232A or 233A of the Act: *Migration Act 1958* (Cth) s 236B(5).

64 Ibid s 236B(3)(a) and (b).

65 Ibid s 236B(4)(a).

66 Ibid s 236B(3)(c).

67 Ibid s 236B(4)(b).

68 Commonwealth Director of Public Prosecutions (n 43) 241 [1057].

69 *Magaming v R* (2013) 252 CLR 381 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, Gageler J not deciding). See French CJ, Hayne, Crennan, Kiefel and Bell JJ at 396 [47]–[49] and Keane J at 414 [107]–[108].

70 *Crimes Act 1914* (Cth) s 16AAA.

71 Ibid s 16AAB. For a detailed discussion of these provisions, see Commonwealth Director of Public Prosecutions (n 43) section 8.3.1.

72 *Crimes Act 1914* (Cth) s 16AAC.

73 Ibid s 16AAC(1).

1–High-level Commonwealth child sex offences

In the case of mandatory minimum sentences for high-level Commonwealth child sex offences, the minimum levels set depend on the type of offence and maximum penalty — ranging from 5 years' imprisonment (for offences carrying a 20 year maximum penalty) to 7 years' imprisonment (for offences carrying a maximum penalty of 30 years or life).[74]

2–Second or subsequent conviction for child sexual abuse offence

There are 35 Commonwealth child sexual abuse offences under the *Criminal Code* (Cth) specified for the purposes of the provision, with mandatory minimum sentences ranging from 1 year's imprisonment (for an offence carrying a maximum penalty of 5 years) to 4 years' imprisonment (for an offence with a maximum penalty of 15 years' imprisonment).[75]

To qualify for this form of sentence, the person must have been convicted previously at any time of a 'child sexual abuse offence' which is defined to mean:

- a 'Commonwealth child sex offence' (as further defined);
- an offence against sections 273.5, 471.16, 471.17, 474.19 or 474.20 of the *Criminal Code* (as in force at any time before the commencement of Schedule 7 to the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019*);
- an offence against Part IIIA of the *Crimes Act* (as in force at any time before the commencement of Schedule 1 to the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*); or
- a 'State or Territory registrable child sex offence' (as further defined).[76]

Discretion to fix non-parole period or recognizance release order period

In contrast to the mandatory sentencing requirements for specified people-smuggling offences (discussed above), the legislation does not set mandatory minimum NPPs that the person being sentenced is required to serve. Nor must the period to be served represent any set or minimum proportion of the head sentence as applies to certain national security offences (see discussion above).

This means that the court must fix a NPP or RRO in the same way as for any other offence not subject to mandatory requirements, except that immediate release under a RRO is only available in exceptional circumstances.[77]

2.4 NSW

2.4.1 General provisions applying to parole

Sentences of imprisonment of six-months or less in NSW are for 'fixed terms'.[78] This means that the offender must spend the whole of the fixed term of imprisonment in custody and is then released unconditionally at the end of the term.

For terms of imprisonment over six months, the court must 'first set a non-parole period (NPP)', and 'the balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence'.[79] This means that the NPP is effectively three-quarters or more of the total sentence length.[80] However, a court has discretion to exceed the statutory one-third requirement if there are 'special circumstances' (and those reasons must be stated in the decision).[81] When sentencing a person for two or more offences, the court may set one NPP for all the offences to which the sentence relates after setting the term of the sentence.[82]

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74 Ibid s 16AAA.
75 Ibid s 16AAB(2).
76 Ibid s 3(1).
77 Commonwealth Director of Public Prosecutions (n 43) 245 [1075] and *Crimes Act 1914* (Cth) ss 20(1)(b)(ii) and (iii).
78 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.
79 Ibid ss 44(1) and 44(2).
80 Ibid s 44. The non-parole period is defined as 'the minimum period for which the offender must be kept in detention in relation to the offence' (s 44(1)).
81 Ibid s 44(2). Analysis of sentencing findings of 'special circumstances' by the Judicial Commission of New South Wales led former Chief Justice Spigelman to query in a 2004 Court of Appeal decision whether many offenders' circumstances really were sufficiently 'special' to justify lowering NPPs: *R v Fidow* [2004] NSWCCA 172 [20] (Spigelman CJ).
82 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2A).

For sentences of 3 years or less, statutory parole orders direct the release of an offender on parole at the end of the NPP.[83] This release is conditional upon the person being eligible for release on parole.[84] For sentences over 3 years, the NPP signifies parole eligibility only.

In 2013 the NSW Law Reform Commission (NSWLRC) made several recommendations in relation to the setting of NPPs, including that the general 'statutory ratio' between the NPP and term of the sentence be changed from three-quarters to two-thirds of the sentence.[85] Those recommendations are yet to be implemented.

2.4.2 Standard non-parole period scheme

NSW has also established a standard non-parole period ('SNPP) scheme that applies to a range of serious offences, including murder.[86]

An SNPP represents the non-parole period for an offence that, 'taking into account only the objective factors affecting the relative seriousness' of the offence, 'is in the middle of the range of seriousness'.[87] The SNPP operates as a 'legislative guidepost' in sentencing, along with the maximum penalty.[88] When sentencing an offence to which an SNPP applies, the court must also consider other legislated and common law sentencing considerations.[89]

When introduced in 2003, the SNPP scheme was justified on the basis it would provide judges with 'a further important reference point' when sentencing offenders for SNPP offences.[90] Its introduction was linked to a statement made by the then Premier of NSW, Bob Carr, that under the scheme:

> Judges will have a new statutory duty to give explicit reasons, justifying the sentence they hand out and making them more accountable. Sentences will be tougher and more consistent because judges will have to apply the same rules to every case.[91]

The offences to which the scheme applies and associated SNPPs are set out in a Table to Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). As originally introduced, the scheme applied to more than 20 categories of serious indictable offences including a range of violent, sexual and drug offences, such as murder, sexual assault, commercial manufacture of drugs and unauthorised possession of a firearm. The number of offences captured under the scheme has since expanded to over 30, and the offence categories 'cover the majority of serious crimes that have a relatively high volume'.[92]

The SNPPs are expressed as a number of years. For example, the SNPP for attempt to murder is 10 years, and 7 years for sexual assault.

The levels at which the SNPPs were originally set 'generally were at least double the median non-parole period between 1994 and 2001, and in some cases, such as sexual offences and supplying a commercial quantity of a prohibited drug, they were nearly triple the existing median periods'.[93] The SNPP is based on the seriousness of the offence, the maximum penalty and sentencing trends for the offence.[94]

The SNPP provisions do not apply where an offender is:

- sentenced to life imprisonment or for any other indeterminate period (and is therefore ineligible for parole):[95]
- sentenced to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW);
- dealt with summarily; or
- under 18 years at the time the offence was committed.[96]

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83 *Crimes (Administration of Sentences) Act 1999* (NSW) s 158(1).
84 Ibid s 126.
85 Recommendation 6.2, NSW Law Reform Commission, *Sentencing - Final Report* (2013).
86 *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A, ss 54A-54D.
87 Ibid s 54A(2).
88 *Muldrock v The Queen* (2011(244 CLR 120 at [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
89 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).
90 NSW Law Reform Commission, *Sentencing: Interim Report on Standard Non-parole Periods*, Report 134 (2012) [1.14].
91 R Carr, 'Premier Carr Releases Plan for Tougher and More Consistent Sentences' (News Release, 4 September 2002).
92 NSW Law Reform Commission (n 90) [1.21].
93 Ibid [1.16].
94 NSW Sentencing Council, *Standard Non-parole Periods: Final Report* (2013) 3 citing the Second Reading speech in the NSW Parliament on 23 October 2002.
95 In NSW the maximum (non-mandatory) penalty for murder is life imprisonment (*Crimes Act 1900* (NSW) s 19A, inserted by the *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1(14)) and a life sentence without parole may be imposed where 'the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence': *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).
96 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D.

The court must record in the sentencing remarks the reasons for setting a NPP that is longer or shorter than the SNPP and each factor that was taken into account when making this determination.[97] When determining an aggregate sentence of imprisonment, the court must state in writing which offences the SNPP applies to and the NPP that would have been set for each offence to which the aggregate sentencing relates, had each offence received a separate sentence of imprisonment.[98]

Reviews of the SNPP scheme

In 2012 and 2013, the NSW Sentencing Council and the NSWLRC both examined the SNPP scheme.

The NSWLRC observed that, 'there is an absence of any consistent pattern in the relationship between the maximum penalties for the offences that are included in the SNPP Table and the SNPPs nominated for these offences'.[99] When the NSWLRC examined the SNPP as a percentage of the maximum penalty, it found significant variation between offences. This included offences with the same maximum penalty having different SNPPs, and offences having the same ratio of SNPP to maximum penalty, despite one being the aggravated form of an offence.[100] The NSWLRC also noted that the 'proximity of the SNPP to the maximum sentence for some offences causes problems in applying the scheme and can result in sentencing outcomes that would be inconsistent with general sentencing practice'.[101]

Many NSW stakeholders responded to both references, expressing concern that 'there was an absence of transparency in relation to the reasons for which the individual SNPP offences were selected for the scheme, or in relation to the way in which the relevant SNPP levels were set'.[102]

Both bodies recommended retaining the scheme,[103] along with recommending changes to provide more structure to the scheme. The NSW Sentencing Council made recommendations relating to:

- principles used to identify SNPP offences;[104]
- offences to be retained or added to the SNPP scheme;[105]
- how to set SNPPs;[106]
- adjusting existing SNPPs;[107]
- setting new SNPPs for sexual offences against children;[108] and
- dealing with SNPP offences in future.[109]

Principles to identify SNPP offences

The NSW Sentencing Council identified eight factors that could be considered in deciding whether to include an offence in the SNPP scheme. These were whether the offence:[110]

- has a significant maximum penalty;
- is triable on indictment only;
- involves elements of aggravation;[111]
- involves a vulnerable victim;
- involves special risk of serious consequences to the victim and the community;[112]
- is prevalent;

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97 Ibid s 54B(3).
98 Ibid s 54B(4).
99 NSW Law Reform Commission (n 90) [2.5], [2.34].
100 Ibid Appendix A. For example, attempted murder has a maximum penalty of 25 years and an SNPP of 10 years (40%), compared with wounding with intent to do bodily harm which has the same maximum penalty of 25 years, but a SNPP of 7 years (28%), and sexual assault and aggravated sexual assault both have an SNPP ratio of 50% despite having a different maximum penalty. These differences remain today.
101 Ibid [2.11]–[2.13].
102 Ibid [2.34].
103 Ibid xi-xiii. The NSW Government adopted the recommendation made by the NSWLRC in this report.
104 NSW Sentencing Council (n 94) Recommendation 2.1.
105 Ibid viii - ix, Recommendations 3.1 and 3.2.
106 Ibid ix, Recommendation 4.1.
107 Ibid x, Recommendation 4.2.
108 Ibid xi, Recommendation 4.3.
109 Ibid xii, Recommendation 5.1.
110 Ibid 9.
111 Examples include the offender was in the company of another person or people, the offender deprives the victim of his or her liberty before or after the offence, or the victim is under 16 years of age, under the authority of the offender or has a serious physical disability or cognitive impairment: NSW Sentencing Council (n 94) 12–13.
112 For example, sexual offences against children result in significant and long lasting harms, and supply or manufacture of illegal drugs which relate to organised criminal activities. NSW Sentencing Council (n 94) 14.

- is subject to a pattern of inadequate sentencing; and
- is subject to a pattern of inconsistent sentences.[113]

Additionally, if the offence potentially encompassed a wide range of offending behaviour, this could be a factor considered in whether to exclude the offence from the SNPP scheme.

The NSW Sentencing Council advised these factors should be applied flexibly, and none should be solely necessary or sufficient to include an offence in the SNPP scheme.

Setting an SNPP

The NSW Sentencing Council found there were 'significant difficulties' for offences where the SNPP represented 70-80 per cent of the maximum penalty.[114] It recommended 'setting an SNPP for each offence using a starting point of 37.5 per cent of the maximum penalty and then moving the figure up (to no more than 50 per cent of the maximum penalty for the offence) or down as appropriate' when certain matters are identified.[115] Those matters were: the special need for deterrence; recognising the exceptional harm the offence may have caused; the potential vulnerability of victims; the extent to which the offence involved a breach of trust or absence of authority; and sentencing statistics and practices, including appellate guidance. The NSW Sentencing Council observed that 'a universally applied fixed proportion does not recognise differences in the range and seriousness of offending behaviour covered by the offences included in the SNPP scheme'.[116]

2.5 Northern Territory

2.5.1 General provisions applying to parole

In the Northern Territory, a court is prohibited from fixing a non-parole period for a sentence of imprisonment of less than 12 months or suspended in whole or in part[117] except if a new offence is committed before the NPP for another offence has ended – in which case the court must set a single NPP for all offences.[118]

For sentences of imprisonment of 12 months or longer, a court must fix an NPP of not less than 50 per cent of the period of imprisonment the offender is to serve under the sentence[119] (provided this is not for a period of less than 8 months[120]) – unless the court considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate[121] (in which case the person must serve the whole period of the sentence in custody).

Different parole requirements apply to setting NPPs for murder,[122] and where minimum NPPs and fixed NPPs apply (discussed below).

2.5.2 Mandatory minimum sentencing and non-parole period provisions

The *Sentencing Act 1995* (NT) contains a number of mandatory sentencing provisions — some of which require a court to impose an actual term of imprisonment, a minimum period of imprisonment of a specified length, or a minimum NPP (being a set proportion of the head sentence). Most of these mandatory sentencing provisions are directed at sexual offences and violent offences.

Mandatory imprisonment for certain violent offences

Mandatory minimum custodial sentences for certain violent offences were introduced in the Northern Territory in May 2013 by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT). This Act expanded on the provisions to which mandatory imprisonment then applied.

The Act created 5 levels of violent offence based on the type of offence, whether the victim experienced physical harm and whether a weapon was used, with imprisonment requirements varying based on the five levels – See Table 3. 'Actual imprisonment' includes a sentence of imprisonment that is partly suspended, or partly suspended

113 The NSW Sentencing Council suggested patterns of inadequate sentences could be 'measured by reference to public opinion, views formed by the government or other indicators such as the number of Crown appeals against sentences imposed for the offence': NSW Sentencing Council (n 94) 16.
114 NSW Sentencing Council (n 94) xi.
115 Ibid 40–41.
116 Ibid 42.
117 *Sentencing Act 1995* (NT) s 53(1A).
118 Ibid s 57.
119 Ibid ss 53(1) and 54(1).
120 Ibid s 54(2).
121 Ibid s 53(1).
122 Ibid s 53A.

on the offender entering into a home detention order,[123] but where a minimum sentence is specified, the court cannot suspend the imprisonment for the specified period required to be imposed.[124]

Table 3: NT Offence levels and mandatory imprisonment

Offence level	Mandatory terms of imprisonment
Level 5	• A minimum of 3 months' actual imprisonment if the offender has not previously been convicted of a violent offence,[125] or • 12 months' actual custody if the person has previously been convicted of a violent offence.[126]
Level 4	• A 3-month minimum sentence (whether or not the person has previously been convicted of a violent offence).[127]
Level 3	• Where a victim suffers physical harm and the offender has not previously been convicted of a violent offence, a sentence of actual imprisonment, but without the minimum length being specified.[128] • If the person has previously been convicted of a violent offence, a minimum sentence of 3 months' actual imprisonment applies.[129]
Level 2	• Impose a term of actual imprisonment.[130]
Level 1	• A term of actual imprisonment in circumstances where the offender has been previously convicted of a violent offence.[131]

There is some provision for departure from the specified minimum periods of imprisonment in exceptional circumstances (in which case a partly suspended sentence or partly suspended sentence with a home detention order may be ordered instead).[132] In deciding if the circumstances are 'exceptional' the court must have regard to any victim impact statement or victim report presented, and any other matter it considers relevant.[133] The relevant section lists circumstances in which a case involving domestic violence might be found to be exceptional, including that the offender has taken responsibility for their conduct and has made a genuine effort to change their behaviour, as well as circumstances that do not meet the required threshold, being:

1. that the offender was voluntarily intoxicated by alcohol, drugs or a combination of alcohol and drugs at the time the offender committed the offence; or
2. that another person was involved in the commission of the offence, or coerced them to commit it.[134]

Examples of level 5 offences, as defined under the Act[135] include serious harm[136] as well as offences such as assault of persons providing rescue, medical treatment or other aid,[137] causing harm,[138] choking, strangling or suffocating in a domestic relationship,[139] some aggravated forms of common assault,[140] assaults on police or emergency workers,[141] and assault with intent to steal provided the offence committed involved the actual use or threatened use of an offensive weapon and the victim suffered harm as a result.[142]

While a minimum NPP is not specified, if the court is required under these provisions to impose a minimum sentence of 12 months' actual imprisonment, the NPP fixed must not be less than 12 months.[143]

123 Ibid s 78DG – referring to orders under ss 40 (suspended sentence) and 44 (home detention order).
124 Ibid s 78DH.
125 Ibid s 78D.
126 Ibid s 78DA.
127 Ibid s 78DB.
128 Ibid s 78DC
129 Ibid s 78DD.
130 Ibid s 78DE.
131 Ibid s 78DF.
132 Ibid s 78DI.
133 Ibid s 78DI(3).
134 Ibid ss 78DI(3)–(4).
135 Ibid s 78CA(1).
136 Criminal Code (NT) s 181.
137 Ibid s 155A (only applies to assault, not to obstruction).
138 Ibid s 186.
139 Ibid s 186AA.
140 Ibid s 188(2) but excluding in the circumstances listed in paragraph (k) (indecent assault).
141 Ibid s 189A.
142 *Sentencing Act 1995* (NT) s 78CA(1).
143 Ibid s 54(4).

