May 2022

Final Report

The '80 per cent Rule': The Serious Violent Offences Scheme in the *Penalties and Sentences Act 1992* (Qld)

Preface, executive summary and recommendations

Queensland Sentencing Advisory Council

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The artwork in the cover design is a visual representation of words contained in transcripts of subject-matter expert interviews conducted by the Council for this reference. Words that are larger appeared more frequently in those transcripts. This word cloud was automatically generated with design elements added.

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

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

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Preface

The serious violent offences (SVO) scheme Terms of Reference from the Attorney-General proved to be both challenging and rewarding. We are grateful to the Attorney-General for referring this review.

The number of offenders who are subject to the SVO scheme fortunately represents only a very small proportion of those who are sentenced in Queensland. Yet the offences committed by these offenders cause enormous harm to victims and the wider community and often have a profound and enduring impact on people's lives.

The Council was asked to consider the operation and efficacy of the SVO scheme. This included how the scheme is currently applied, its impact on court sentencing practices, and whether it creates any inconsistencies or constrains the sentencing process.

This project was not just a straightforward review of a technical area of sentencing law — instead, it raised many fundamental questions about how the criminal justice system can best respond to this form of serious offending, including how the purposes of punishment, denunciation and community protection can best be met, what works in reducing the risks of reoffending; what role parole plays, and how competing interests and views can best be balanced. We came to fully appreciate the complexity of this review the deeper we delved into these issues.

The Council consulted extensively, through our usual submissions process, as well as holding key stakeholder meetings and roundtables. We are grateful to all individuals and organisations who made submissions and helped the Council understand the application, impact, and wider significance of the SVO scheme. A diversity of views was expressed, ranging from support for the repeal of the SVO scheme to expanding its mandatory application. The Council considered all views carefully in the development of its recommendations.

One of the more challenging aspects of the review was to consider the scheme's impact on victim satisfaction, given the very serious consequence to victims and victims' families that often follows from this type of offending. To better understand this aspect, we consulted with victims, the organisations that support them and advocate on their behalf, and those with a role in providing information to victims about court processes.

The Council is enormously grateful to victims who took the time to share their personal experiences to help us better understand their views on sentencing and how current criminal justice system responses to serious forms of offending might be improved. We were moved by their stories and want to sincerely thank every person who participated in these consultation sessions. It takes courage to talk about and revisit a traumatic experience of loss and grief.

The Council also conducted extensive subject-matter expert interviews to understand the impact of the SVO scheme on sentencing practices. Those who participated in these interviews included members of the judiciary from the District and Supreme Courts, legal practitioners, public prosecutors, members of the Parole Board Queensland, representatives from victim support and advocacy organisations and others, including legal and transitional support services who work with prisoners. The Council extends its sincere appreciation to all those who participated for sharing their invaluable insights, as well as to those who provided the necessary permissions for this work to proceed.

The Council wishes to express its gratitude to members of our Aboriginal and Torres Strait Islander Advisory Panel for providing advice on the impact of the recommendations for reform on Aboriginal and Torres Strait Islander defendants, and on potential effects on the serious issue of over-representation.

We also acknowledge the valuable contribution of members of the Council's Consultative Forum for openly sharing their views and providing us with a platform for confidential discussion and the exchange of ideas. Your support of the Council's work is greatly appreciated.

Through consultation, data and case law analysis and consideration of the research evidence, the Council learnt that the SVO scheme and schemes like it fulfil an important function in the sentencing process. They formally recognise the harm caused by serious forms of offending by requiring a significant proportion of the sentence to be served in custody prior to parole eligibility. When an SVO declaration is made, we were told by victims and victim support organisations that it greatly contributes to victims' satisfaction with the sentencing outcome, thereby contributing to victim and public confidence in sentencing.

However, we also learnt that the SVO scheme — as it is currently operating — is not fully meeting its intended objectives and is in need of reform. We found strong evidence that the scheme is constraining the sentencing process and is too restrictive on judicial discretion. The scheme was referred to, by those working with it on a regular basis, as arbitrary and blunt, as distorting sentencing practices, adding unnecessary complexity to sentencing, and as severely curtailing judges' discretion.

From a victim's perspective, we heard concerns about the scheme's impact in reducing head sentences to below 10 years, and the very different outcomes that could result in the minimum period to be served prior to parole eligibility depending on whether a declaration was made. When the conclusion reached was that an offence was

not 'seriously violent enough' to justify a declaration being made, this was met with feelings of disbelief, anger and frustration that the seriousness of the offending had not been properly recognised.

The Council was particularly concerned by the relatively short period of time some offenders subject to a declaration spend supervised on parole. The Council was also very concerned about the number of offenders who do not apply for parole and are subject to release at the end of their sentence with no supervision at all, which does not adequately support the important sentencing purpose of community protection.

This is a difficult topic to grapple with. It may seem counterintuitive that a better outcome may be achieved if the most serious offenders spend less, rather than more time in prison. However, the evidence on the importance of parole for community safety is clear. It is in the interest of community safety for serious offenders who have spent a significant amount of time in prison to be supervised in the community upon their release and to serve a longer, rather than shorter period under supervision.

The Council's final recommendations were not easy to reach. However, we are confident that our careful and systematic consideration of data, information and existing evidence guided us towards recommendations that will greatly improve the SVO scheme if adopted.

Balancing all the evidence and relevant considerations, the Council reached the view that the current SVO scheme should be reformed and recommends that a presumptive scheme be adopted. That is (in simple terms), amendments to the present law that will require a judge to presume, when sentencing for an offence subject to the scheme, that a declaration will be made, unless it is in the interests of justice in the particular case not to do so.

In our view, this form of scheme, which will apply to sentences of greater than 5 years (or 10 years or more for serious drug offences) best balances the need to properly recognise the seriousness of these offences, while at the same time providing courts with some flexibility to respond to the individual circumstances of each case.

Under the reforms recommended, parole eligibility will no longer be fixed at 80 per cent, but rather will be able to be set within a set range of 50 to 80 per cent, while also allowing a court to depart where this is in the interests of justice. This flexibility will ensure the reformed scheme does not erode a sentencing court's ability to deliver individualised justice, given the Council's view that a 'one-size-fits-all' approach does not serve the community well. The recommended presumptive scheme will strike the right balance by ensuring sentencing outcomes reflect the seriousness of these offences and declarations are only made in appropriate cases.

Other recommendations include the creation of a separate and more targeted schedule of offences to apply for the purposes of the reformed scheme, and renaming the scheme the 'serious offences scheme' to reflect the fact that all offences included within the scheme have potential to cause serious harm, but not all are inherently violent, such as serious drug offences.

We hope that our recommendations will contribute to creating a better criminal justice response to serious offending — a topic far more complex and wide-ranging than we were able to address in this review.

We express our continuing gratitude to Council members who generously give their time and expertise to advise on the reference. We would like to particularly thank Phil McCarthy, Helen Watkins and Warren Strange for forming the Project Board and providing outstanding leadership over the duration of this review.

We also want to particularly thank all members of the Council's Secretariat for working tirelessly on this review. Each and every one of you supports our work with your dedication and professionalism. In truth, the extensive work that underpins this report is primarily yours. We thank you for your expertise, intellectual rigour, resilience and good humour.

John Robertson
Chair
Queensland Sentencing Advisory Council
May 2022

Dan Rogers
Project Sponsor and Council Member
Queensland Sentencing Advisory Council
May 2022

Executive Summary

Introduction

This report presents the Queensland Sentencing Advisory Council's findings and recommendations on its review into the operation and efficacy of the serious violent offences ('SVO') scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) ('PSA').

The review of the SVO scheme was referred to the Council in April 2021 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 asking the Council to undertake this review, the Attorney-General referred to:

- the importance of judicial discretion in the sentencing process;
- sentencing orders being properly administered to ensure the facilitation of a fair and just sentencing regime that protects the community's safety;
- the purpose of parole in allowing an offender to serve an appropriate portion of their period of imprisonment in the community to support their reintegration and minimise the likelihood of reoffending; and
- the significance of supporting and promoting public confidence in the criminal justice system to the overall administration of justice.