The requirement to record a conviction and impose either a term of actual imprisonment or a partly suspended sentence also applies to a court when sentencing an offender for a sexual offence.[144]

Minimum non-parole periods for certain sexual offences, drug offences and offences against children under 16 years

In addition to the mandatory sentencing provisions discussed above, a minimum non-parole period of 70 per cent of the head sentence, applies to offenders sentenced to 12 months or more for:

- specified sexual offences (including sexual intercourse without consent (rape)[145] and listed sexual offences where committed against a child under 16 by a person who was an adult);[146]
- drug offences (including supply, manufacture and possession of a commercial quantity of a dangerous drug);[147] and
- offences of violence committed against children aged under 16 (including acts intended to cause serious harm or prevent apprehension, serious harm, harm, endangering the life of a child by exposure and common assault).[148]

A court also may set a higher NPP than the minimum specified, and may also decline to set an NPP if it considers that the fixing of such a period is inappropriate taking into account the nature of the offence, the past history of the offender or the circumstances of the particular case.[149]

The main justification provided by the Country Liberal Party for the introduction of these NPP provisions was that offenders who commit certain types of offences 'should spend longer in prison',[150] including to 'act as a deterrent for would be offenders'.[151]

The general parole provisions that currently apply were also introduced by the Country Liberal Party at the time the 70 per cent minimum NPP was introduced for the offence of rape, on the basis of the government's position (seen as also reflective of the public's view) 'that the most important factor of imprisonment is the amount of time the offender actually spends in prison'.[152] In circumstances where an offender receives 'a large head sentence', it was suggested, 'the public has the right to know that … they will spend a significant proportion of that sentence in prison'.[153]

The NT Court of Criminal Appeal has considered a number of the aspects of the operation of the 70 per cent mandatory minimum NPP scheme. Points of clarification have included:

- both the 50 per cent minimum NPP in section 54 of the *Sentencing Act 1995* (NT), and the 70 per cent NPP in section 55A of the Act (that applies to certain offences against children under 16 years) apply to offences committed prior to the introduction of these minimum NPPs provided the offender is sentenced after these provisions came into force;[154]
- the 70 per cent minimum non-parole period mandated by sections 55 and 55A applies only to offences against those sections of the *Criminal Code* listed in sections 55 and 55A and 'not to offences of a similar or even identical kind under previous legislation';[155] and
- where a court is imposing a total effective sentence for two or more offences, some of which are subject to the minimum NPP of 70 per cent and some of which are subject to the minimum NPP of 50 per cent, the requirement to fix a minimum NPP of not less than 70 per cent of the sentence applies only to that

144 *Sentencing Act 1995* (NT) s 78F(1). A 'sexual offence' to which this section applies means an offence specified in sch 3: s 3. A court can also impose a partially suspended sentence.
145 Ibid s 55.
146 Ibid s 55A. Sexual offences this applies to under the Criminal Code (NT) are: sexual intercourse or gross indecency involving a child under 15 years (s 127), sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person attempts to procure child under 16 (s 131), sexual relationship with a child (s 131A), indecent dealing with a child under 16 (s 132), incest (s 134) and gross indecency without consent (s 192(4).
147 *Sentencing Act 1995* (NT) s 55.
148 Ibid s 55A.
149 Ibid ss 55(2), 55A(2) and 53(1).
150 See Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 May 1995, 3388 (Attorney-General, Fred Finch) with respect to the original form of section 55 that applied to the offence of rape.
151 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 5 June 2001, 7891 (Attorney-General, Denis Burke) discussing extending the section 55 provisions to offenders convicted of child abuse offences.
152 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 May 1995, 3388 (Attorney-General, Fred Finch).
153 Ibid.
154 *R v Cumberland* [2019] NTCCA 13 (19 June 2019); 278 A Crim R 304 [10] (Grant CJ, Kelly, Barr, Hiley JJ and Riley AJ) citing *TRH v The Queen* [2018] NTCCA 14 (2 August 2018). See also *JL v The Queen* [2019] NTCCA 7 (22 March 2019) at [34] (Kelly and Barr JJ and Riley AJ).
155 Ibid.

part of the sentence that relates to the 'specified offences' under section 55 of the *Sentencing Act*[156] (and, by extension, those offences listed in section 55A as subject to the 70% minimum NPP).

While the Court has avoided commenting on the merits of the scheme itself, it has noted that one of its effects is the 'inevitable interference with courts' capacity to maintain parity and consistency in sentencing' given the mandatory nature of these provisions.[157]

2.6 Queensland

As the SVO scheme is the subject of the Council's current review, an explanation of it is not included in this background paper. For information about the history of the SVO scheme in Queensland, see Background Paper 1. Information about the general operation of the scheme is contained in an Information Sheet available on the Council's website.

There are other mandatory sentencing and minimum non-parole provisions that apply in Queensland to serious sexual and non-sexual violent offences. For example:

- An offender convicted of a repeat serious child sex offence (both committed when the offender was an adult) is subject to a mandatory life sentence or indefinite sentence (with a nominal sentence and finite sentence of life imprisonment).[158] A 'serious child sex offence' is defined as a provision mentioned in schedule 1A of the PSA committed in relation to a child under 16 years, in circumstances in which the offender would be liable on conviction to imprisonment for life.[159] Offences listed in schedule 1A include carnal knowledge with or of children under 16 years, taking a child for immoral purposes, incest, maintaining a sexual relationship with a child and rape. If sentenced under these provisions, the minimum NPP that applies is 20 years.[160]
- For offenders convicted of unlawful striking causing death sentenced to an unsuspended term of imprisonment, a court must make an order that the person must not be released from imprisonment until the person has served 80 per cent of the person's term of imprisonment for the offence, or 15 years (whichever is less).[161] This does not apply if a life sentence is imposed[162] (in which case the same 15-year minimum non-parole period applies[163]).

2.7 South Australia

2.7.1 General provisions applying to parole

In South Australia (SA), if a person is sentenced to imprisonment for a period of 12 months or more, the court must fix a non-parole period (if the person is not subject to an existing NPP), or if the person is subject to an existing NPP, review this period and extend it 'by such period as the court thinks fit'.[164]

A court may also, by order, decline to fix a non-parole period if the court is of the opinion it would be inappropriate to do so because of:

- the seriousness of the offence or the circumstances surrounding the offence;
- the person's criminal record;
- the person's behaviour during any previous period of release on parole or conditional release; or
- any other circumstance.[165]

While there is no mandatory (or minimum) ratio between the head sentence and NPP, the South Australian Court of Criminal Appeal has noted that NPPs have 'tended to range between 50% and 75% of the head sentence'.[166]

In SA a court cannot set a parole period for sentences of under 12 months.

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156 *R v Cumberland* [2019] NTCCA 13 (19 June 2019); 278 A Crim R 304 [49] (Grant CJ, Kelly, Barr, Hiley JJ and Riley AJ).
157 *Norris v The Queen* [2020] NTCCA 8 (8 July 2020) (Grant CJ, Southwood and Barr JJ) [46] citing *R v Bojovic* [1999] QCA 206 at [34].
158 *Penalties and Sentences Act 1992* (Qld) s 161E.
159 Ibid s 161D.
160 *Corrective Services Act 2006* (Qld) s 181A.
161 Criminal Code (Qld) s 314A(5). See s 314A(6)(c) as to this not applying if an intensive correction order is made, or if the term of imprisonment is suspended in whole or in part.
162 Ibid ss 314A(6)(a)–(b).
163 *Corrective Services Act 2006* (Qld) s 181.
164 *Sentencing Act 2017* (SA) ss 47(5)(a) and 47(1)(a)–(b).
165 Ibid s 47(5)(e).
166 *R v Devries* [2018] SASCFC 101 at [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34 at [4] (Kourakis CJ).

2.7.2 Overview of mandatory and presumptive parole provisions

The *Sentencing Act 2017* (SA) ('*Sentencing Act*') includes various mandatory sentencing provisions in respect of serious repeat offenders, offenders convicted of murder or a serious offence against the person, and serious firearm offenders.

In addition to these mandatory schemes, there are limitations on when a court may impose a suspended sentence, an intensive correction order or a home detention sentence. Those schemes that involve the application of a minimum NPP are discussed below.

2.7.3 Serious repeat offenders scheme (*Sentencing Act 2017* (SA), Pt 3, Div 4)

Introduction of scheme to replace the habitual offenders scheme

The serious repeat offenders scheme was introduced in 2003 to replace the largely unused habitual offenders scheme. The then Attorney-General justified its introduction on the basis of the need to modernise the habitual offender provisions, which had been criticised on the basis of being 'reasonably restrictive in some ways but irrationally wide in others' and being 'too broad and its consequences too drastic'.[167]

He referred to a number of policy principles that had been used to guide the development of the alternative legislative model, including:

- The scheme not being about 'preventive detention' and 'predictions of dangerousness', given these were 'imprecise subjective phrases with unfortunate connotations. Something more objective and tangible is needed.' For this reason, a focus on 'the protection of society' was preferred.
- The need to 'not cast the net so wide as to destroy the credibility of the scheme' and for the scheme 'to appeal to the public and parliament as a rational response to the small number of offenders who pose a risk to the public, while doing little violence to the principles of justice and fairness that underlie [the] sentencing system'.
- Basing such a scheme on judicial discretion and the avoidance of mandatory sentencing.[168]

The current legislative framework

Section 54(1) of the *Sentencing Act* provides that a court sentencing a person who is a 'serious repeat offender' is not bound to ensure that the sentence it imposes is proportional to the offence. It further provides that the court must ensure that any NPP fixed in relation to the sentence must be at least four-fifths (80%) the length of the sentence.

The scheme is presumptive rather than strictly mandatory in that section 54(2) of the Act provides that a court may declare that subsection (1) does not apply if the person satisfies the court by evidence on oath[169] that their personal circumstances are so exceptional as to outweigh the paramount consideration of protecting the safety of the community and personal and general deterrence, and that it is, in all the circumstances, not appropriate that they be sentenced as a serious repeat offender.[170] The defendant must satisfy both requirements before the exception to being sentenced as a serious repeat offender operates.[171]

A person is taken to be a serious repeat offender if the person (whether as an adult or as a child) has committed and been convicted of:

- at least 3 'serious offences' committed on separate occasions; or
- at least 2 'serious sexual offences' committed on separate occasions.[172]

The offence for which the person is to be sentenced is included in this calculation provided it is an offence of the relevant kind (i.e. a 'serious offence' or a 'serious sexual offence' respectively).

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167 South Australia, *Parliamentary Debates*, House of Assembly, 19 February 2003, 2323 (Michael Atkinson, Attorney-General).

168 Ibid.

169 The requirement for evidence on oath does not require a defendant to themselves give evidence — see for example *R v Douglass* [2019] SASCFC 67 where the only evidence given on oath was by a forensic psychologist who had assessed the defendant.

170 *Sentencing Act 2017* (SA) s 54(2). For detailed consideration by the South Australian Court of Criminal Appeal of *the* meaning of 'exceptional circumstances' see *Knight v The Queen* [2021] SASCFC 12.

171 *Knight v The Queen* [2021] SASCFC 12 [62]–[63]. See also *R v Karnage* [2019] SASCFC 82. For an example of a case where a declaration was made under s 54(2), see *R v Douglass* [2019] SASCFC 67. The sentencing judge made the declaration for a first-time sentenced defendant who had a significant intellectual disability and this was not set aside on appeal.

172 *Sentencing Act 2017* (SA) s 53.

The issue of what amounts to 'separate occasions' for the purposes of these provisions was considered by the South Australian Court of Criminal Appeal in the decision of *R v Harradine*.[173] The Court found: 'the term "occasion" connotes an event defined by reference to temporal limits'.[174] For occasions to be 'separate', the offending conduct must be temporally or circumstantially distinct.[175] The key feature is whether the offending conduct, having regard to both the physical acts and the mental state, is part of one 'continuous occurrence' or 'single episode'.[176] Whether the offending conduct occurs on separate occasions is a question of fact, and continuity of motive or intent, while relevant, are not necessarily determinative:

> where there are multiple offences of the same kind, such as sexual offending against the same victim, or drug dealing over the course of a period of time, continuity of intent may not establish that the multiple offences constitute a single episode. It will always be a matter to be determined by reference to all of the circumstances, though not a matter of discretion.[177]

Serious offences (including serious firearm offences) and serious sexual offences

The terms 'serious offence' and 'serious sexual offence' are defined in section 52 of the Act.

An offence will not be a 'serious offence' unless a sentence of imprisonment (other than a wholly suspended sentence[178] or a sentence that consists only of a community based custodial sentence[179]) has been, or is to be, imposed for the offence. This means that offences for which a wholly suspended sentence, home detention order or an intensive correction order have been imposed do not count towards the calculation.[180]

An offence (other than a serious firearm offence) will not be regarded as a 'serious offence' unless the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years.

An offence is a 'serious offence' if it is:

1. A serious firearm offence within the meaning of Division 3 of the *Criminal Law Consolidation Act 1935* (SA) ('*Criminal Law Consolidation Act')*.
2. Any of the following offences if the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:
    a. an offence under Part 5 Division 2 or 3 of the *Controlled Substances Act 1984* (SA) (includes drug trafficking, manufacture for sale, sale/manufacture for sale of a controlled precursor, cultivate controlled plants for sale, sale of controlled plants, and sale of equipment (if aggravated offence, or basic offence where the offender is a serious drug offender), sale of instructions (if aggravated offence or basic offence where offender is a serious drug offender), sale/supply/administration of a controlled drug to a child or in a school zone, sale of equipment or instructions to a child, procuring a child to commit an offence);
    b. an offence under Commonwealth law dealing with the unlawful importation of drugs into Australia;
    c. an offence involving a terrorist act (within the meaning of Part 5.3 of the Criminal Code of the Commonwealth);
    d. one of the following offences under the *Criminal Law Consolidation Act:*
        i. an offence under Part 3 of the Act (Offences against the person etc);
        ii. robbery (s 137);
        iii. serious criminal trespass in a place of residence (s 170);
        iv. an aggravated offence of criminal trespass in a place of residence (s 170A);
        v. arson (s 85(1));
        vi. causing a bushfire (s 85B);
    e. a serious and organised crime offence (within the meaning of the *Criminal Law Consolidation Act*);
    f. an offence under a corresponding previous enactment substantially similar to an offence referred to above;
    g. a conspiracy to commit, or an attempt to commit, an offence referred to above;

173 (2019) 134 SASR 68; [2019] SASCFC 144.
174 Ibid at [82] (Hughes J, Peek J agreeing).
175 Ibid at [92].
176 Ibid at [84]–[90].
177 Ibid at [89].
178 Prior to 30 April 2018, home detention orders had the status of a 'suspended sentence of imprisonment'.
179 From 30 April 2018 onwards, home detention orders and intensive correction orders under the *Sentencing Act 2017* (SA) have the status of 'community based custodial sentences'.
180 This amendment to the scheme came into effect on 14 November 2020. *Sentencing (Serious Repeat Offenders) Amendment Act 2020* (SA) s 4. Prior to this, only suspended sentences were excluded.

h. an offence under the law of another State or of a Territory involving conduct that would, if committed in SA, be a serious offence.[181]

A 'serious firearm offence' is defined in section 49 of the *Sentencing Act* and includes one of a number of offences involving the use, carriage and supply of firearms, other offences under the *Firearms Act 2015* (SA), such as those involving the use or possession of a firearm that was used in the course of, or for a purpose related to a serious drug offence, or committed in certain circumstances such as while the person was on bail, a good behaviour order, home detention order or while on parole that is subject to firearm conditions, as well as listed offences under the *Criminal Law Consolidation Act.*

A 'serious sexual offence' is defined to include several offences under the *Criminal Law Consolidation Act*, including sexual exploitation of a person with a cognitive impairment (ss 51(1) and (2) – if it is a subsequent offence against s 51(2) based on the maximum penalty of 5 years), and one of a number of listed sexual offences where the victim was aged under 14 at the time of the offence.

2.7.4 Mandatory minimum non-parole period for serious offences against the person

Offenders convicted of a 'serious offence against the person' are subject to a mandatory minimum NPP of four-fifths the length of the head sentence (80%).[182] A 'serious offence against the person' is defined to mean 'a major indictable offence (other than an offence of murder) resulting in the death of the victim, or the victim suffering total incapacity'[183] — that is, becoming 'permanently physically or mentally incapable of independent function'.[184]

A court can impose a longer non-parole period if satisfied this is warranted because of any objective or subjective factors affecting the relative seriousness of the offence.[185]

A court can set a shorter NPP only where there are 'exceptional circumstances'.[186] Section 48(3) of the *Sentencing Act* sets out a non-exhaustive list of exceptional circumstances:

(a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;

(ab) the offence was committed in circumstances of family violence (being circumstances in which the offender, or a member of the offender's family, was a victim of family violence committed by the victim of the offence);

(b) if the offender pleaded guilty to the charge of the offence — that fact and the circumstances surrounding the plea;

(c) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such cooperation.

The existence of one of more of these circumstances, however, does not require the court to consider fixing a shorter NPP.[187] It is a decision made with reference to the individual circumstances of the case and factors personal to the defendant.[188]

This scheme commenced operation on 1 November 2007.[189]

2.7.5 Recent reviews

The *Criminal Law (Sentencing Act) 1988* (SA) was extensively reviewed by the SA Attorney-General in 2015 and 2016[190] resulting in its replacement by the current *Sentencing Act 2017* (SA). The review recommended the introduction of a new primary consideration in sentencing, being the 'protection of the community'. This primary sentencing purpose is now reflected in section 3 of the Act.

As the *Sentencing Act* only came into operation in 2017, there have been no recent evaluations of its operation. However, in 2019, retired Supreme Court Judge, the Honourable Brian Martin AO QC, was appointed by the

181 This requires an evaluation of whether the elements of the interstate offence, if found proven in SA, would constitute a serious offence. See *R v Kennedy* (Press J).
182 *Sentencing Act 2017* (SA) s 47(5)(d).
183 Ibid s 47(12)(e). It also includes a conspiracy to commit such an offence, or aiding, abetting, counselling or procuring the commission of such an offence.
184 Ibid s 47(12)(f).
185 Ibid s 48(2)(a).
186 Ibid 48(2)(b). There is also a power to prescribe circumstances in which a shorter NPP may be set by regulation. No circumstances are currently prescribed.
187 See *R v Barnett* (2009) 54 MVR 283; 198 A Crim R 251.
188 *R v Frencken* (2012) 61 MVR 195; [2012] SASCFC 71 at [14}–20] (Vanstone J, Nyland and David JJ agreeing).
189 This scheme was established in the *Criminal Law Sentencing Act 1988* (SA) inserting a new s 32(5)(ba): *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007* (SA) s 9(2). The relevant amendments commenced by proclamation: Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act (Commencement) Proclamation 2007.
190 Information relating to this review can be found at < https://www.agd.sa.gov.au/projects-and-consultations/transforming-criminal-justice/better-sentencing-options>.