The '80 per cent rule'

The SVO scheme came into operation on 1 July 1997, through two additions to the PSA: Part 9A (the scheme itself) and Schedule 1 (the list of offences it can apply to).[1]

The SVO scheme requires a person declared convicted of the relevant listed offences[2] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[3] The making of a declaration is mandatory for sentences of imprisonment of 10 years or more, and discretionary for sentences of imprisonment greater than 5 years and less than 10 years. The SVO scheme, as it applies to sentences of 10 years or more, is a form of mandatory sentencing.

The scheme applies to certain listed offences if they are sentenced in the District or Supreme Courts. Listed offences in the scheme fall into four broad categories: non-sexual violence offences, sexual violence offences, serious drug offences and other offences.

The court also has discretion to declare a conviction for a non-scheduled offence attracting a sentence of any length, or for a scheduled offence resulting in a sentence of less than 5 years' imprisonment, a serious violent offence if it involved the use, or attempted use, of serious violence or resulted in serious harm to another person, provided the offence is dealt with on indictment.

The SVO declaration attaches to the offence rather than the offender. However, the circumstances of the offender can be relevant to the decision made by the court whether to make a declaration in circumstances where this is discretionary.

The fixing of parole eligibility at 80 per cent is very different to the usual rules applying to the setting of a parole release or parole eligibility date in Queensland. Ordinarily, courts have discretion to decide the date an offender must be released on parole (if the person is eligible for court ordered parole) or is able to apply for release on parole. If no parole eligibility is set, a person generally is eligible for parole after serving half of their sentence.[4]

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

The Council's approach to this review

The Council conducted extensive research and consulted widely with legal and non-legal stakeholders, including victim and survivor support and advocacy organisations.

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1 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ss 10, 17.
2 Or of counselling, procuring, attempting or conspiring to commit such an offence.
3 *Corrective Services Act 2006* (Qld) s 182 ('CSA').
4 Ibid s 184(2). There are some exceptions to this. See s 184 further.

The Council undertook the review over five key stages. The initial stages included the publication of an information sheet on the SVO scheme, a call for preliminary feedback to help inform the Council's approach, and the initiation of a subject-matter expert interview project to better understand the operation of the scheme and how it impacts on court sentencing practices and pre-sentence processes.

Over August to October 2021, the Council released four Background Papers, together with a literature review produced by the University of Melbourne.[5] The background papers considered various areas of the SVO scheme's operation, including the scheme's history, minimum and standard non-parole period schemes operating in other jurisdictions, key court decisions and how the scheme is being applied based on data provided by Court Services Queensland and Queensland Corrective Services.

In November 2021, the Council released a detailed issues paper: *The '80 per cent rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Issues Paper.* The Council invited written submissions to 34 questions posed in the Issues Paper. The Council received 20 submissions in response. Submissions are available on the Council's website, with the exception of confidential submissions.

Over June to October 2021, the Council conducted 71 interviews with a range of experts, including: members of the judiciary; public prosecutors; legal practitioners; members of the Parole Board; victims and survivor support and advocacy organisations; and other stakeholders, including organisations providing legal advice and transitional support to prisoners.

The Council also held a series of consultation sessions with victims and survivors of serious violent offences and their families and sought input from its Aboriginal and Torres Strait Islander Advisory Panel.

The publication of this report: *The '80 per cent rule': Serious Violent offences scheme in the Penalties and Sentences Act 1992: Final Report* presents the Council's findings and recommendations.

The case for reform

The review identified a number of issues with the operation and application of the SVO scheme. The Council found that the practical application and operation of the scheme is not consistent with its original intended purposes and is in need of reform.

The SVO scheme's application may be impacting on its operation and efficacy

The Council found that the scheme is applied differently across different offence categories to which the scheme can apply (sexual violence offences, non-sexual violence offences, serious drug offences and other offences).

Declarations were overwhelmingly made for 9 offences (of the 60 listed offences), with the majority of eligible Schedule 1 offences not receiving a declaration over the data period. The majority of declarations made were mandatory (72.8% over the 9-year data period). Discretionary declarations were most commonly made for non-sexual violence offences (78.2%).

The Council found that discretionary SVO declarations were less commonly made for sexual violence offences. This is suggestive of a complex broader systemic issue that sexual violence offences may be treated differently to offences involving non-sexual violence by legal practitioners and the courts.

Discretionary declarations were also rarely made for serious drug offences, with many expert interview participants expressing a view that for these offences, a serious violent offence declaration was not an appropriate designation as these offences are not inherently violent.

The Council's data analysis, information provided in submissions, and views expressed by participants in expert interviews made clear that the SVO scheme is applied inconsistently across included offence categories, impacting on its operation and efficacy.

The SVO scheme delivers on its objectives only in part and to a limited extent

When the scheme was introduced by the then Government in 1997, the scheme was primarily justified on the basis of punishment, denunciation and community protection.

The Council found that, when a declaration is made, the scheme results in offenders being detained in custody for longer. To this extent, it could be viewed as contributing to achieving the sentencing purposes of punishment and denunciation, as well as short-term community protection. However, the ability of the scheme to deliver on its intended purposes is likely compromised by the setting of the fixed non-parole period under the scheme at 80 per cent and its mandatory application to sentences of 10 years or more.

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

The Council found the application of the scheme can result in what would otherwise have been an appropriate head sentence needing to be adjusted down to ensure a sentence that is just in all the circumstances. This is because an offender's plea of guilty and other mitigating factors cannot be taken into account by setting an earlier parole eligibility date.

The Council did not find evidence that the scheme supports long-term community protection. The scheme results in offenders subject to a declaration spending far less time than they otherwise might in the community under supervision — if released to parole at all.[6] There is clear evidence that spending time supervised on parole reduces an offender's risk of re-offending — and this is particularly the case for higher-risk offenders who also are likely to benefit from longer periods of supervision on parole.[7]

The Council found that the SVO scheme delivers on its objectives only in part and to a limited extent and does not operate in a way that supports the objective of long-term community protection.

The SVO scheme creates unnecessary complexity and unintended consequences

The Council identified several ways in which the scheme constrains sentencing practices for serious violent offences, including by creating unnecessary complexity, unintended consequences and anomalies in the sentencing process.

The Council found that the mandatory operation of the scheme may be contributing to inconsistent sentencing outcomes — in particular between offences attracting a 10-year sentence and those falling just below this threshold. When sentencing co-offenders, the split mandatory/discretionary nature of the scheme can make it more difficult to apply the principle of parity.

The Council found that the scheme has a 'distorting effect'[8] on sentencing. This is because it restricts courts in recognising an offender's plea of guilty and other relevant mitigating factors through the setting of an earlier parole eligibility date, thereby exerting downward pressure on head sentences to ensure the imposition of a sentence that is 'just in all the circumstances'.

The scheme was also widely criticised during this review as adding an unnecessary layer of complexity to sentencing, including when dealing with multiple offences committed over different time periods or involving different complainants where only some of the offences may be subject to the SVO scheme.[9]

The Council found that the arbitrary nature of the 10-year mark at which the making of a declaration becomes mandatory and the high level at which the non-parole period is set under the scheme creates unnecessary complexity and leads to unintended consequences.

The SVO scheme contributes to victim and survivor dissatisfaction when a declaration is not made

The SVO scheme requires the offender to spend a substantial proportion of their sentence in custody prior to being eligible for release on parole.

Victims and survivors reported experiencing a great sense of relief when an SVO declaration was made. It meant that they knew the offender would have to serve at least 80 per cent of their sentence in custody. Stakeholders and participants in consultation sessions said that the deferral of parole eligibility provided victims and survivors with reassurance that the seriousness of the offending and the harm caused to them or their family members had been appropriately recognised. This contributed to their feelings of personal safety, knowing that the person would have to serve a long period in custody.