Government of SA to review the sentencing discounts given for guilty pleas and cooperation with authorities.[191] This review recommended a reduction in the discounts provided and restrictions to the discount available for serious violent and sexual offences. Changes recommended in this report were brought into effect by the *Statutes Amendment (Sentencing) Act 2020* (SA), which commenced on 2 November 2020. The maximum reduction for a a guilty plea in the case of a serious indictable offence is now 25 per cent[192] — a reduction from the previous maximum discount of 40 per cent — with reductions also made to the discounts that can be applied to pleas entered at a later stage.

2.8 Tasmania

2.8.1 General provisions applying to parole

In Tasmania, when sentencing a person to a term of imprisonment a court *may* set a parole eligibility date or order that an offender is not eligible for parole in respect of the sentence at all.[193] The parole period specified by the court 'is not to be less than one-half of the sentence'.[194]

However, when a court sentences a person to life imprisonment, the order *must* state that the person is either not eligible for parole[195] or set a parole eligibility date.[196] There is a statutory obligation to provide reasons when making an order barring or allowing parole eligibility.[197]

Excepting life sentences, if the court does not state an eligibility date, then the offender is not eligible for parole.[198] This means that in contrast to Queensland, when a court does not state a parole eligibility date there is no default entitlement to parole under the *Corrections Act 1997* (Tas). This amendment was introduced in 2002 via the *Sentencing Amendment Act 2002* (Tas). According to the Second Reading speech for the bill, this amendment was made in order 'to force the courts to impose a non-parole period failing which the offender cannot be paroled'.[199] In the same speech the former Attorney-General stated that:

> The Government's view is that the sentencing courts are far better placed to determine exactly when a convicted person should be eligible for parole. The court has all the facts of the case before it and has knowledge of the effect it has had on the victim or the family of a deceased victim and the community in general. These are matters which have dissipated because of the passage of time when the Parole Board comes to consider parole.[200]

2.8.2 Minimum sentence of imprisonment for causing serious bodily harm to a police officer

There is only one mandatory sentencing scheme that appears to exist in Tasmania. The *Sentencing Act 1997* (Tas) provides that for the offence of causing serious bodily harm to a police officer, the court must order a person to serve a term of not less than 6 months, unless the court finds there are exceptional circumstances.[201]

Inserted into the Act in 2014,[202] this provision was introduced to give effect to a Government election commitment to legislate for a minimum mandatory sentence of six months imprisonment for assaults on police officers and other emergency service personnel, to ensure sentences where serious harm was caused would 'reflect the gravity of the crime'.[203]

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191 Brian Ross Martin, *Review of the Sentence Reduction Scheme - Part 2 Division 2 Subdivision 4 of the Sentencing Act 2017: Interim Report* (2019).

192 *Sentencing Act 2017* (SA) s 40(3) – as substituted by *Statutes Amendment (Sentencing) Act 2020* (SA) s 9(3)(a)(i). This can be applied if a defendant has pleaded guilty to an offence or offences not more than 4 weeks after their first court appearance in relation to the relevant offence or offences. What constitutes a 'serious indictable offence' is defined in section 40(8) to mean a serious offence of violence or serious sexual offence (as further defined) — in either case for which the maximum penalty is, or includes imprisonment for at least 5 years – or any other offence prescribed by the regulations for the purposes of this section.

193 *Sentencing Act 1997* (Tas) ss 17(2)(b), 17(3), 17(3A).

194 Ibid s 17(3).

195 Ibid s 18(1)(a).

196 Ibid s 18(1)(b).

197 Ibid ss 17(7) and 18(5) and *Young v Wilson* [2015] TASSC 16 [54].

198 Ibid s 17(3A) and *Corrections Act 1997* (Tas) ss 68(1) and 69.

199 Tasmania, *Parliamentary Debates*, House of Assembly, 29 May 2002, 66 (Peter Patmore, Attorney-General).

200 Ibid.

201 *Sentencing Act 1997* (Tas) s 16A(1).

202 *Sentencing Amendment (Assaults on Police Officers) Act 2014* (Tas) s 4.

203 Tasmania, *Parliamentary Debates*, Legislative Council, 26 November 2014, 2 (Vanessa Goodwin, Leader of the Government in the Legislative Council).

2.8.3 Tasmania Law Reform Institute review

In 2008 the Tasmania Law Reform Institute examined whether a scheme similar to the NSW SNPP should be introduced. The Institute concluded it should not, noting among other difficulties with the SNPP scheme, that multiple sentences in Tasmania are usually dealt with by way of a global sentence and that an SNPP scheme would not fit within that approach.[204]

2.9 Victoria

2.9.1 General provisions applying to parole

Victoria, like many other Australian jurisdictions (except Queensland) does not allow the court to set a parole period for sentences of imprisonment of under 12 months.[205] That means for sentences of less than one year, an offender must serve the entire sentence in prison.[206]

For sentences between 12 and 24 months the court does not have to, but may choose to set an NPP.[207] And for sentences of more than two years, the court *must* set an NPP, unless it considers that the nature of the offence or the circumstances of the offender make it inappropriate to do so.[208] For sentences between 12 and 24 months, and over two years, the NPP must be six months or more.[209] Unless the offence is captured in one of the mandatory sentencing schemes (set out below), there is no 'requirement at law which calls for a set ratio between the head sentence and the non-parole period'.[210]

Generally sentencing courts impose NPPs that are between 60 and 75 per cent of the head sentence.[211] However 'different standards may apply for both longer and shorter sentences'.[212] The Victorian Court of Appeal has observed that while there is 'no usual non-parole period'[213] and that such an idea is 'problematic' because it 'tends to imply'[214] a two-stage sentencing process, a range still 'informs the sentencing task by providing an important guide to sentencing judges'.[215]

When fixing an NPP that is higher or lower than the common proportional range, a court should give reasons for doing so, but is not required to.[216]

2.9.2 Mandatory sentencing provisions

Victoria has several mandatory sentencing schemes:

- mandatory imprisonment sentences for Category 1 and Category 2 offences;
- statutory minimum sentences;
- mandatory non-parole periods that apply to standard sentences; and
- the serious offenders scheme.

All are intended to increase sentence lengths and, in particular, the period of time spent by an offender in custody.

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204 Tasmanian Law Reform Institute, *Sentencing*, Final Report (2008) [6.4.8].
205 *Sentencing Act 1991* (Vic) s 11(2).
206 Ibid; Victorian Sentencing Advisory Council, *A Quick Guide to Sentencing* (2021) 22.
207 *Sentencing Act 1991* (Vic) s 11(2).
208 Ibid s 11(1).
209 Ibid s 11(3).
210 *R v Tran and Tran* [2006] VSCA 222 [27] Redlich JA with whom the other members of the court agreed.
211 Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, July 2021) ('*Victorian Sentencing Manual*') 158 [8.3.2].
212 Ibid.
213 *Wallace v The Queen* [2012] VSCA 114 [16].
214 *Kumova v The Queen* [2012] VSCA 212 [9]–[10] (Nettle JA, Redlich and Osborn JJA agreeing).
215 Ibid [34]–[35] (Redlich and Osborn JJA).
216 'The failure to give reasons does not indicate error but it invites appellate scrutiny': *Victorian Sentencing Manual* (n 211) 158 [8.3.2]. The Court of Appeal has requested sentencing judges not use 'phrases such "shorter-than-usual" and "longer-than-usual"' as it is unhelpful and 'is apt to create false or unrealistic expectations'. Instead sentencing judges should state 'that the non-parole period is "shorter than it would otherwise have been" - for example, because of the offender's efforts towards and/or prospects of rehabilitation': *Wallace v The Queen* [2012] VSCA 114 [16].

2.9.3 Mandatory imprisonment for a Category 1 or Category 2 offence

In Victoria, like Queensland, imprisonment is generally a sentence of last resort.[217] However, as is the case in Queensland, there are legislated exceptions to this.

In 2017, the Victorian Parliament created special categories of offences, called Category 1 offences and Category 2 offences requiring a court to impose a sentence of imprisonment unless an exception is enlivened.[218] This scheme was introduced in response to concerns about the 'perceived overexpansion of the use of community correction orders ('CCOs') in cases involving serious offences'.[219]

There are 23 Category 1 offences and 19 Category 2 offences in Victoria.[220]

Most Category 1 offences *must* receive a sentence of imprisonment and the court cannot attach a CCO.[221] However, there are certain Category 1 offences for which a court may impose a sentence other than a term of imprisonment, if special reasons exist. If special reasons exist (see **Statutory minimum sentences** below) and it is a Category 1 offence against certain prescribed officials,[222] a court may impose either a custodial order or make one of the following orders: a mandatory treatment and monitoring order; a Residential Treatment Order; or a Court Secure Treatment Order.[223]

In the case of Category 2 offences, a court must impose a sentence of imprisonment unless the offender was aged under 18 years at the time the offence was committed, or a special reason exists. In either case, the court is not permitted to impose a sentence of imprisonment in addition to making a CCO.[224]

Special reasons for not imposing a term of imprisonment for a Category 2 offence include:

- The offender has assisted, or has agreed to assist after sentencing, law enforcement authorities in the investigation or prosecution of an offence;[225] or
- The offender proves on the balance of probabilities that:
  - At the time of the commission of the offence, they had impaired mental functioning (that was not primarily caused by self-induced intoxication) that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability; or
  - They have impaired mental functioning that would result in being subject to burdens or risks of imprisonment substantially and materially greater than the ordinary; or
- The court proposes to make a Court Secure Treatment Order[226] or a Residential Treatment Order[227] in respect of the offender; or

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217 *Sentencing Act 1991* (Vic) s 5(4). The language used in this subsection is that a court must not impose a sentence that involves the confinement of an offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the offender's confinement. The court is also prohibited from ordering an offender's confinement if the purposes of the sentence can be achieved by making either a drug and alcohol treatment order or a community correction order: ss 5(4B)–(4C).

218 Ibid ss 5(2G) and (2H).

219 Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria* (June 2021) 8, citing Victoria, 'Sentencing (Community Correction Order) and Other Acts Amendment Bill 2016', *Parliamentary Debates*, Legislative Assembly, 13 October 2016, 3860 (Martin Pakula, Attorney-General); Victoria, 'Sentencing (Community Correction Order) and Other Acts Amendment Bill 2016', *Parliamentary Debates*, Legislative Assembly, 27 October 2016, 4149–76.

220 *Sentencing Act 1991* (Vic) s 3 (definitions of 'Category 1 offence' and 'Category 2 offence'). Some Category 1 offences overlap because they account for previous and current versions of the same offence.

221 Ibid ss 5(2G)-5(2GC).

222 If the offender was charged with intentionally causing serious injury, recklessly causing serious injury or intentionally or recklessly causing injury (against a protected official) and the court finds that special reasons exist for not applying the statutory minimum, it must sentence in accordance with s 5(2GA) of the *Sentencing Act 1991* (Vic).

223 These orders are only available if the offender proves on the balance of probabilities that, at the time of the commission of the offence, they had impaired mental functioning (that was not substantially caused by self-induced intoxication) that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability; and the court is satisfied that one of these orders is appropriate.

224 *Sentencing Act 1991* (Vic) ss 5(2G) and (2H). This is otherwise permitted under s 44 of the Act.

225 This is to be distinguished from an admission, which is not the same thing for the purposes of this exception: *Farmer v The Queen* [2020] VSCA 140, [72], [83]–[84].

226 An order detaining a person in a designated mental health facility. A court secure treatment order is made where the person would have been sentenced to imprisonment but for their mental illness - *Sentencing Act 1991* (Vic) ss 94A, 94B and 94C.

227 An order detaining a person for a period of up to 5 years in a specified residential treatment facility to receive specified treatment, if the person has been found guilty of a serious offence (*Sentencing Act 1991* (Vic) s 3(1)) or sexual assault, or sexual assault by compelling sexual touching (*Crimes Act 1958* (Vic) ss 40(1) and 41(1)) – *Sentencing Act 1991* (Vic) s 82AA.

- There are substantial and compelling circumstances that are exceptional and rare and that justify not imposing the statutory minimum.[228]

These exceptions closely follow the test of 'special reasons' for not imposing a mandatory minimum sentence (discussed below), including provisions about the weight given to general deterrence and denunciation, limits on consideration of good character, guilty plea, rehabilitation or parity, and a need to have regard to parliament's intention that a sentence of imprisonment should ordinarily be imposed for this type of offence.[229]

The test for 'substantial and compelling circumstances' is stringent, 'but one in which the accumulation of detail may compel a conclusion that the mandatory detention provision should not apply'.[230]

The legislation does not specify a minimum term of imprisonment, and it is therefore possible for a very short prison sentence, which may even be a time served prison sentence to meet the requirement of the Category 1 offence classification.[231]

2.9.4 Statutory mandatory minimum sentences and non-parole periods

In Victoria, certain Category 1 and 2 offences are subject to a statutory defined term minimum NPP. First introduced in 2013 for the offences of intentionally causing serious injury and recklessly causing injury in circumstances of 'gross violence', the scheme has subsequently been expanded to include other offences.[232]

This scheme requires Victorian courts to impose a statutory minimum sentence or NPP for a specified number of months or years for certain categories of offending when committed by an offender aged 18 years and over at the time of the offence where no special reason exists.[233]

The minimum NPP provisions can be divided into five groups:

- manslaughter offences;[234]
- gross violence offences;[235]
- offences against protected officials;[236]
- driving offences against protected officials;[237] and
- aggravated home invasion or carjacking offences.[238]

There are also mandatory minimum sentences for certain breaches of supervision orders under the *Serious Offenders Act 2018* (Vic).[239] The offences subject to the statutory minimum sentence scheme are set out in detail in Table A2-1 in Appendix 2.

The mandatory NPP is different for each of the offences and is dependent on the circumstances of the offence. For example, the *Sentencing Act 1991* (Vic) specifies two situations in which a 10-year minimum NPP applies to a conviction of manslaughter. These are:

- manslaughter in circumstances of gross violence;[240] and

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228 *Sentencing Act 1991* (Vic) ss 5(2H)–(2HA) (Category 2 offence).
229 *Victorian Sentencing Manual* (n 211) 175.
230 Ibid 176.
231 Victorian Sentencing Advisory Council (n 219) 8.
232 Victorian Sentencing Advisory Council, *Sentencing Guidance in Victoria* (2016) 18. The Victorian Government sought advice from the Sentencing Advisory Council on the statutory minimum sentence scheme. See *Statutory Minimum Sentences for Gross Violence Offences: Report* (2011). The Victorian Sentencing Advisory Council was not asked to consider the merits of a statutory minimum sentence scheme, but to advise on what exceptional circumstances should be included and to specify what factors should be applicable when a court is sentencing gross violence to which a minimum sentence is applicable.
233 *Sentencing Act 1991* (Vic) s 10A.
234 Ibid ss 9B and 9C. In both cases, a court must impose a term of imprisonment and fix an NPP of not less than 10 years.
235 Ibid s 10. A court must impose a impose a term of imprisonment and fix an NPP of at least 4 years.
236 Ibid s 10AA. A court must impose a impose a term of imprisonment and fix an NPP of at least 6 months for intentionally or recklessly causing injury and at least 5 years for offences in circumstances of gross violence.
237 Ibid s 10AE. For these offences a court must impose a term of imprisonment and fix an NPP of at least 2 years.
238 Ibid ss 10AC–10AD. In both these cases, a court must impose a term of imprisonment and fix an NPP of not less than 3 years.
239 Ibid s 10AB.
240 Ibid s 9B(2). Manslaughter in circumstances of gross violence requires proof beyond reasonable doubt that the offender caused the victim's death in the company of two or more people, or entered into an agreement, arrangement or understanding with two or more people to engage in the conduct that caused the victim's death; and the offender planned in advance to have and use an offensive weapon or firearm and did use the offensive weapon or firearm to cause the victim's death, or planned in advance to engage in the conduct that caused the victim's death and, at the time of planning, a reasonable person would have foreseen that the conduct would be likely to result in death, or caused two or more serious injuries to the victim during a sustained or prolonged attack.

- manslaughter by a single punch or strike.[241]

Other forms of manslaughter, such as criminal negligence, are not subject to the mandatory minimum sentence of imprisonment. In both situations, the prosecution must give notice that, if the accused is found guilty of the offence, it intends to ask the court to sentence the person in accordance with the mandatory minimum NPP provisions.[242]

Special reasons

Victorian mandatory minimum sentence provisions all provide an exception where the court finds a 'special reason'. If the court finds a 'special reason' exists, it may decline to impose a term of imprisonment (in the case of a Category 1 offence) or may impose an NPP below the statutory minimum (in the case of minimum NPP offences).[243]

A special reason to not impose an NPP exists if:

- The offender has assisted, or has agreed to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence;[244] or
- The offender proves on the balance of probabilities that:
  - At the time of the commission of the offence, they had impaired mental functioning (that was not primarily caused by self-induced intoxication) that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability; or
  - They have impaired mental functioning that would result in being subject to burdens or risks of imprisonment substantially and materially greater than the ordinary; or
- The court proposes to make a Court Secure Treatment Order[245] or a Residential Treatment Order[246] in respect of the offender; or
- There are substantial and compelling circumstances that are exceptional and rare and that justify not imposing the statutory minimum.[247]

When considering whether there are 'substantial and compelling circumstances' the court must:

- consider general deterrence and denunciation of the offender's conduct as having greater importance than the other sentencing purposes;[248] and
- place less weight on the personal circumstances of the offender than other matters, such as the nature and gravity of the offence; and
- not have regard to:
  - the offender's previous good character (other than an absence of previous convictions or findings of guilt); or
  - an early guilty plea; or
  - prospects of rehabilitation; or
  - parity with other sentences; and
- have regard to Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a sentence or NPP of not less than the relevant statutory minimum should ordinarily be fixed, and whether the cumulative impact of the circumstances of the case would justify a departure from that sentence and, where relevant, the minimum NPP.[249]

The court must state, in writing, the special reason to not impose the statutory minimum.[250]

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241 Ibid s 9C(2).
242 Ibid s 9A.
243 However, where a court finds that a special reason exists in cases where the underlying offence is a Category 1 offence of causing serious injury intentionally or recklessly, causing injury intentionally or recklessly to an emergency worker, or exposing or aggravatedly exposing such a worker to a risk of driving, and it declines to impose a term of imprisonment, it must impose a mandatory treatment and monitoring order, a Residential Treatment Order or a Court Secure Treatment Order: *Sentencing Act 1991* (Vic) s 5(2GA)(b).
244 This is to be distinguished from an admission, which is not the same thing for the purposes of this exception: *Farmer v The Queen* [2020] VSCA 140, [72], [83]–[84].
245 An order detaining a person in a designated mental health facility. A court secure treatment order is made where the person would have been sentenced to imprisonment but for their mental illness - *Sentencing Act 1991* (Vic) ss 94A, 94B and 94C.
246 An order detaining a person for a period of up to 5 years in a specified residential treatment facility to receive specified treatment, if the person has been found guilty of a serious offence (*Sentencing Act 1991* (Vic) s 3(1)) or sexual assault, or sexual assault by compelling sexual touching (*Crimes Act 1958* (Vic) ss 40(1) and 41(1)) - *Sentencing Act 1991* (Vic) s 82AA.
247 *Sentencing Act 1991* (Vic) s 10A.
248 Ibid s 5(1).
249 Ibid s 10A.
250 Ibid s 10A(4)(a).