However, the scheme can give rise to significant victim and survivor dissatisfaction in circumstances where, despite the seriousness of the offence, a declaration is not made — either because the prosecution did not actively advocate for this, or the court determined that it was not appropriate to make a declaration. It can lead to victims and survivors feeling a sense of anger and frustration that an offence, which clearly involved serious violence and caused serious harm, is not recognised as such.

The discretionary operation of the scheme below 10 years was viewed as concerning on the basis that it resulted in very few declarations being made. There were concerns that the grounds upon which a discretionary declaration should be made were unclear and to the extent they existed, inconsistently applied.

The Council found that the scheme impacts on victim and survivor satisfaction with the sentencing outcome when a declaration is not made. This can contribute to re-traumatisation if the offence was not recognised as 'seriously violent enough' and subsequent feelings of alienation from the criminal justice process.

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6 For more information, see Part B, Chapter 9.

7 See, for example, Evarn J. Ooi and Joanna Wang, 'The Effect of Parole Supervision on Recidivism' (*Crime and Justice Bulletin*, No. 245, February 2022, NSW Bureau of Crime Statistics and Research) ('*The Effect of Parole Supervision on Recidivism*'); and *University of Melbourne Literature Review* (n 5) 13.

8 *R v Sprott; Ex parte A-G* (Qld) [2019] QCA 116, [41] (Sofronoff P, Gotterson JA and Henry J agreeing) ('*Sprott*').

9 *R v Dutton* [2005] QCA 17 cf *R v Lee* [2021] QCA 233.

The SVO scheme may limit rights protected under the *Human Rights Act 2019*

The Council was asked to consider the compatibility of the current scheme to the rights contained within the *Human Rights Act 2019* ('HRA'). The Council was primarily concerned with compatibility issues that might arise from the SVO scheme's mandatory operation.

The Council views the mandatory component of the SVO scheme as giving rise to human rights concerns as it constrains sentencing and can lead to inconsistencies between sentences that attract an SVO declaration and those that do not.

It thereby interferes with the court's capacity to maintain parity and consistency. As courts are restricted in their ability to recognise relevant mitigating factors in setting the non-parole period — such as a plea of guilty or cooperation with law enforcement — it limits the ability of a court to consider individual circumstances when setting the head sentence.

The Council acknowledges that the scheme's compatibility with rights of victims and survivors of crime needs to be considered, in particular the rights to be protected from torture and cruel, inhuman or degrading punishment, the right to life, and the right to security of person. In the Council's assessment of human rights, it balanced the rights of both victims and offenders.

The Council is of the view that the SVO scheme may limit rights protected under the Human Rights Act and that there are less restrictive and reasonably available ways to achieve the purposes of the SVO scheme.

The Council's recommendations to reform the SVO scheme

On the basis of the issues identified above, the Council recommends retaining a scheme for serious offences and reforming the existing scheme to allow it to better meet its purposes of punishment, denunciation and community protection.

Retention of minimum non-parole period scheme for serious offences

A minimum non-parole period scheme should be retained in Queensland for offenders convicted on indictment of serious offences. The SVO scheme's retention in a modified form is supported over its repeal, in recognition that there is an existing category of high-harm offences. These offences warrant a significant proportion of the sentence being required to be spent in custody for the purposes of punishment, denunciation and community protection to recognise the seriousness of these offences and promote victim and community confidence.

Presumptive model instead of mandatory/discretionary SVO scheme

The current split model should be replaced by a presumptive scheme. On sentencing an offender to imprisonment for a listed offence once the required sentencing threshold is met, a sentencing court should be required to make a declaration, unless the recommended grounds for departure are met. In the Council's view, this approach best balances competing interests and objectives compared to other options considered by the Council.