Statutory minimum youth justice centre orders: youth offenders aged 18-20 years

In some circumstances where a young offender (aged 18 years and over but under 21 years at the time of sentence) is found to have committed a 'causing injury offence' against emergency or custodial workers on duty, the court may impose a minimum term of youth justice centre detention in lieu of a statutory minimum NPP. The court can do so if it finds:

- a special reason under section 10A of the *Sentencing Act 1991* (Vic) does not exist; and
- a pre-sentence report indicates, and the court is of the view, that:
  - there are reasonable prospects for rehabilitation; or
  - the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison. [251]

This exception does not apply to charges of intentionally or recklessly causing serious injury in circumstances of gross violence.[252]

Victorian Court of Appeal on statutory minimum sentence for manslaughter

The Victorian Court of Appeal in *Esmaili v The Queen*[253] observed that there are two undesirable consequences from the fact that the legislation fixes only a mandatory minimum NPP. First, in cases where the mandatory term must be imposed it is antithetical to general sentencing principles and skews the court's exercise of discretion. Secondly, it may lead 'to an unacceptably short prospective period of supervision on parole'.[254]

Priest and Kyrou JJA remarked that:[255]

> First, so far as principle is concerned, the application of s 9C has inverted the conventional and time-honoured method by which head sentences and non-parole periods are imposed. Rather than a judge, through instinctive synthesis, arriving first at an appropriate head sentence, and then fixing a non-parole period which represents the minimum period that justice demands a prisoner must serve before being eligible for conditional release, when s 9C is engaged the exercise of the sentencing discretion is driven by the imposition of the non-parole period. Although mandatory (unless s 10A applies), such an approach is antithetical to general (and venerable) sentencing principles, and, quite plainly, skews the discretionary sentencing exercise.
>
> Secondly, as a practical matter, the judge's application of s 9C has led to an unacceptably short prospective period of supervision on parole for the applicant. Plainly, in this case, unfettered by the shackles of s 9C, the sentencing judge would have imposed a head sentence with a non-parole period shorter than 10 years, potentially allowing for a much longer period of supervision on parole. In the present case, the applicant, who has limited education, who has not held down a steady job and who has been habituated to illicit drugs for years, will be about 33 years of age when his non-parole period expires. Were he to immediately secure parole at the expiry of his non-parole period, he will be subject to supervision for only six months. The undesirability of a man with the applicant's background being returned to the community without extended supervision and support after a decade's incarceration is self-evident. There is no doubt, in my view, that a man in the applicant's position, and thereby the community, would be best served by the applicant being subject to supervised release for a period much greater than six months. It goes without saying, however, that it would have been completely wrong and offensive to principle for the judge to have imposed a disproportionately long head sentence — one greater than justified by the circumstances of the offence and of the offender — so as artificially to allow for a longer potential period of parole.

2.9.5 Standard sentences scheme

The standard sentences scheme was based on recommendations made by the Victorian Sentencing Advisory Council (VSAC) in its 2016 report, *Sentencing Guidance in Victoria*.[256] VSAC was asked for advice on legislative mechanisms for sentencing guidance in Victoria, and specifically to provide an alternative to the baseline sentencing provisions,[257] which the Victorian Court of Appeal had found to be 'incapable of being given any practical operation'.[258] The standard sentencing scheme closely resembles the NSW defined term SNPP scheme, but with the period set as the 'standard sentence' in this case applying to the setting of the head sentence, rather than to the setting of the NPP.

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251 Ibid s 10AA.
252 Ibid s 10.
253 [2020] VSCA 63.
254 *Esmaili v The Queen* [2020] VSCA 63, [60]–[63], [98]–[99].
255 Ibid [62]–[63]. These sentiments were echoed by Croucher AJA at [98]–[99].
256 Victorian Sentencing Advisory Council (n 232).
257 A 2014 scheme introduced to set median prison sentence lengths for certain serious offences. It was repealed and replaced with the standard sentence scheme.
258 *DPP v Walters (a Pseudonym)* [2015] VSCA 303 (17 November 2015).

An offender aged 18 or older who commits a prescribed offence on or after 1 February 2018 is subject to the standard sentencing scheme.[259] The court must consider the standard sentence as a guidepost for 12 serious offences (see Table A2-2, Appendix 2). Its broad policy intention is to increase sentencing practices for certain serious offences to bring sentencing more in line with community expectations.[260]

The standard sentence represents the midpoint of objective seriousness for the offence.[261] That means the middle of the range of seriousness when just considering the offending and no other factors (such as the offender's circumstances, criminal history or plea).[262]

The standard sentence is just one factor to be considered by the court, alongside all other relevant sentencing principles and factors. The standard sentence is not more important than other factors, and it does not affect instinctive synthesis.[263] Nor is it 'a mandatory sentence' or a 'starting point from which to add or subtract time'.[264]

When sentencing a person under this scheme, the court must state how the sentence imposed on a standard sentence offence relates to the prescribed standard sentence. In determining the objective factors, a court must consider only the nature of the offence and not the personal circumstances of the offender. When considering current sentencing practices for a standard sentence offence, a court is prohibited from considering past sentencing practices for the offence.[265] However, courts sentencing non-standard sentencing versions of relevant offences must take into account *both* how the offence has been sentenced as a standard sentence offence and how the offence has been sentenced as a non-standard sentence.[266]

Conspiracy, incitement or attempt to commit a standard sentence offence is not a standard sentence offence.[267]

In addition to standard sentences that must be considered by a court when setting the head sentence, there are also legislated NPPs that apply to 'standard sentence offences'. The court must fix an NPP when sentencing an offender for a standard sentence offence of at least the specified period, unless the court considers that it is in the interests of justice not to do so.[268] These NPPs must be at least:

- 30 years, if the relevant term is a term of life imprisonment;
- 70 per cent if the relevant term is a term of 20 years or more; or
- 60 per cent if the relevant term is a term of less than 20 years.[269]

The 'relevant term' is defined for the purposes of this calculation as the sentence imposed for the standard sentence offence, or the total effective sentence imposed in respect of 2 or more sentences, at least one of which is for a standard sentence offence.[270]

Where the court fixes an NPP shorter than that specified by the *Sentencing Act 1991* (Vic), the court must give reasons and explain how the sentence imposed relates to the standard sentence.[271] Section 5B requires the judge to identify the facts, matters and circumstances bearing upon his or her judgment as to the appropriate sentence. The Victorian Court of Appeal has provided clear guidance to judges on how to provide adequate reasons for departing from the standard sentencing scheme (whether that be higher or lower).[272]

In 2021, VSAC reported that the standard sentence scheme appeared to 'have had a tangible effect on the length of prison sentences imposed, as intended'.[273] Its analysis of sex offences found that in 2019 'the average prison sentences were uniformly longer for standard sentence offences of the relevant sex offences than for non-standard sentence versions of the same offences'.[274] VSAC thought this difference could be:

> due to the "anchoring effect" arising from the numerical guidance provided by the standard sentence set for each offence or it could be due to courts being prohibited from considering sentencing practices in cases in which the offence was a non-standard sentence offence - or a combination of the two.[275]

259 *Sentencing Act 1991* (Vic) ss 5A and 5B.
260 Victorian Sentencing Advisory Council (n 219) 12.
261 *Sentencing Act 1991* (Vic) s 5A(1)(b).
262 Ibid ss 5A(1)(b) and (3).
263 *Brown v The Queen* [2019] VSCA 286, [4], [44]. [106].
264 *DPP v Hermann* [2019] VSC 694 (29 October 2019) [104].
265 *Sentencing Act 1991* (Vic) s 5B(2)(b).
266 Victorian Sentencing Advisory Council (n 219) 14.
267 *Sentencing Act 1991* (Vic) s 5A(2).
268 Ibid s 11A(4).
269 Ibid s 11A.
270 Ibid s 11A(5).
271 Ibid s 5B (4)–(5).
272 *Brown v The Queen* [2019] VSCA 286, [45] and *DPP v Drake* [2019] VSCA 293 [14]–[17].
273 Victorian Sentencing Advisory Council (n 219).
274 Ibid 78.
275 Ibid.

2.9.6 Serious offenders

Victoria also has a serious offender scheme, which allows for a court to order a term of imprisonment that is longer than would otherwise be proportionate taking into account the seriousness of the offence.

Under Part 2A of the *Sentencing Act 1991* (Vic) a 'serious offender' means a:[276]

- 'serious arson offender' (who is a person convicted of a serious arson offence);[277]
- 'serious drug offender' (who is a person convicted of a drug offence);[278] or
- 'serious sexual offender' (who is a person convicted of:
  - two or more sexual offences;
  - persistent sexual abuse of a child under 16;
  - committing the incidents of a sexual offence included in a course of conduct charge (as defined in clause 4A of Schedule 1 of the *Criminal Procedure Act 2009*); or
  - at least one sexual offence and at least one violent offence arising out of the same course of conduct);[279] or
- serious violent offender (who is a person convicted of a serious violent offence).[280]

In each case, to meet the criteria of being a 'serious offender', the person must have been sentenced to a term of imprisonment or detention in a youth justice centre for the relevant offence or offences.[281]

If the offender is a serious offender and the court considers that imprisonment for the relevant offence is justified, the court, in determining the length of the sentence:

- must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and
- may, in order to achieve that purpose, sentence the offender to a term that is longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances.[282]

The aim of requiring a court to regard community protection as the predominant purpose is to ensure it gives proper consideration to the question and undertake a 'requisite risk assessment'.[283]

The discretion to impose a disproportionate sentence is one the Victorian Court of Appeal has found should be exercised rarely.[284] When a court imposes a disproportionate sentence, the judge must explain the reasons for assessing the offender as likely to remain a risk to the community beyond what would otherwise be a proportionate term.[285]

A person will fall within one of the 'serious offender' categories if they have previously received a term of imprisonment or youth detention (even within the same hearing) for a charge (or, for some offences, at least two charges) of the relevant offence.[286] The serious offender provisions do not apply to the sentencing of young offenders, that is, someone under the age of 21 at the time of committing an offence that qualifies as a 'relevant offence'.[287] A person can be sentenced as a serious offender if their prior conviction (and imprisonment) was in another jurisdiction. Where a person has a conviction for an offence against a law of the Commonwealth, or another state or territory or international jurisdiction, the court must be satisfied that the offence is substantially similar to an arson offence, drug offence, serious violent offence, sexual offence or violent offence (as the case requires) and that the offender was sentenced to a term of imprisonment or detention for that offence.[288]

When sentencing a serious offender for a relevant offence, the court must also declare on court records that the offender was sentenced as a serious offender.[289]

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276 The 'serious offender' offences are set out in schedule 1 of the *Sentencing Act 1991* (Vic).
277 *Sentencing Act 1991* (Vic) ss 6B(2)-(3).
278 Ibid ss 6B(2)–(3).
279 Ibid ss 6B(2).
280 Ibid ss 6B(2)–(3).
281 Ibid s 6B(2).
282 Ibid s 6D.
283 *R v LD* [2009] VSCA 311; *DPP (Vic) v Patterson* [2009] VSCA 222, [33].
284 *R v GLH* [2008] VSCA 88, [25] (Lasry AJA, Warren CJ and Ashley JA agreeing) referring with approval to observations made by Buchanan JA in an earlier decision of *R v Prowse* [2005] VSCA 287.
285 Ibid [25]–[26].
286 Victorian Sentencing Advisory Council, *Guide to Sentencing Schemes in Victoria 2021* (February 2021) 11.
287 *Sentencing Act 1991* (Vic) ss 3(1), 6B(2).
288 Ibid s 6C(3).
289 Ibid s 6F.

Every term of imprisonment imposed on a serious offender for a relevant offence must be served cumulatively on any uncompleted sentence of imprisonment, unless the court orders otherwise.[290] As noted by the Victorian Court of Appeal:

> This terminology underscores the force of the reversal of the presumption of concurrence in the circumstances to which it applies…requires the judge to take a starting point in favour of cumulation, but otherwise preserves the judge's discretion. The judge may 'otherwise direct'. It is precisely the same situation, in reverse, that empowers a judge to 'direct otherwise' in a case in which the presumption of concurrence applies.[291]

The Victorian Court of Appeal has observed that this scheme creates tension between the requirement of cumulation and the principle of totality, but as the objective seriousness of the total offending increases, so will the degree of cumulation, thereby producing a total effective sentence that meets both.[292] The Victorian Court of Appeal has also noted that 'the proportionate gap between head sentence and non-parole period is likely to be less where a long sentence is imposed'.[293]

Where an offender meets the statutory criteria of being a 'serious offender' a prosecutor cannot waive the application to have the person declared to be a serious offender, but may decline to seek that a disproportionate sentence be imposed.[294]

2.10 Western Australia

2.10.1 General provisions applying to parole

In Western Australia (WA) a court may not make a parole eligibility order if the fixed term is less than 6 months.[295] For sentences of imprisonment (including aggregate terms) of 6 months or more, a court may make a parole eligibility order which means the person is eligible to be considered for parole by the Prisoners Review Board.[296]

The court can decline to make a parole eligibility order if it considers the offender should not be eligible for parole on the basis of at least one of four factors:

- the offence is serious;
- the offender has a significant criminal record;
- the offender, when released from custody under a previous release order, did not comply with that order;
- any other reason the court considers relevant.[297]

If the court does not make a parole eligibility order, the offender cannot be released on parole.[298] A court must not make a parole eligibility order in respect of a prescribed term (a term imposed for escaping lawful custody).[299]

A person serving a term of imprisonment to which a parole eligibility order applies is subject to a statutory minimum NPP that varies depending on the sentence length. Section 93(1) of the *Sentencing Act 1995* (WA) provides that:

- for sentences of 4 years or less, a NPP of 50 per cent applies before the prisoner becomes eligible for parole; and
- for sentences of more than 4 years, a prisoner is eligible for parole when they have served all but 2 years of their term of imprisonment in custody.[300]

2.10.2 Minimum non-parole periods

In WA, a minimum NPP scheme applies to all terms of imprisonment, life imprisonment,[301] and to prescribed offences. In addition, some offences subject to the minimum NPP scheme, are also subject to mandatory minimum terms of imprisonment in certain circumstances.

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290 Ibid s 6E.
291 *Gordon (a pseudonym) v The Queen* [2013] VSCA 434 at [60] (Ashley JA).
292 Ibid at [74] (Redlich JA).
293 Ibid at [16] (Ashley JA) citing *Romero v The Queen* (2011) 32 VR 486.
294 *Ngyuen v The Queen* [2013] VSCA 63 at [31] (Kaye AJA, Redlich and Whelan JJA agreeing).
295 *Sentencing Act 1995* (WA) s 89(2).
296 Ibid s 89(1).
297 Ibid s 89(4).
298 Unless the sentencing judge (or, on an appeal against sentence by the Court of Appeal) makes a parole eligibility order, the offender can never be released on parole and s 20 of the *Sentencing Administration Act 2003* (WA) is not engaged.
299 *Sentencing Act 1995* (WA) ss 85(1) and 89(3).
300 Some exceptions to this are set out in ss 94A, 94 and 95A.
301 Ibid s 90(1)(a): mandatory minimum NPP for a sentence of life imprisonment for murder is 10 years and s 96(1): an offender serving a life sentence for an offence other than murder must serve a mandatory NPP of 7 years.

Mandatory minimum terms of imprisonment

Where an offence attracts a mandatory minimum term of imprisonment, the minimum NPPs set by section 93(1) of the *Sentencing Act 1995* (WA) continue to apply. The court cannot suspend any term of imprisonment and in the case of juvenile offenders, must record a conviction.[302] There are numerous criminal offences in WA which attract a mandatory minimum sentence. Broadly, these include:

- repeat home burglaries;[303]
- offences committed in the course of conduct that constitutes aggravated home burglary;[304]
- reckless driving to evade police and certain 'escape pursuit' dangerous driving offences;[305]
- certain assaults on specific public officers;[306]
- certain drug offences committed by adults in relation to children;[307] and
- certain breaches of restraining orders or police orders by repeat offenders.[308]

Mandatory minimum terms of imprisonment vary between offences. For example, a person convicted of serious assault must be sentenced to at least 6 months[309] or 9 months[310] depending on the circumstances of the case, whereas an adult convicted of grievous bodily harm must be sentenced to at least 12 months,[311] or when committed in the course of an aggravated home burglary, at least 75 per cent of the maximum penalty of either 10 years or 14 years.[312]

Mandatory minimum terms for prescribed offences

There are also prescribed offences which are subject to a mandatory NPP which is the greater of either the minimum term applicable to the offence or the period which they would have been required to serve if the offence were not a prescribed offence.[313]

Prescribed offences are the following (if committed by an adult):

- Grievous bodily harm committed against a police officer or certain other officers such as those working in hospitals, courts or prisons.[314]
- Serious assault committed against a police officer or certain other officers such as those working in hospitals, courts and prisons.[315]
- Dangerous driving causing death or grievous bodily harm, and dangerous driving causing bodily harm, where the offence is committed in circumstances of 'escape pursuit of police'.[316]

2.10.3 Declaration of offence as a 'serious offence'

Although not directly relevant to the sentence imposed, a court, when sentencing a person to imprisonment for an indictable offence that involved the use or attempted use of a firearm, serious violence against another person, or that resulted in serious harm to, or the death of another person, can declare the offence committed by that person to be a 'serious offence' for the purposes of the *High Risk Offenders Act 2020* (WA) and the *Sentencing Administration Act 2003* (WA) Part 5A.

The making of a declaration means that the person who committed the offence or offences to which it applies can be subject to a post-sentence supervision order (PSSO) made by the Parole Board. Even if a court has not declared the offence to be a 'serious offence', the Parole Board must consider whether a PSSO should be made if it is otherwise a 'serious offence' within the meaning used in the *High Risk Serious Offenders Act 2020* (WA).[317] This definition incudes not only court declared offences, but also offences listed in Schedule 1 to that Act, or an offence

302 For example, Criminal Code (WA) ss 297(5), 297(6).
303 Criminal Code (WA) ss 400, 401A and 401B.
304 Criminal Code (WA), examples include murder (s 279), attempted murder (s 283), manslaughter (s 280) acts intended to cause grievous bodily harm (s 294) and sexual offences (ss 320, 321, 324, 325, 326, 327 and 328).
305 *Road Traffic Act 1974* (WA) ss 59, 60
306 Criminal Code (WA) grievous bodily harm (s 297(8)) and serious assault (s 318(5)).
307 *Misuse of Drugs Act 1981* (WA) ss 34(3), 34(4) and 34(5).
308 *Restraining Orders Act 1997* (WA) s 61A(4).
309 Criminal Code (WA) s 318(4)(b).
310 Ibid s 318(4)(a).
311 Ibid s 297(5)(b).
312 Ibid ss 297(5)(a)(i) or 297(5)(a)(ii).
313 *Sentencing Act 1995* (WA) s 95A(1).
314 Ibid s 85(a) and Criminal Code s 297.
315 Ibid s 85(b) and Criminal Code s 318(5).
316 Ibid s 85(c) and *Road Traffic Act 1974* (WA) ss 59, 59A, 49AB(1)(c).
317 *Sentencing Act 1995* (WA) s 74A (definition of 'serious offence', adopting the definition in s 5 of the *High Risk Serious Offenders Act 2020* (WA)).

of conspiracy, attempt or incitement to commit such an offence.[318] Offences under Commonwealth law are also captured.[319]

A PSSO must be made by the Board if it considers the order is necessary for the prevention of harm to the community from further offending by the person.[320] In making this determination, the Board must have regard to a range of matters, including issues for any victim of a serious offence for which the person is in custody, including any matters raised in a victim's submission, the person's behaviour in custody, whether they have participated in programs available to them in custody and their performance, and if not, the reasons for this, and the likelihood of them committing a serious offence.[321]

If a PSSO is made, the person is subject to certain reporting and notification conditions, as well as any additional requirements imposed, for a period that must not be less than 6 months, or not more than 2 years commencing at the end of the person's sentence.[322] In the case of an offender serving a sentence for a family violence offence where the person is a 'serial family violence offender' the Board must consider whether to impose electronic monitoring requirements.[323] A 'serial family violence offender' is defined under section 124E of the *Sentencing Act 1995* as a person declared to be such in circumstances where they have (including the current conviction) been convicted of at least 2 prescribed offences that can only be tried on indictment, at least 2 of which were committed on different days, or have been convicted of at least 3 prescribed offences with at least 3 having been committed on different days.[324]

Breach of a PSSO without a reasonable excuse is punishable by up to 3 years' imprisonment.[325]

This new regime was introduced in 2017 as a result of amendments made to the *Sentence Administration Act 2003* (WA).

The Attorney-General, introducing the amendment Bill, referred to the scheme as implementing 'a government election commitment to provide stricter supervision of certain serious and violent offenders, particularly those who commit family violence and arson offences by introducing a post-sentence supervision order to 'enable the supervision of seriously violent criminals beyond the completion of their sentence'.[326] It was made clear that these PSSOs would not replace the existing legislative provisions in WA relating to dangerous sexual offenders allowing for a continuing detention order or a supervision order to be made under the *Dangerous Sexual Offenders Act 2006* (WA).[327]

3 International approaches

3.1 Canada

3.1.1 General requirements applying to parole

With the exception of sentences of imprisonment under 6 months,[328] in Canada parole is decided by the Parole Board and is generally available after a third of the head sentence is served or 7 years (whichever is less).[329] Canada also has earned remission, which applies to sentences under 2 years (15 days of remission for each month).[330]

Statutory release applies to prisoners who either do not apply for release on parole, or who have been denied release on full parole.[331] It is automatic and triggered once two-thirds of the head sentence is served (if parole has not already been granted)[332] — but can be annulled by executive intervention regarding listed offences grounded in concerns about the person's likelihood of reoffending on release.[333]

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318 Ibid ss 5(1) and (3).
319 Ibid s 5(5).
320 *Sentence Administration Act 2003* (WA) s 74D(3).
321 Ibid ss 74D(4) and 74B.
322 Ibid s 74E.
323 Ibid s 74G(2).
324 See s 124E for additional criteria that apply.
325 Ibid s 74L.
326 Western Australia, *Parliamentary Debates*, Legislative Council, 13 September 2016, 5939 (Michael Mischin, Attorney-General).
327 Ibid 5939–40.
328 *Corrections and Conditional Release Act*, SC 1992, c 20, s 119(2) (day parole) 123(3.1) (full parole).
329 Ibid s 120(1).
330 *Prisons and Reformatories Act*, RSC 1985, c P-20, s 6.
331 Correctional Services Canada, 'Types of Release' (Web Page, 11 September 2019) < https://www.csc-scc.gc.ca/parole/002007-0002-en.shtml>.
332 *Corrections and Conditional Release Act*, SC 1992, c 20, s 127(3).
333 Ibid s 130.

'Parole' under the *Corrections and Conditional Release Act* means 'day parole' or 'full parole'.[334] Day parole is an offender's (authorised) being at large during the sentence, to prepare 'for full parole or statutory release' with conditions requiring 'return to a penitentiary, community-based residential facility, provincial correctional facility or other location each night or at another specified interval'.[335] Full parole is authorised being at large during the offender's sentence.[336]

Day parole eligibility

The portion of the sentence that must first be served depends on the head sentence:

- For sentences less than 2 years – half of the portion of the sentence that must be served before full parole may be granted.
- For sentence 2 years or more – the greater of the portion ending 6 months before the date on which full parole may be granted, and 6 months.[337]

This does not apply to some forms of imprisonment, such as life sentences.[338]

In the case of short sentences, the Parole Board is not required to review the case of an offender serving a sentence of less than 6 months who applies for day parole.[339]

Full parole eligibility

An offender is not eligible for full parole until the day on which they have served a period of ineligibility of the lesser of one third of the sentence and 7 years.[340]

For example, if a person is sentenced to 6 years' imprisonment for a federal offence with a commencement date of 1 January 2021, they can apply for day parole 6 months prior to being eligible for full parole (on 1 July 2022) and for full parole after serving one-third of their sentence (2 years) on 1 January 2023.

Eligibility for parole is subject to the particular requirements of the *Criminal Code* — such as for life without eligibility for parole for a specified number of years,[341] and special provisions applying to indeterminate sentences.[342] By section 120(2) of the *Corrections and Conditional Release Act*, an offender serving a life sentence that was not imposed as a minimum punishment is not eligible for full parole until 7 years are served (subject to the court's power to delay parole[343]).

Eligibility for full parole cannot generally be later than 15 years after sentence, or any additional sentence.[344] Again, life sentences are an exception to this.[345]

3.1.2 Special provisions for serious violent, drug and sexual offences

Notwithstanding the general 'one-third/7-year' rule in section 120 of the *Corrections and Conditional Release Act*, courts can order 'that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or 10 years, whichever is less'.[346]

Using the same example above, if a person is sentenced to 6 years' imprisonment, the court may order that they not be released on full parole until they have served 3 years, rather than the 2 years they would otherwise have had to serve before being eligible for full parole.

This is only possible for imprisonment of 2 years or more (including a sentence of imprisonment for life imposed otherwise than as a minimum punishment), if the offence is one listed in *Corrections and Conditional Release Act* Schedule I (a long list of Code offences including violent, sexual and weapons offending) and Schedule II (drug offending) which was prosecuted on indictment.

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334 Ibid s 99.
335 Ibid.
336 Ibid.
337 Ibid ss 119(1)(c)–(d).
338 *Criminal Code*, RSC 1985, c C-46, s 746.1(2). No day parole can be granted in this case until the person has served all but 3 years of the specified number of years of imprisonment required to be served before being eligible for parole. See s 745 for relevant mandatory and minimum non-parole periods for life sentences.
339 *Corrections and Conditional Release Act*, SC 1992, c 20, s 119(2).
340 Ibid s 120(1).
341 Ibid and *Criminal Code*, RSC 1985, c C-46, s 746.1.
342 *Criminal Code*, RSC 1985, c C-46, s 761.
343 Ibid s 743.6.
344 *Corrections and Conditional Release Act*, SC 1992, c 20, s 120.3.
345 Ibid and *Criminal Code*, RSC 1985, c C-46, s 745.
346 *Criminal Code*, RSC 1985, c C-46, s 743.6(1).

The court must be 'satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires'.[347]

In the absence of such an order being made, the same parole release arrangements that apply generally apply to offenders convicted of serious violent, drug and sexual offences — although in this case there is provision for their ongoing risk to be reviewed before they reach the end of their sentence.[348]

The statutory release date for offenders sentenced to imprisonment (and who are not granted or who have not applied for parole) is the day on which the person completes two thirds of the sentence. However, before the statutory release date of an offender who is serving a sentence of 2 years or more that includes a sentence imposed for a Schedule I or II offence, the Commissioner must cause the offender's case to be reviewed by the Service, which must refer the case to the Parole Board more than 6 months before the day on which an offender is entitled to be released on statutory release.[349]

The Service must provide the Parole Board with information relevant to a Schedule I case regarding the likelihood of the offender committing an offence causing death or serious harm to another person before the expiration of the offender's sentence.[350] This applies to offenders convicted of offences listed in Schedule 1 where the commission of the offence caused the death or serious harm to another person, or was a sexual offence involving a child (defined in s 129(9)). 'Serious harm' is defined as 'severe physical injury or severe psychological damage'.[351]

For Schedule II offences, the threshold is reasonable grounds to believe the offender is likely to commit a serious drug offence before the expiration of the sentence.

More generally, the Commissioner must refer a case to the Board if he or she believes on reasonable grounds that an offender is likely, before the expiration of the sentence, to commit an offence causing death or serious harm, a sexual offence involving a child, or a serious drug offence (Schedule II).[352] This must generally occur more than 6 months before the statutory release date.[353]

The Board must conduct a review. The prisoner is not entitled to statutory release. On completion of the review, the Board can order the offender not be released until the expiration of the sentence, if satisfied of the likelihood of reoffending as discussed above.[354] The Board must review such a decision within one year, and again within each subsequent year while the order remains in force, or 2 years for a Schedule I offender who caused death or serious harm.[355]

There are non-exhaustive legislated factors, including issues relating to risk and behavioural patterns, which the Commissioner or Board must take into consideration regarding likelihood of reoffending causing death or serious harm, a sexual offence involving a child or a serious drug offence.[356]

3.1.3 Long-term sentences for dangerous offenders

History and introduction

Canada has both a 'dangerous offender' designation and a 'long-term offender' designation.

The current provisions have their origins in 'habitual criminals' legislation introduced in 1947 based on the British *Prevention of Crime Act 1908*.[357] In 1977, the *Criminal Code of Canada* was amended to remove the terms 'habitual offender' and 'dangerous sexual offender' and were replaced by a section relating to 'dangerous offenders'.[358] In 1977, the concept of the 'serious personal injury' offence was introduced 'with the intent of bringing into focus the perceived "dangerousness" of the offender'.[359] Between 1977 and 1997, on finding an offender to be a dangerous offender, a judge could sentence that person to either a determinate or an indeterminate sentence.[360] The legislation was again amended in 1997 with determinate sentences then removed as a sentencing option.[361]

347 Ibid.
348 *Corrections and Conditional Release Act*, SC 1992, c 20, s 130.
349 Ibid s 129(1).
350 Ibid s 129(2).
351 Ibid s 99.
352 Ibid s 129(3).
353 Ibid.
354 Ibid s 130.
355 Ibid s 131.
356 Ibid s 132.
357 Solicitor General Canada, *High-Risk Offenders A Handbook for Criminal Justice Professionals* (2001) < High-Risk Offenders - A Handbook for Criminal Justice Professionals (publicsafety.gc.ca)>.
358 Ibid.
359 Ibid.
360 Ibid.
361 Ibid.

In 1997, a new 'long-term offender' designation was introduced as a stand-alone application or as an alternative to a dangerous offender finding in circumstances where the threshold for meeting the 'dangerous offender' test cannot be met. This application is heard by a judge alone.

Dangerous offenders

The process for designation of an offender as a 'dangerous offender' relies on an application being made by the Crown.[362] If the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a 'serious personal injury offence' or one of a number of offences referred to in paragraph 753.1(2)(a) of the Code might be found to be a dangerous offender or a long-term offender, the court must remand the offender prior to sentence for a period not exceeding 60 days to the custody of a person who can arrange for an assessment to be completed for use as evidence in the application.[363]

After an assessment report is filed, the court must find the offender to be a 'dangerous offender' if satisfied:

> (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 [Dangerous Offenders and Long-term Offenders – definitions] and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing:
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
>
> (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 [Dangerous Offenders and Long-term Offenders – definitions] and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.[364]

An application must be made before the person is sentenced unless, before the sentence is imposed, the prosecutor gives notice to the offender of a possible intention to make an application not later than 6 months after sentence, and it is shown that relevant evidence not reasonably available to the prosecutor at the time the sentence was imposed became available in the interim.[365]

The finding of 'dangerousness' is a finding of fact.[366] The sentencing judge is not prevented from considering evidence relating to the prospects of future treatment when considering a dangerous offender designation.[367]

The Crown bears the burden of proof to establish the elements under the provision are met, which must satisfy this to a criminal standard (beyond reasonable doubt).[368]

There is also a presumption (until the contrary is proven on the balance of probabilities) that a person is a 'dangerous offender' in circumstances where the court is satisfied that the offence for which the person has been convicted is a 'primary designated offence' for which it would be appropriate to impose a sentence of imprisonment of 2 years or more, and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least 2 years' imprisonment for each of those convictions.[369]

If the court finds an offender to be a dangerous offender, it has three options:

1. To impose an indeterminate sentence of detention – with the presumption being such a sentence will be imposed, unless the court is satisfied there is a reasonable expectation that either a sentence under 2 or

362 *Criminal Code*, RSC 1985, c C–46, s 752.1(1).
363 Ibid s 752.1(1).
364 Ibid s 753(1).
365 Ibid s 753(2).
366 *R v Currie*, 1997 CanLII 347 (SCC), [1997] 2 SCR 260, [17] (Lamer CJ on behalf of the Court).
367 *R v Boutilier*, 2017, SCC 65 CanII, [2017] 2 SCR 936, [21]–[23] (Cote J).
368 See *R v Carlton*, 1981 ABCA 220 (CanLII), [1981] 69 CCC (2d) 1 (ABCA), per McGillivray JA (6:1).
369 *Criminal Code*, RSC 1985, c C–46, s 753 (1.1).

3 will adequately protect the public against the commission by the offender of murder or a serious personal injury offence;

2. To impose a sentence for a minimum of 2 years and order that the person be subject to long-term supervision for a period that does not exceed 10 years; or
3. To impose a standard determinate sentence for which the person has been convicted.[370]

There are two types of 'serious personal injury offence'.[371] The first type is an indictable offence (other than high treason, treason, or first or second degree murder) involving the use or attempted use of violence against another, or conduct endangering/likely to endanger the life or safety of another, or inflicting/likely to inflict severe psychological damage on another, and for which the sentence may be 10 years' imprisonment or more. The second type of 'serious personal injury offence' is one of a number of listed sexual offences (sexual assault, and with a weapon/threats to a third party or causing bodily harm, and aggravated sexual assault – or attempts to commit these).

A 'primary designated offence' is any of a list of sexual, violent, or weapons offences (or attempts or conspiracies to commit them).[372]

Long-term offenders

The court may find an offender to be a 'long-term offender' if the court is satisfied that:

1. it would be appropriate to impose a sentence of imprisonment of 2 years or more for the offence for which the offender has been convicted;
2. there is a substantial risk that the offender will reoffend; and
3. there is a reasonable possibility of eventual control of the risk in the community.[373]

The Code goes on to define the concept of 'substantial risk' for the court. It states that:

> (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
>
> (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and
>
> (b) the offender
>
> (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
>
> (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain, or other evil to other persons in the future through similar offences.

If the court finds an offender to be a long-term offender, it must impose a sentence for the offence for which the offender has been convicted, which must be for a minimum term of 2 years and order that the offender be subject to long-term supervision for a period that does not exceed 10 years.[374] If the court is found not to be a long-term offender, it proceeds to impose a standard determinate sentence.[375]

The supervision period is not part of the person's sentence and is a post-sentence order.

3.2 England and Wales

3.2.1 General rules applying to parole

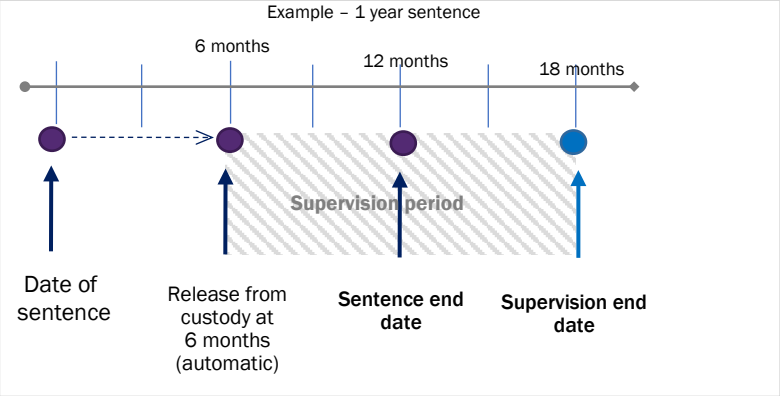
In England and Wales, parole (referred to as 'release on licence') is automatic after a prisoner serving a fixed-term sentence has served one-half of their sentence.[376] This does not apply to prisoners sentenced as offenders of particular concern, serving extended sentences or a fixed term sentence for a terrorism-related offence, or who have been released on licence and recalled to prison.[377]

370 Ibid ss 753(4) and (4.1).
371 Ibid s 752.
372 Ibid.
373 Ibid s 753.1(1).
374 Ibid s 753.1(3).
375 Ibid s 753.1(6).
376 *Criminal Justice Act 2003* (c 44) (UK) s 244.
377 Ibid ss 244(1)–(1A).