Presumptive model to apply to sentences of greater than 5 years for certain serious offences

The new presumptive scheme should apply to sentences of greater than 5 years for offences listed in a separate new stand-alone 'serious offences' schedule — with the exception of serious drug offences, to which a 10-year threshold should continue to apply. Setting the threshold at greater than 5 years will remove the current artificial distinction between a sentence of 10 years or more, and one falling just under this level, and also capture those sentences for which immediate imprisonment is the only sentencing option available to a court.

Departure from the scheme permitted if it is 'in the interests of justice'

Departure from the scheme should be permitted where a court is satisfied that this is 'in the interests of justice'. The Council recommends statutory guidance should be introduced to guide this decision to promote understanding of the types of factors a court is required to take into account when making this assessment, while preserving the current legislative sentencing guidance provided under section 9 and other sections of the PSA. The Council recommends this list of factors also be used to assist the court in determining where to fix the parole eligibility date where a declaration is made.

Range to set non-parole period between 50 and 80 per cent if declaration is made

On a declaration being made, a sentencing judge should be permitted to set parole eligibility within a range of 50 to 80 per cent of the head sentence (or 15 years, whichever is less). This will provide courts with greater flexibility to deliver individualised justice than is possible under the current model, while still providing a degree of certainty for victims and survivors and the broader community that offenders who commit serious offences will be required to serve a significant proportion of their sentence in custody.

Rename the scheme to the 'serious offences scheme'

The scheme should be renamed the 'serious offences scheme'. While not all offences included in the scheme are inherently violent, all are serious given they cause, or carry a significant risk of causing, a high level of harm to individuals.

Create a separate and more targeted schedule of offences for reformed scheme

Some offences, such as certain child exploitation material offences, and choking, strangulation or suffocation in a domestic setting, should be added to the new schedule, while a number of existing offences to which the current scheme can apply should be removed. This will better target the scheme at offences that involve serious violence and can cause serious harm.

Review of reforms after 5 years

To ensure the scheme operates as intended, the Council recommends it be reviewed after operating for a period of 5 years, or when another appropriate period of time has passed.

The Council's recommendations are set out in full in Chapter 18.

Benefits of the presumptive scheme

The Council supports a presumptive scheme for the following reasons:

- it will address many of the problems and issues identified by victims and survivors and by the legal profession with the current SVO scheme, especially those arising from its mandatory operation;
- it will recognise that all offences under the scheme are 'serious' and require judges to consider the appropriateness of departing from a declaration for all offences captured under the scheme sentenced to greater than 5 years' imprisonment, thereby avoiding current arbitrary distinctions made between sentences at or above 10 years, and those falling just below this level;
- it will promote community and victim confidence that sentencing outcomes reflect the seriousness of these offences by requiring all offenders convicted of serious offences to serve a significant proportion of their sentence in custody (unless a court determines that it is in the interests of justice that a shorter non-parole period be set);
- it will increase the discretion of the court to set an appropriate parole eligibility date, particularly for sentences of 10 years or more, giving judges the ability to determine whether the community is better protected by the offender serving a longer period of supervision in the community or a longer period of imprisonment based on the individual circumstances of the offence and the offender;
- it thereby better enables courts to deliver individualised justice; and
- it will likely lead to more declarations being made for sentences of over 5 and under 10 years, potentially improving victim satisfaction with sentencing outcomes.

Overview of chapters of this report

Chapter 1 discusses the background to this review, the Council's approach, the project scope and relevant information and data sources. It also discusses terminology used in this report.

PART A – The SVO scheme: History, current law and practice, and alternative approaches

Chapter 2 explores the history of the SVO scheme in Queensland, including when and why it was introduced, the purposes of the scheme and how the scheme impacts on parole eligibility.

The chapter discusses the purposes of parole and the non-parole period. While there is no legislated 'usual' ratio of the minimum time a court must order to be served in Queensland, the chapter discusses the common practice in Queensland to set parole eligibility at one-third of the head sentence if the offender pleads guilty and there are other mitigating features.[10] It also notes the statutory non-parole period that applies (50%) if no parole eligibility date is set.