The system of automatic parole in England and Wales was introduced in 1991 for offenders serving less than 4 years.[378] In 2003, this was extended to all fixed-term prisoners.[379] Prior to 1991, most prisoners were eligible to apply for discretionary parole after they had served one-third of their sentence.[380]

For sentences of more than 1 day, but less than 2 years, the person is also subject to a 'supervision period' that ends on the expiry of 12 months beginning immediately after the person has served the requisite 'custodial period' (for a prisoner serving one sentence, one-half of the sentence).[381] The stated purpose of the supervision period is 'the rehabilitation of the offender'.[382]

Figure 2: Release on licence and supervision period, sentences more than 1 day, less than 2 years, England and Wales



Earlier release (at any time during the period of 135 days before the person has served the entirety of the non-parole period – called the 'requisite custodial period') is also possible provided the length of the requisite non-parole period is at least 6 weeks and the person has served at least 4 weeks of that period and at least one-half of that period.[383] This does not apply to sentences that are for a term of 4 years or more.[384] There are a number of other exclusions to eligibility for early release including if the person being sentenced:

- is sentenced to an extended sentence for a violent, sexual or terrorism offence, or a special custodial sentence if sentenced as an offender of particular concern;
- is a prisoner who has been convicted of a terrorism offence;
- is a prisoner subject to the notification requirements under Part 2 of the *Sexual Offence Act 2003* (c. 42) (this applies to offenders convicted of offences listed in a schedule to that Act);[385]
- is a prisoner who has been released on licence and has been recalled to prison.[386]

Breaches of supervision conditions vary depending on the extent to which the person has complied with the order. A court, rather than the Parole Board, must deal with the breach to determine whether the person has failed without reasonable excuse to comply with the requirements of their order.[387] The maximum penalty for failing to comply with a supervision requirement is 14 days' custody, or a fine not exceeding Level 3 (currently £1,000).[388] The court may also make a 'supervision default order' imposing an unpaid work requirement or a curfew requirement.[389]

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378 Padfield, Nicola, *Parole: Reflections and Possibilities: A Discussion Paper* (Howard League for Penal Reform, 2018) 2 referring to reforms under the *Criminal Justice Act 1991* (UK).

379 Ibid referring to the enactment of the *Criminal Justice Act 2003* (c 44) (UK) which also introduced the Indeterminate Sentence for Public Protection and the extended sentence.

380 Ibid.

381 *Criminal Justice Act 2003* (c 44) (UK) ss 256AA and s 244(3) (definition of 'requisite custodial period').

382 Ibid s 256AA(5).

383 Ibid s 246.

384 Ibid s 246(4)(aa).

385 *Sexual Offences Act 2003* (c 42) (UK) sch 3. It also applies to people found not guilty of a Schedule 3 offence by reason of insanity, found to be under a disability and to have done the act charged in respect of a Schedule 3 offence, and who have been cautioned in respect of such an offence: Ibid s 80. Schedule 3 lists 42 provisions covering a broad range of conduct.

386 *Criminal Justice Act 2003* (c 44) (UK) s 246(4).

387 Ibid s 256AC.

388 Ibid.

389 Ibid s 256AC(4)(c). If a curfew requirement is included, an electronic monitoring requirement also applies: Ibid s 256AC(5).

3.2.2 Minimum sentences for listed offences

Certain minimum custodial sentences apply to listed serious offences. These apply generally, but not in all cases,[390] to repeat offences — such as a 7 year minimum sentence for a third conviction for a class A drug trafficking offence, and a minimum sentence of 3 years for a third conviction for domestic burglary. The court is required to consider these minimum sentences, but has discretion to depart by setting a lower sentence where they consider the circumstances of the offence or offender would make the imposition of the minimum sentence unjust. A reduction for an early guilty plea of up to 20 per cent is also permitted. Changes proposed in a Bill currently before the UK Parliament would limit departure from these minimum terms to cases where exceptional circumstances can be shown.[391]

These minimum sentences are not technically mandatory; rather they are a mandatory consideration that the court must take into account before imposing sentence. There is no power to suspend a sentence imposed under the minimum sentence provisions.[392]

3.2.3 Sentencing of 'dangerous offenders': an overview

A different sentencing regime applies to the sentencing of 'dangerous offenders', including:

- life sentences for 'serious offences' (first offence);
- life sentences for a second listed offence;
- extended sentences for certain violent, sexual or terrorism offenders; and
- release on licence of certain violent or sexual offenders.

The parole arrangements that apply to determinate sentences (that is, a sentence other than one of life imprisonment) are summarised in Table A2-3 in Appendix 2.

The Crown Prosecution Services has developed detailed guidelines about how these provisions operate together and are to be applied by courts.[393]

In brief, the decision-making process followed by judges in sentencing is:

1. For an offence listed in Schedule 18 (for extended sentences) or Schedule 19 (for life sentences) of the Sentencing Code, to consider whether the offender is 'dangerous'. That is, there is a significant risk that:
   a. the defendant will commit further specified offences; and
   b. by doing so, will cause serious physical or psychological harm to one or more people.
2. If the offender is 'dangerous':
   a. consider whether the seriousness of the offence and offences associated with it justify a life sentence (in which case the judge must pass a life sentence in accordance with section 285 of the Sentencing Code);
   b. if a life sentence for the individual offence is not justified, consider whether section 283 of the Sentencing Code applies (life sentences for second listed offence) and if it does, a life sentence must be imposed;
   c. If no life sentence is imposed, consider whether a determinate sentence alone would be sufficient;
   d. If a determinate sentence is not sufficient, consider imposing an extended sentence.[394]

In making the assessment of whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, the court—

- must take into account all the information that is available to it about the nature and circumstances of the offence;

---

390 They also apply to a single offence for certain firearms offences listed in schedule 20 to the Sentencing Code (UK): Sentencing Code (UK) s 311; and bladed articles/offensive weapons offences under the *Criminal Justice Act 1988* (c 33) (UK) s 139AA (Offence of threatening with article with blade or point or offensive weapon and *Prevention of Crime Act 1953* (c 14) (UK) s 1A (offence of threatening with offensive weapon in public: Sentencing Code (UK) s 312. The Sentencing Code was enacted as part of the *Sentencing Act 2020* (c 17) (UK) (see s 1 - Parts 2 to 13 called the 'Sentencing Code'). The Code commenced operation on 1 December 2020: s 416 and *Sentencing Act 2020 (Commencement No. 1) Regulations.* It applies to offenders convicted on, or after the date of commencement.

391 Police, Crime, Sentencing and Courts Bill 2021 (UK) cl 102.

392 *Whyte* [2018] EWCA Crim 2437. The Court found the reference to 'imprisonment' under the minimum sentence provisions is a reference to a term of 'immediate imprisonment'.

393 United Kingdom, Crown Prosecution Service, *Sentencing Dangerous Offenders* (Web Page, update 6 November 2019) < Sentencing Dangerous Offenders | The Crown Prosecution Service (cps.gov.uk)>.

394 United Kingdom, Judicial College*, Crown Court Compendium Part II* (2020) 5-32–5-33 [1]–[3] 'S5.10 Extended sentences (21+)' <https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-II-Sentencing-December-2020-amended-18.03.21.pdf> .

- may take into account all the information that is available to it about the nature and circumstances of any other offences for which the offender has been convicted by a court anywhere in the world;
- may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned above forms part; and
- may take into account any information about the offender which is before it.[395]

3.2.4 Extended determinate sentences for certain violent, sexual or terrorism offenders

The current form of extended sentence was introduced in 2012, and reformed what were previous terms 'indeterminate sentences for public protection' (IPPs). The justification for their replacement of IPPs was explained in the Second Reading speech for the Bill that introduced this new form of sentencing order as including the need for greater clarity in the length of time an offender is to serve in custody prior to release, as well as the high numbers of those detained for indefinite periods under the IPP scheme:

> IPPs are poorly understood by the public. They lead to inconsistent sentences for similar crimes. They deny victims clarity about the length of time an offender will serve. The previous Government estimated that there would be around 900 such prisoners in jail. There are now 6,500 and more than half of those are beyond their tariff. As of the end of June 2011, only 320 had been released.
>
> IPPs clearly need major reform. We will replace the IPP with the new extended determinate sentence. Instead of serious violent and sexual criminals being released automatically halfway through their sentence, those receiving the new extended determinate sentence will have to serve at least two-thirds before they can be considered for release, and the more serious offenders will not be released at that point unless the Parole Board considers it safe to do so.[396]

An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of—

1. the appropriate custodial term; and
2. a further period (the 'extension period') for which the offender is to be subject to a licence.[397]

The appropriate custodial term is defined as 'the term of imprisonment that would be imposed in respect of the offence … if the court did not impose an extended sentence of imprisonment'.[398]

The extension period is 'a period of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the offender of further specified offences' and must:

- be at least 1 year; and
- not exceed 5 years (for a specified violent offence), 8 years (in the case of a specified sexual offence, specified terrorism offence and serious terrorism offence), or 10 years in the case of a serious terrorism offence for which the sentence is imposed on or after the commencement of section 18 of the *Counter-Terrorism and Sentencing Act 2021*.[399]

The combined total of the custodial term and extension period must not exceed the maximum term of imprisonment with which the offence is punishable.[400]

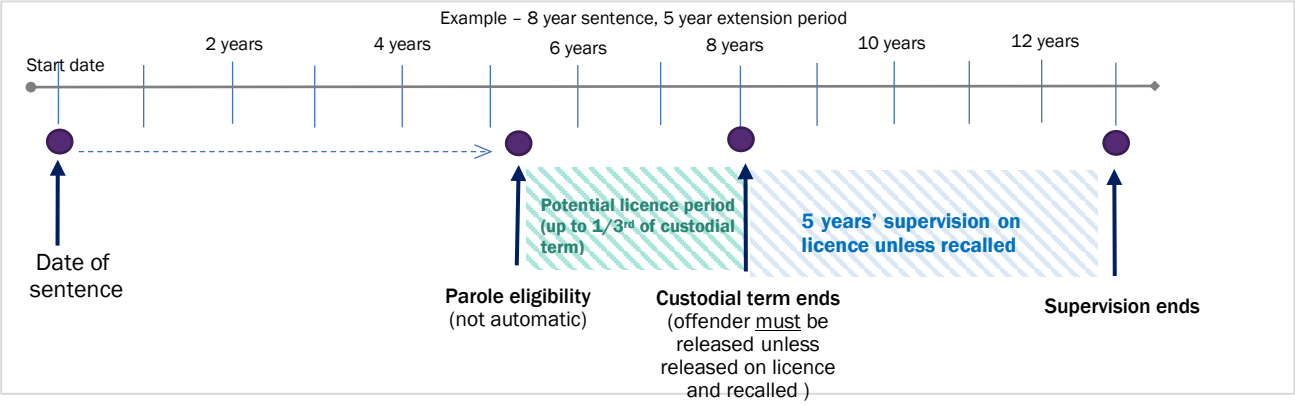
Within the legislative parameters, the extended licence period is not tied to the seriousness of the offending as its purpose is protective.[401] However, as for other sentences, the period should not be longer than necessary and should be just and proportionate.[402]

Offenders subject to an extended sentence can apply for parole two-thirds of the way through their custodial term.[403] The Parole Board makes the decisions whether the prisoner should be released after serving two-thirds of their sentence, but must not order this unless satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.[404] The person must be released at the end of the appropriate custodial period set by the court at the time of sentence, unless they have previously been released on licence and recalled to

395 Sentencing Code (UK) s 308(2).
396 United Kingdom, *Parliamentary Debates*, House of Lords, 21 November 2011, 'Legal Aid, Sentencing and Punishment of Offenders Bill 2011 — Second Reading' (Lord Tom McNally).
397 Sentencing Code (UK) s 279.
398 Ibid s 281(2).
399 Ibid ss 281(3)–(4).
400 Ibid s 281(5).
401 United Kingdom, Judicial College, *Crown Court Compendium Part II* (2020) 5-28 [10] <https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-II-Sentencing-December-2020-amended-18.03.21.pdf>.
402 Ibid citing *Phillips* [2018] EWCA Crim 2008.
403 *Criminal Justice Act 2003* (c 44) (UK) s 246A.
404 Ibid s 246A(6).

custody.[405] On release, they remain under supervision on licence until the expiry of the extension period, and are liable to be recalled to prison if they fail to comply with the conditions.[406]

Figure 3: Extended determinate sentence for certain violent, sexual or terrorism offenders, custodial term and extension period, England and Wales



An extended sentence is available where:

- the offence for which the person is being sentenced is a 'specified offence' (being a specified violent offence, a specified sexual offence, or a specified terrorism offence[407]) listed in Schedule 18 of the Sentencing Code;
- the offender is aged 18 years or over when convicted of the offence;
- the court is of the opinion there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (with a requirement for a pre-sentence report, unless the court considers this unnecessary[408]);
- the court is not required to impose a sentence of imprisonment for life; and
- either:
  - when the offence was committed, the offender had been convicted of an offence listed in Parts 1, 2 or 3 of Schedule 14; or
  - if the court were to impose an extended sentence of imprisonment, the term it would specify as the appropriate custodial term would be at least 4 years.[409]

The Court of Appeal has held that the absence of previous relevant convictions does not preclude the sentencing judge from reaching the view that an offender is dangerous — even in the absence of a pre-sentence report.[410]

A broad range of violent and sexual offences are captured under Schedule 18.

Over 60 violent offences are included in the Schedule including: manslaughter, infanticide, kidnapping, false imprisonment, soliciting murder, threats to kill, wounding with intent to cause grievous bodily harm, malicious wounding, attempting to choke, suffocate or strangle in order to commit or assist in committing an indictable offence, child abandonment, explosives-related offences, injuring persons by furious driving, assault with intent to resist arrest and assault occasioning actual bodily harm, cruelty to children, firearms offences, robbery or assault with intent to rob, burglary with intent to inflict grievous bodily harm or do unlawful damage to a building or anything in it, arson, torture, riot, violent disorder, affray causing death by dangerous driving and stalking involving fear of violence or serious alarm or distress.

Over 90 sexual offences are listed in the Schedule under 11 separate Acts including: rape, sexual assault, rape or assault by penetration of a child under 13, sexual assault of a child under 13, sexual activity with a child, grooming offences, intercourse with a person with an intellectual disability, incest, indecent assault, abduction, prostitution-related offences, indecent conduct towards a young child, burglary with intent to commit rape, child exploitation material offences.

405 Ibid s 246A(7). The person's further release is then governed by s 244C.
406 Ibid s 254.
407 Ibid s 306(1).
408 Ibid ss 280 and 30(2).
409 Ibid s 280.
410 See *R v Cela* [2018] EWCA Crim 2954.

The UK Sentencing Council reports that in 2019, 700 offenders were given an extended sentence, representing one per cent of offenders sentenced to immediate custody.[411] The equivalent figure in 2020 was 846. As at 31 March 2021, there were over 6,000 prisoners serving an extended determinate sentence.[412]

3.2.5 Sentence for offenders of particular concern

In 2014, an additional form of sentencing order was introduced – sentences for offenders of particular concern (SOPC) which comprise a custodial term[413] and a mandatory year of licence to be served at the end of that custodial term.[414] Similar to the earlier reforms, it aimed to discontinue the practice of automatically releasing offenders convicted of serious child sex and terrorism offences at the half-way point, with these offenders instead only being eligible for parole after serving at least half their sentence if parole is granted by the Parole Board.[415] The 12 months additional mandatory licence period was intended to ensure that where an offender was not released prior to the end of their custodial term, then they would not be released without supervision.[416]

The provision applies where the court imposes a sentence of imprisonment for an offence where—

- the offence is listed in Schedule 13 of the Sentencing Code;
- the court does not impose an extended sentence, a life sentence and/or a serious terrorism sentence.[417]

If these criteria are met, a court must, when imposing a term of imprisonment on an offender, make this form of order — and must also ensure that the total term of the sentence does not exceed the maximum term of imprisonment with which the offence is punishable.[418]

The offences listed in Schedule 13 are much more limited than those that support the making of an extended sentence. They primarily consist of offences with an established terrorist connection, but also include two sexual offences against children: the rape of a child under 13[419] and the assault of a child under 13 by penetration.[420]

This requirement to impose a SOPC does not apply if the person was aged under 18 years at the time of offence if either: the offence was committed before the day on which new terrorism provisions came into force, or is an offence listed in Part 2 of Schedule 13 of the Sentencing Code.[421]

Under a Bill currently before the UK Parliament, the minimum period to be served for these offences prior to being eligible for parole would be lifted to two-thirds of the sentence.[422]

According to data produced by the Minister of Justice, only 50 of these sentences were imposed in 2019, and 49 in 2020.[423]

3.2.6 Parole at two-thirds

In addition to the provisions discussed above, changes proposed in the Police, Crime, Sentencing and Courts Bill 2021 would require certain sexual and violent offenders sentenced to standard determinate sentences to serve at least two-thirds of their sentence in custody before being released on licence.[424] Unlike offenders subject to extended sentences and SOPCs, release would remain automatic.

To protect against offenders being released at the two-thirds mark who may pose a risk to the community, the Secretary of State would be given a power under these reforms to refer certain prisoners to the Parole Board instead of automatically release them (in which case release would be a decision made by the Parole Board).[425] This power

411 United Kingdom, Sentencing Council, *Extended Sentences* (Web Page) < Extended sentences – Sentencing (sentencingcouncil.org.uk)>. The Ministry for Justice reports this figure as being 725: United Kingdom, Ministry for Justice, 'Sentencing Data Tool' – <Criminal justice system statistics quarterly: December 2019 - GOV.UK (www.gov.uk)>

412 Ministry of Justice (2021) Offender Management Statistics Quarterly: October to December 2020 and annual 2020 (London: Ministry of Justice).

413 This is the appropriate custodial term that 'in the opinion of the court, ensures that the sentence is appropriate': Sentencing Code (UK) s 278(3).

414 Sentencing Code (UK) s 278(2). The total term must not exceed the maximum term of imprisonment for which the offence is punishable.

415 See Explanatory Notes, Criminal Justice and Courts Bill (UK) 3.

416 Ibid.

417 Sentencing Code (UK) s 278(1). 'Serious terrorism offence' is defined under Sentencing Code (UK) s 282A.

418 Ibid s 278(2).

419 *Sexual Offences Act 2003* (UK) s 5.

420 Ibid s 6.

421 Sentencing Code (UK) s 278(1A).

422 Police, Crime, Sentencing and Courts Bill 2021 (UK) cl 108.

423 United Kingdom, Ministry for Justice, 'Sentencing Data Tool' - <Criminal justice system statistics quarterly: December 2019 - GOV.UK (www.gov.uk)> and <Criminal justice system statistics quarterly: December 2020 - GOV.UK (www.gov.uk)>. This compares to 68,870 standard determinate prison sentences in 2019 and 66,555 in 2020.

424 Police, Crime, Sentencing and Courts Bill 2021 (UK) cl 107.

425 Ibid cl 109.

would be exercised if the Secretary of State believes on reasonable grounds that the prisoner would pose a significant risk of serious harm to the public by committing certain specified offences (adopting the definition in section 306 of the Sentencing Code - being the same offences listed in Schedule 18 that trigger eligibility for an extended sentence) mainly of a violent, sexual or terrorist nature.

3.3 New Zealand

3.3.1 Overview of parole for 'short-term' and 'long-term' sentences

There are two kinds of sentences in New Zealand - short-term and long-term sentences. Only the latter is subject to the parole regime and therefore, legislation regarding minimum NPPs.[426]

A short-term sentence[427] is a sentence or notional single sentence (combined cumulative terms)[428] of imprisonment of 24 months or less, or imprisonment of 12 months' or less imposed before the 30 June 2002 commencement date of the *Parole Act 2002* (NZ) (called a 'pre-cd sentence').[429]

A long-term sentence is a sentence or notional single sentence of more than 24 months, or pre-cd sentence of imprisonment of more than 12 months' duration.[430] However, pre-cd sentences do not have NPPs.[431]

A court imposing a long-term sentence of imprisonment may impose a minimum period[432] exceeding the general statutory NPP of one-third of the length of the sentence.[433]

A 'statutory release date' means 'the release date of the sentence to which the offender is subject' (being the later of any multiples).[434] An imprisoned offender must be released from detention on their statutory release date[435] and is no longer subject to recall.[436] Offenders can be released earlier under the *Parole Act 2002* (NZ) and may be subject to 'release conditions' after their statutory release date.[437]

A recall application is one which seeks an offender's recall to custody to continue serving a sentence of imprisonment in prison. It can be made regarding prisoners on parole, most relevantly those on a determinate sentence who have not reached their statutory release date.[438] Grounds for recall include undue risk to the safety of others, breach of release conditions and commission of an offence.[439]

A statutory release date is different to an 'expiry date', which is the date reached when the offender has served the full term of a determinate sentence.[440]

A 'release date' is separately defined as the date on which the offender on a determinate sentence is no longer liable to be recalled.[441] Release dates are:

- for a short-term sentence - generally the half-way mark.[442] Such an offender is subject to any release conditions imposed by the court;[443]
- for a long-term sentence - its sentence expiry date.[444] Such an offender is subject to the standard statutory release conditions[445] for 6 months from the statutory release date, as well as any special conditions[446] (within the same timeframe) which the New Zealand Parole Board imposes;[447]
- for a pre-cd short-term sentence - the final release date as determined by 1985 legislation;[448]

426 *Parole Act 2002* (NZ) ss 6(4) and 20(4).
427 Defined in *Parole Act 2002* (NZ) s 4.
428 Cumulative sentences forming notional single sentences are addressed in *Parole Act 2002* (NZ) ss 4 and 75.
429 Referred to as a 'pre-cd sentence' in the *Parole Act 2002* (NZ) ss 2 and 4.
430 Defined in *Parole Act 2002* (NZ) s 4.
431 *Parole Act 2002* (NZ) s 85.
432 *Sentencing Act 2002* (NZ) s 86.
433 *Parole Act 2002* (NZ) s 84(1).
434 Ibid s 17(1)
435 Ibid ss 6(2), 17.
436 Ibid s 6(2).
437 Ibid s 6(2).
438 Ibid s 60(2).
439 Ibid ss 61, 66.
440 Ibid s 82. For pre-cd sentences see s 83.
441 Ibid s 4.
442 Ibid s 86(1), subject to s 86(2).
443 Ibid s 18(1). For exceptions see ss 18(3) and 19.
444 Ibid s 86(2).
445 Ibid s 14.
446 Ibid s 15.
447 Ibid s 18(2).
448 Ibid s 87(1).

- for a pre-cd long-term sentence - the date 3 months before the expiry date.[449]

An offender's parole eligibility date is the date on which they have finished serving the NPP of every long-term sentence, and passed the release date of any short-term sentence, to which they are subject.[450]

For indeterminate sentences or determinate sentences of 10 years or more, the Board can make a 'postponement order' if satisfied that, absent a significant change in the offender's circumstances, he or she will not be suitable for release during the postponement order period, being up to 5 years beyond the most recent parole hearing.[451]

3.3.2 Parole for long-term sentences

There are three main schemes that apply to the sentencing of offenders for serious violent offences:

1. Discretionary minimum NPPs for determinate sentences of imprisonment.
2. Sentences of preventative detention.
3. 'Three-strike' sentencing for repeated serious violent offending.

1 - Discretionary minimum period for determinate sentence of imprisonment

A sentencing court imposing a long-term sentence (over 2 years) 'for a particular offence' can, at the same time, order that the offender serve a **minimum period** of imprisonment (the NPP) 'in relation to that particular sentence' not exceeding two-thirds of the full term or 10 years (whichever is less).[452]

The court must be satisfied that the standard one-third period is insufficient for all or any of the following purposes:

- holding the offender accountable for the harm done to the victim and the community by the offending;
- denouncing the conduct in which the offender was involved;
- deterring the offender or other persons from committing the same or a similar offence; and
- protecting the community from the offender.[453]

The New Zealand Court of Appeal has found that in making the determination whether to set a longer minimum period: 'The central consideration must be culpability which necessarily is increased by matters such as unusual callousness, extreme violence, vulnerable or multiple victims and serious actual or intended consequences'.[454] The last listed factor 'may be important in cases involving major drug dealing'.[455] The sentencing court must not 'simply … go to the point of two-thirds of the sentence without carefully reviewing the circumstances of the offence and the offender' and that the 'seriousness of the offending necessarily must be considered in the assessment' of both the head sentence and the minimum period to be served.[456]

2 – Preventative detention (indeterminate sentence)

New Zealand also has a preventative detention scheme 'to protect the community from those who pose a significant and ongoing risk to the safety of its members'.[457] Preventative detention sentences are 'indeterminate', along with imprisonment for life.[458]

As indeterminate sentences are beyond scope of this paper, they are not discussed further.

3 - 'Three-strike' sentencing scheme for repeat serious violent offending

New Zealand has graduated minimum mandatory penalties for repeat adult offenders who commit listed serious violent offences.

The scheme was introduced by the *Sentencing and Parole Reform Act 2010* (NZ) and commenced operation on 1 June 2010.[459]

The Minister of Corrections, when introducing the Bill, said that the reforms had two main purposes: (1) 'to deny parole to repeat serious violent offenders and to offenders who are guilty of committing the worst murders', and (2)

449 Ibid s 87(2).
450 Ibid s 20(1). For pre-cd sentences, see ss 20(2), (3).
451 Ibid s 27.
452 Ibid s 86(4).
453 Ibid s 86(2).
454 *R v Brown* [2002] NZCA 243; [2002] 3 NZLR 670 at [32].
455 Ibid.
456 Ibid [34]–[35].
457 *Parole Act 2002* (NZ) s 87(1).
458 Ibid s 4.
459 *Sentencing and Parole Reform Act 2010* (NZ) s 2. The Act commenced the day after Royal assent, being 31 May 2010.

'to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious and violent offences'.[460]

The Second Reading speech focused on parole being a 'privilege' not 'a right' and importance of considering the needs of victims:

> Parole is not a right for prisoners; it is a privilege. This privilege is earned, and it should not be granted to those who demonstrate total disregard for the law by continuing to commit serious violent offences, despite being warned of the consequences. This bill ensures that the victims of repeat offenders and their families do not have to experience the additional stress of attending regular parole hearings or worry that an offender may be released on parole.[461]

The scheme is characterised by 3 stages:[462]

1. Stage 1: When a court convicts an offender aged over 18 at the time of the offence of one or more serious violent offences, the court must warn the offender of the consequences if convicted of any serious violent offence committed after that warning, and make a record of that warning as well as issuing the offender with a written notice setting out the consequences.[463]
2. Stage 2: When a court convicts an offender of one or more offences committed at a time when the offender had a record of a first warning (called a 'stage-2 offence') other than for murder), the court must, similarly to the process in stage 1, warn the offender of the consequences of being convicted of any serious violent offence committed after that warning, make a record of that warning and give the offender a written notice.[464] In this case the court must also, if sentencing the offender to a determinate sentence of imprisonment, order that the offender serve the full term of the sentence (with no possibility of release on parole in the case of a sentence over 2 years).[465] Where a court would have set a minimum term beyond the statutory one-third, the court must state the minimum period of imprisonment it would have imposed but for the operation of this section.[466]
3. Stage 3: If an offender commits another serious violent offence (other than murder) after having received a final warning on being sentenced for a stage-2 offence, the court must sentence the offender to the maximum term of imprisonment prescribed for the offence or offences, and order the offender serve the sentence without parole, unless satisfied it would be manifestly unjust to do so.[467] These cases can only be heard by the High Court and no other court other than the High Court (or the Court of Appeal or Supreme Court on an appeal) may sentence an offender for a stage-3 offence.[468] For stage-3 convictions for manslaughter, the minimum NPP must not be less than 20 years, unless the court considers given the circumstances of the offences and offender, this would be manifestly unjust – in which case the court can set an NPP not less than 10 years.[469]

It does not matter, for any of them, whether any future serious violent offence is of a different kind to that giving rise to a preceding warning (except for murder); it matters only that any further offence is one of the 40 listed.[470] The warnings do not expire (but are subject to the outcome of successful appeals).[471]

Stages 2 and 3 apply differently to murder. A conviction for murder at stages 2 or 3, means a mandatory life sentence, without parole (unless satisfied that, given the circumstances of the offence and offender, it would be manifestly unjust to make the non-parole order).[472] If the court declines to make a non-parole order, it must impose an NPP of at least 20 years for a stage-3 murder conviction (subject to the same test of 'manifest injustice' that applies to stage-3 manslaughter cases, which then applies the 'conventional' murder sentencing non-parole provision).[473] This provision states that the minimum NPP a court can set when imposing a life sentence for murder is 10 years, or 17 years if certain circumstances apply (unless unjust to do so).[474] The maximum penalty for murder in New Zealand is life imprisonment, but unlike Queensland, this is not generally mandatory.[475]

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460 New Zealand, *Parliamentary Debates*, 4 May 2010, vol 662, 10673 (Judith Collins, Minister for Corrections).
461 Ibid.
462 *Sentencing Act 2002* (NZ) s 86A defining a 'stage-1 offence', 'stage-2 offence' and 'stage-3 offence' for the purposes of the scheme.
463 Ibid s 86B.
464 Ibid ss 86C(1), (7)
465 Ibid ss 86C(4)(a).
466 Ibid s 86C(6).
467 Ibid ss 86D(2)–(3).
468 Ibid s 86D(1).
469 Ibid s 86D(4).
470 Ibid ss 86B(1)(a), 86C(1)(a), 86D(2).
471 Ibid s 86F.
472 Ibid s 86E.
473 Ibid s 103.
474 Ibid ss 103(2) and 104.
475 *Crimes Act 1961* (NZ) s 172.

The offences captured by the 'three-strikes' scheme are the 40 listed sexual and violent offences under the *Crimes Act 1961* (NZ).[476] All carry a maximum penalty of 7 years' imprisonment or more.

The Labour Party has publicly committed to repealing the three-strikes law on the basis it leads to injustice,[477] but has not yet introduced legislation to do so.

4 Conclusion

In this background paper, we have explored a number of different minimum or standard NPP regimes as these apply to people convicted of serious violent offences.

The models adopted are different in each jurisdiction as to:

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

The level at which minimum NPP percentage schemes operate also differ across jurisdictions.

- In Queensland, if a prisoner has been declared convicted of a serious violent offence under Part 9A of the PSA, their parole eligibility date is the day after which they have served the lesser of 80 per cent of the term of imprisonment for the serious violent offence or offences, or 15 years.[478]
- In SA, a minimum NPP of four-fifths (80%) applies to serious repeat offenders and those convicted of a 'serious offence against the person' (a major indictable offence resulting in the victim's death, or total incapacity, other than murder), unless there are exceptional circumstances.
- Under Commonwealth law, a minimum NPP of 75 per cent applies to offenders convicted of listed national security offences.
- In NSW, an effective minimum NPP of 75 per cent applies to a court when sentencing an offender for any offence — whether falling within a particular category of 'seriousness' or not (the balance of the sentence is not to exceed 'one-third of the non-parole period for the sentence') unless there are special circumstances.
- In the Northern Territory, offenders sentenced for specified sexual offences, drug offences and offences of violence committed against persons aged under 16 must be ordered to serve a minimum of 70 per cent of the sentence before being eligible to apply for parole.
- In Victoria, the minimum NPP for a 'standard sentence offence' (other than for a life sentence) must be a period of at least 70 per cent of the relevant term if it is 20 years or more, or 60 per cent if the sentence is for less than 20 years (unless the court considers it is not in the interests of justice).
- In England and Wales, offenders subject to extended sentences, which can be imposed on offenders convicted of specified violent offences, sexual offences and terrorism offences, are eligible for parole at two-thirds of their custodial term.
- In New Zealand, a court may impose an NPP of up to two-thirds or the sentence, or 10 years (whichever is less) if satisfied that parole eligibility after one-third is insufficient to hold the offender accountable for the harm caused to the victim and community, to denounce their conduct, to deter them or other people from committing the same or a similar offence, and/or to protect the community;
- In Canada, there is a discretion to set parole eligibility at 50 per cent of the head sentence (instead of the usual one-third, or 7 years - whichever is less) when sentencing an offender convicted on indictment of certain serious offences, including violent, sexual and weapons offences - provided that this period does not exceed 10 years;

476 *Sentencing Act 2002* (NZ) s 86A – definition of 'serious violent offence'.

477 Edward Gay, 'Labour set to repeal three strikes law, which sees repeat offenders get max sentence', *Stuff* (online, 26 October 2020) < Labour set to repeal three strikes law, which sees repeat offenders get max sentence | Stuff.co.nz>

478 *Corrective Services Act 2006* (Qld) s 182. There are some exceptions to this: where a court has sentenced an offender convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation; and if a later parole eligibility is fixed for the period of imprisonment.

- In WA, a general parole provision applies to sentences of 4 years or more which means a prisoner is eligible for parole when they have served all but 2 years of their term of imprisonment in custody — which, in practice, may result in parole eligibility at 50 per cent of the head sentence (for a 4 year sentence) to, for example, 90 per cent for a 20 year sentence.

The similarities and differences in the operation of these schemes will help inform the questions posed by the Council in its Issues Paper to be released later this year as part of its review of the SVO scheme.

Feedback on other schemes that should be considered as part of the Council's review is welcome and can be provided by email to info@sentencingcouncil.qld.gov.au.

Appendix 1: Overview of minimum and standard NPP schemes in Australia

Table A1-1: Overview of minimum non-parole period schemes in Australia, adult offenders

Jurisdiction	Name of scheme	Description of the scheme	Types of offences	Minimum non-parole period	Mandatory, presumptive or discretionary?	Exceptions to application?
Queensland[1]	Serious violent offences (SVO) scheme[479]	Requires a person declared convicted of a serious violent offence to serve a fixed minimum NPP before being eligible to apply for parole.	Serious violent offences, serious sexual violence offences, and serious drug offences listed in a schedule to the PSA (schedule 1). Includes a broad range of violent offences and sexual violent offences. Also applies to serious drug offences (trafficking in dangerous drugs, aggravated supply of dangerous drugs, and producing dangerous drugs (sch 1) in an amount of or exceeding quantity in sch 3 of *Drugs Misuse Regulation 1987*).	80% of head sentence or 15 years, whichever is less (fixed period)	Mandatory declaration: sentence of 10+ yrs for offences in sch 1 PSA Discretionary: sentence of imprisonment: • 5 to <10 years for offence listed in schedule 1; or • of any length for an offence dealt with on indictment that: (a) involved the use/attempted use, of serious violence against another person; or (b) that resulted in serious harm to another person.	No Yes. A declaration cannot be made for an offence: • dealt with summarily, or • in relation to an offence for which the offender is sentenced to imprisonment ordered to be suspended in whole or in part, or served by way of an intensive correction order.
	Repeat child sex offence scheme[480]	An offender convicted of a repeat serious child sex offence (both committed when the offender was an adult) is subject to a mandatory life sentence or indefinite sentence (with a nominal sentence and finite sentence of life imprisonment).	Serious child sex offences committed in relation to a child under 16 yrs in circumstances in which the offence attracts a maximum penalty of life.	20 years	Mandatory	No

479 Refer to Queensland Sentencing Advisory Council, *Background Paper 1 – History of the Serious Violent Offences Scheme* (2021) and *The Serious Violent Offences Scheme: Information Sheet* for more information about the scheme.

480 Refer to section 2.6 for more detail.

Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

Jurisdiction	Name of scheme	Description of the scheme	Types of offences	Minimum non-parole period	Mandatory, presumptive or discretionary?	Exceptions to application?
	Unlawful striking causing death offence[481]	Offenders convicted of this offence and sentenced to imprisonment are subject to a mandatory NPP.	Single punch causing death.	80% of head sentence or 15 years, whichever is less (fixed period)	Mandatory	Yes. Does not apply if the court orders that the sentence be suspended in whole or in part or imposes a life sentence or indefinite sentence.
Commonwealth	'Three-quarters rule' for national security offences[482]	Requires a court to fix a single minimum NPP whenever a person is convicted of a 'minimum non-parole period offence', or set proportion of the aggregate term if the person is sentenced for two or more of those offences.	Relevant offences include terrorism, treason, international espionage.	At least 75% of the head sentence	Mandatory	Yes. Does not apply if sentenced to a penalty other than imprisonment.
	People smuggling offences[483]	A mandatory term of imprisonment, a mandatory minimum duration of that term, and a mandatory minimum NPP for listed people-smuggling offences.	Aggravated people smuggling, forging documents relating to a group of 5 or more non-citizens.	Varies – period of at least 5 years (for an 8-year minimum sentence) and at least 3 years (for a 3-year minimum sentence)	Mandatory	No – although does not apply if court is satisfied the offender was aged under 18 yrs at time of offence.
NSW	Standard non-parole period scheme[484]	The SNPP scheme applies to listed indictable offences. An SNPP represents the non-parole period for an offence that, 'taking into account only the objective factors affecting the relative	Serious violent offences, serious sexual violent offences, serious drug offences, and firearms and weapons offences.	No standard ratio; SNPP varies by offence and is expressed as a number of years (e.g. the SNPP for attempt to murder is 10 years, and 7 years for sexual assault)	Discretionary – SNPP and the maximum penalty for the offence both operate as 'legislative guideposts'[485]	Yes. Does not apply to offences dealt with summarily. Does not prevent the court from imposing a non-custodial sentence (although the court must provide reasons for doing so).

481 As above.
482 Refer to section 2.3.2 for more detail.
483 Refer to section 2.3.2 for more detail.
484 Refer to section 2.4.2 for more detail.
485 See *Muldrock v The Queen* (2011(244 CLR 120 at [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

Jurisdiction	Name of scheme	Description of the scheme	Types of offences	Minimum non-parole period	Mandatory, presumptive or discretionary?	Exceptions to application?
		seriousness' of the offence, 'is in the middle of the range of seriousness'.				
Northern Territory	Minimum non-parole periods for certain sexual offences and drug offences[486]	Requires a court when sentencing an offender for listed offences (referred to as 'specified offences') to 12 months or longer, not suspended in whole or in part, to fix a NPP of not less than 70% of the period of imprisonment the offender is to serve under the sentence.	Sexual intercourse without consent, serious drug offences and drug offences which involved procuring a child under 14 yrs to commit the offence.	Not less than 70% of the head sentence	Mandatory	Yes. Does not apply to sentences of imprisonment of less than 12 months, or suspended in whole or in part. A court may also decline to fix a NPP if it considers the fixing of a NPP is inappropriate.
	Fixed non-parole periods for offences against persons under 16 yrs[487]	Requires a court when sentencing an offender to imprisonment for a listed offence committed as an adult against a child under 16 yrs, to fix a NPP of not less than 70% of the period of imprisonment the offender is to serve under the sentence.	13 offences committed by an adult against a child under 16 yrs (e.g. sexual intercourse or gross indecency involving a child under 16 yrs, incest, indecent dealing with a child, female genital mutilation, common assault and endangering the life of child by exposure).	Not less than 70% of the head sentence	Mandatory	Yes. Does not apply to sentences of imprisonment of less than 12 months, or suspended in whole or in part. A court may also decline to fix a NPP if it considers the fixing of a NPP is inappropriate.
South Australia	Serious repeat offenders scheme[488]	Allows a court to impose a sentence that goes beyond that which is proportional to the offence when sentencing a 'serious repeat offender'. Any NPP fixed in relation to the offence must be at	A 'serious offence' is an offence for which a sentence of imprisonment (other than a wholly suspended sentence or community-based custodial sentence) is imposed and which carries a maximum penalty of at least 5 years and includes serious firearm	At least 80% of the head sentence	Mandatory – with limited ability to depart	Yes. To be exempt from the operation of the scheme, the offender must satisfy the court that: • their personal circumstances are so exceptional as to outweigh the

486 Refer to section 2.5.2 for more detail.
487 Refer to section 2.5.2 for more detail.
488 Refer to section 2.7.3 for more detail.

Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

Jurisdiction	Name of scheme	Description of the scheme	Types of offences	Minimum non-parole period	Mandatory, presumptive or discretionary?	Exceptions to application?
		least four-fifths the length of the sentence. A person is taken to be a serious repeat offender if the person (whether as an adult or as a child) has committed and been convicted of: • at least 3 'serious offences' committed on separate occasions; or • at least 2 'serious sexual offences' committed on separate occasions.	offences, serious drug offences, violent and sexual offences against the person, serious and aggravated criminal trespass in residence, robbery, arson and causing a bushfire. 'Serious sexual offences' include sexual exploitation of a person with a cognitive impairment and sexual offences where the victim was aged under 14 at the time of the offence.			paramount consideration of protecting the safety of the community and personal and general deterrence; and • it is, in all the circumstances, not appropriate that they be sentenced as a serious repeat offender. Wholly suspended sentences and community-based custodial offences are excluded.
	Mandatory minimum non-parole period for serious offences against the person[489]	Requires a court when sentencing an offender convicted of a 'serious offence against the person' to set a minimum NPP of four-fifths the length of the head sentence.	A 'serious offence against the person' is defined to mean: • a major indictable offence (other than murder) that results in the death of the victim or the victim suffering total incapacity; • a conspiracy to commit such an offence or • aiding, abetting, counselling or procuring the commission of such an offence.	At least 80% of the head sentence	Mandatory – with limited ability to depart	Yes. A court may fix a NPP shorter than the prescribed period in exceptional circumstances, or in any circumstances prescribed by regulation.
Victoria	Statutory minimum sentences[490]	Requires a court to impose a statutory minimum sentence or NPP for a specified	Applies to: • certain manslaughter offences (in	Varies by offence and is expressed as a minimum NPP or term (e.g. a minimum NPP of 10 years	Presumptive	Yes. Does not apply if a special reason exists (e.g. offender assisted law enforcement).

489 Refer to section 2.7.4 for more detail.
490 Refer to section 2.9.3 for more detail.

Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

Jurisdiction	Name of scheme	Description of the scheme	Types of offences	Minimum non-parole period	Mandatory, presumptive or discretionary?	Exceptions to application?
		number of months or years for certain categories of offending when committed by an offender aged 18 yrs and over at the time of the offence where no special reason exists	circumstances of gross violence, or by a single punch or strike); • causing serious injury intentionally or recklessly in circumstances of gross violence; • offences against protected officials, including driving offences; • aggravated home invasion or carjacking offences; and • breaches of supervision orders under the *Serious Offenders Act 2018* (Vic).	for certain manslaughter offences, and a minimum term of imprisonment of 6 months for recklessly causing injury to an emergency worker, custodial officer, or youth justice custodial worker who is on duty).		
	Standard sentencing scheme[491]	The 'standard' sentence for 12 serious offences, which represent the midpoint of objective seriousness for the offence. That means the middle of the range of seriousness when just considering the offending and no other factors (such as the offender's circumstances, criminal history or plea). Prescribed NPPs apply under the scheme.	Applies to: • homicide offences (e.g. murder, homicide by firearm, culpable driving causing death); • sexual offences (e.g. rape, persistent sexual abuse of a child; and • drug offences (e.g. trafficking large commercial quantity of drug of dependence).	NPPs must be at least: • 30 years, if the relevant term is a term of life imprisonment; • 70% if the relevant term is a term of 20 years or more; or • 60% if the relevant term is a term of less than 20 years.	Discretionary (as to the head sentence): The standard sentence is just another factor a court must consider and is not determinative. It is a 'legislative guidepost', having the same function as the maximum penalty.[492] Presumptive (as to the minimum NPP).	A court is not required to order a standard sentence, but must consider it. When sentencing for a standard sentence offence, a court must fix a NPP of at least the specified length, unless it considers that it is not in the interests of justice.
Western Australia	Minimum non-parole period scheme[493]	This scheme applies to all terms of imprisonment, life imprisonment and	Any offence to which a term of imprisonment with a parole eligibility order is made.	• Sentences of 4 years or less: 50% of head sentence.	Mandatory (fixed period) defined in legislation	N/A

491 Refer to section 2.9.5 for more detail.
492 *Brown v The Queen* [2019] VSCA 286, [4], [7], [51], [54].
493 Refer to section 2.10.2 for more detail.

Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

Jurisdiction	Name of scheme	Description of the scheme	Types of offences	Minimum non-parole period	Mandatory, presumptive or discretionary?	Exceptions to application?
		prescribed offences where an order of parole eligibility is made. If a parole order is not made the offender cannot be released on parole.		• Sentences of greater than 4 years (not life sentence[2]): Eligible once served all but 2 years of head sentence.		
	Mandatory minimum terms of imprisonment[494]	Certain offences are subject to mandatory terms of imprisonment, to which the minimum NPP scheme (above) applies.	Includes repeat home burglaries, offences committed in the course of conduct that constitutes aggravated home burglary, reckless driving to evade police and certain 'escape pursuit' dangerous driving offences, certain assaults on specific public officers, certain drug offences committed by adults in relation to children and certain breaches of restraining orders or police orders by repeat offenders.	As above.	Mandatory	N/A
	Mandatory minimum terms for prescribed offences[495]	Some prescribed offences are subject to a mandatory NPP which is the greater of either the minimum term applicable to the offence or the period which they would have been required to serve if the offence was not a prescribed offence.	Applies to: • grievous bodily harm committed against prescribed workers; • serious assault committed against prescribed workers; and • dangerous driving causing death or grievous bodily harm, and dangerous driving causing bodily harm, where the offence is committed in	The mandatory minimum sentence applicable to the offence or the minimum NPP required, had it not been a prescribed offence.	Mandatory	N/A

494 Refer to section 2.10.2 for more detail.
495 Refer to section 2.10.2 for more detail.

Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions

Jurisdiction	Name of scheme	Description of the scheme	Types of offences	Minimum non-parole period	Mandatory, presumptive or discretionary?	Exceptions to application?
			circumstances of 'escape pursuit of police'.			

Notes:
1. Additional requirements apply in some cases if a term of imprisonment is imposed on an offender convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation where the sentence is imposed as the base component of a sentence under section 161R(2) of the *Penalties and Sentences Act 1992* (Qld). See *Corrective Services Act 2006* (Qld) ss 181A(3) (Parole eligibility date for prisoner serving term of imprisonment for life for a repeat child sex offence) and 182(2A)–(2B) (Parole eligibility date for serious violent offender).
2. Sentences of life imprisonment: murder - NPP of 10 years, offence other than murder - NPP of 7 years.

Appendix 2: Supplementary material

Table A2–1: Statutory minimum sentences in Victoria

Offence	Maximum penalty	Category 1 or 2	Statutory minimum non-parole period of sentence
Manslaughter - in circumstances of gross violence	**25 years**	**Category 2** Committed on/after 20 March 2017	**10 years' non-parole period.** Committed on/after 1 November 2014
Manslaughter - by single punch or strike	**25 years**	**Category 2** Committed on/after 20 March 2017	**10 years' non-parole period.** Committed on/after 1 November 2014
Intentionally causing serious injury in circumstances of gross violence	**20 years**	**Category 1** Committed on/after 20 March 2017	**4 years' non parole period**
Intentionally causing serious injury in circumstances of gross violence - emergency/custodial/youth justice worker on duty	**20 years**	**Category 1** Committed on/after 28 October 2018	**5 years' non-parole period** Emergency worker: committed on/after 2 November 2014 Custodial worker: committed on/after 3 October 2016 Youth justice custodial worker: committed on/after 5 April 2018
Recklessly causing serious injury in circumstances of gross violence	**15 years**	**Category 1** Committed on/after 20 March 2017	**4 years' non parole period**
Recklessly causing serious injury in circumstances of gross violence - emergency/custodial/youth justice worker on duty	**15 years**	**Category 1** Committed on/after 28 October 2018	**5 years' non parole period** Emergency worker: committed on/after 2 November 2014 Custodial worker: committed on/after 3 October 2016 Youth justice custodial worker: committed on/after 5 April 2018
Intentionally causing serious injury - emergency/custodial/youth justice worker on duty	**20 years**	**Category 1** Committed on/after 28 October 2018	**3 years' non parole period** Emergency worker: committed on/after 2 November 2014 Custodial worker: committed on/after 3 October 2016 Youth justice custodial worker: committed on/after 5 April 2018
Recklessly causing serious injury - emergency/custodial/youth justice worker on duty	**15 years**	**Category 1** Committed on/after 28 October 2018	**2 years' non parole period** Emergency worker: committed on/after 2 November 2014 Custodial worker: committed on/after 3 October 2016 Youth justice custodial worker: committed on/after 5 April 2018

Offence	Maximum penalty	Category 1 or 2	Statutory minimum non-parole period of sentence
Intentionally causing injury - emergency/custodial/youth justice worker on duty	**10 years**	**Category 1** Committed on/after 28 October 2018	**6 months' non parole period** Emergency worker: committed on/after 2 November 2014 Custodial worker: committed on/after 3 October 2016 Youth justice custodial worker: committed on/after 5 April 2018
Recklessly causing injury - emergency/custodial/youth justice worker on duty	**5 years**	**Category 1** Committed on/after 28 October 2018	**6 months' non parole period** Emergency worker: committed on/after 2 November 2014 Custodial worker: committed on/after 3 October 2016 Youth justice custodial worker: committed on/after 5 April 2018
Intentionally exposing emergency/custodial/youth justice worker on duty to risk by driving - causing injury	**20 years**	**Category 1** Committed on/after 28 October 2018	**2 years' non parole period** Committed on/after 5 April 2018
Aggravated intentionally exposing emergency/custodial/youth justice worker on duty to risk by driving - causing injury	**20 years**	**Category 1** Committed on/after 28 October 2018	**2 years' non parole period** Committed on/after 5 April 2018
Aggravated home invasion	**25 years**	**Category 1** Committed on/after 28 October 2018	**3 years' non parole period**
Aggravated carjacking	**25 years**	**Category 1** Committed on/after 28 October 2018	**3 years' non parole period**
Contravene supervision order or interim supervision order - Intentionally or recklessly contravene a restrictive condition of supervision order or interim supervision order	**5 years**		**12 months' imprisonment**

Source: Victorian Sentencing Advisory Council, *Guide to Sentencing Schemes in Victoria 2021*.

Table A2-2: Standard sentence applying to 12 serious offences in Victoria

Offence and statutory references	Maximum penalty	Category 1 or 2 offence	Standard sentence
Murder - emergency/custodial/youth justice worker on duty	**Life**	**Category 1** Committed on/after 20 March 2017	**30 years** Committed on/after 1 February 2018
Murder - any other case	**Life**	**Category 1** Committed on/after 20 March 2017	**25 years** Committed on/after 1 February 2018
Homicide by firearm	**25 years**	**Category 2**	**13 years**
Culpable driving causing death	**20 years**	**Category 2** Committed on/after 28 October 2018	**8 years** Committed on/after 1 February 2018
Rape	**25 years**	**Category 1** Committed on/after 20 March 2017	**10 years** Committed on/after 1 February 2018
Sexual penetration of a child under the age of 12	**25 years**	**Category 1** Committed on/after 20 March 2017	**10 years** Committed on/after 1 February 2018
Sexual penetration of a child under the age of 16	**15 years**		**6 years** Committed on/after 1 February 2018
Sexual assault of a child under the age of 16	**10 years**		**4 years** Committed on/after 1 February 2018
Sexual activity in the presence of a child under the age of 16	**10 years**		**4 years** Committed on/after 1 February 2018
Persistent sexual abuse of a child under the age of 16	**25 years**	**Category 1** Committed on/after 20 March 2017	**10 years** Committed on/after 1 February 2018
Sexual penetration of a lineal descendent under 18	**25 years**	**Category 1** Committed on/after 20 March 2017	**10 years** Committed on/after 1 February 2018
Sexual penetration of a stepchild under 18	**25 years**	**Category 1** Committed on/after 20 March 2017	**10 years** Committed on/after 1 February 2018
Trafficking large commercial quantity of drug of dependence	**Life**	**Category 1** Committed on/after 20 March 2017	**16 years** Committed on/after 1 February 2018

Source: Victorian Sentencing Advisory Council, *Guide to Sentencing Schemes in Victoria 2021*.

Table A2–3: Summary of sentencing and release provisions in England and Wales for determinate sentences

Type of sentence	Application	Release arrangements
Standard determinate sentence - less than 2 years	Offence committed on or after 01/02/2015	Automatic release at half-way point of sentence On licence (parole) to end of sentence Post-sentence supervision expires 12 months after release.
Standard determinate sentence - less than 2 years for Schedule 18 offence (proposed)	Not yet in force	Automatic release at two-thirds of sentence (unless referred to Parole Board) On licence (parole) to end of sentence Post-sentence supervision expires 12 months after release.
Standard determinate sentence - 2 years or more	Offence committed on or after 04/04/2005	Automatic release at half-way point of sentence On licence (parole) to end of sentence.
Standard determinate sentence - 2 years or more for Schedule 18 offence (proposed)	Not yet in force	Automatic release at two-thirds of sentence (unless referred to Parole Board) On licence (parole) to end of sentence.
Special custodial sentence for certain offenders of particular concern (SOPC)	Sentenced on or after 13/04/2015	Eligible for discretionary release by the Parole Board at one-half of the custodial term (*current proposal to extend to two-thirds of custodial term) Automatic release at the end of the custodial term On licence to the end of the aggregate of the custodial term + one year
Extended determinate sentence	Sentenced on or after 13/04/2015	Eligible for discretionary release by the Parole Board at two-thirds point of custodial period Automatic release at end of custodial period On licence to end of extension period.

Source: The information in this table, with the exception of proposed reforms, is based on content contained in United Kingdom, Ministry for Justice, *Guide to Offender Management Statistics* (Ministry of Justice: Guidance Documentation, July 2016) Appendix A.

Queensland Sentencing
Advisory Council