The chapter explores how the approach under the SVO scheme and its '80 per cent rule' is different to the usual approach to setting parole eligibility dates in Queensland.

Chapter 3 considers the application of sentencing guidelines and principles set out in the PSA and applied under the common law.

10 *R v Crouch & Carlisle* [2016] QCA 81, [29].

It discusses the application of these general principles and key Court of Appeal cases that have guided the application of the SVO scheme. The chapter notes the Court of Appeal's recognition that an 'integrated sentencing approach' is appropriate and that there is no need for 'special factors justifying the exercise of a distinct discretion' to make an SVO declaration.[11]

It also considers what factors support a declaration being made (or not made) in circumstances where the making of a declaration is discretionary.

Chapter 4 examines the way offenders who commit serious offences are managed by Queensland Corrective Services ('QCS') when in custody and on parole. The chapter includes an overview of programs and interventions available in prison and on parole.

Chapter 5 provides a high level overview of approaches to the sentencing of serious violent offences in other jurisdictions, both in Australia and in select international jurisdictions (Canada, England and Wales and New Zealand).

A review of these jurisdictions shows the range of approaches taken to the setting of non-parole periods and outlines differences in the types of minimum and standard non-parole period and sentencing schemes reviewed. These schemes are explored in detail in the Council's paper, *Minimum Non-Parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions* (Background Paper 2).

PART B – Application of the SVO scheme

Chapter 6 examines the application of the SVO scheme, the types of offences that commonly attract an SVO declaration, and mandatory and discretionary declarations made under the scheme based on sentencing data.

The vast majority of cases sentenced for a Schedule 1 offence (for the most serious offence ('MSO') sentenced) were not subject to the SVO scheme.[12] In fact, less than 1 per cent of all cases involving a Schedule 1 offence sentenced across all court levels, and just under 16 per cent of eligible offences[13] (15.8%) resulted in an SVO declaration being made. For eligible offences sentenced to 5 years or more, but less than 10 years, declarations were made in 4.8 per cent of cases.

Over the period 2011–12 to 2019–20, 437 SVO declarations were made (based on a count of the most serious offence (MSO) sentenced). Almost half of all declarations made were for non-sexual violence offences (46.5%), over one-third were for sexual violence offences (37.5%) and 14.9 per cent were for serious drug offences. Discretionary SVO declarations were most commonly made for non-sexual violence offences.

In contrast, discretionary SVO declarations were rarely made for sexual violence offences or serious drug offences. For example, in only 18 cases of sexual violence was a discretionary declaration made (representing 11% of all discretionary declarations). Similarly, for serious drug offences, the majority of declarations were made on a mandatory basis, with only 5 discretionary declarations made (7.7% of discretionary declarations).

The most common offence to attract an SVO declaration (mandatory or discretionary) was maintaining a sexual relationship with a child (n=91), followed by rape (n=71) and drug trafficking (n=65). The remaining offences mostly comprised a variety of non-sexual violence offences — including acts intended to cause grievous bodily harm and other malicious acts, manslaughter, and attempted murder, amongst others.

Chapter 7 further characterises the offences commonly sentenced under the scheme and provides information on socio-demographic characteristics of offenders.

The Council's analysis shows offenders declared convicted of a serious violent offence were predominantly men (96.3%). Aboriginal and Torres Strait Islander peoples were over-represented across most Schedule 1 offences, including all SVO offence categories except trafficking in dangerous drugs. One in five SVO declarations were made for an offence committed by an Aboriginal and Torres Strait Islander person (20.1%).

The chapter further provides information on associated offences, the proportion of SVO and non-SVO cases that were sentenced as a domestic violence offence, differences in plea rates for SVO and non-SVO cases and information on offenders' prior history of being sentenced to imprisonment.

Chapter 8 provides information on sentencing outcomes and appeals based on sentencing data.

The chapter explores patterns of sentence distribution for common SVO declared offences, finding that the offence of trafficking in dangerous drugs appears to have an increased number of cases sentenced at the 9-year mark, relative to sentences of 8 and 10 years. The distribution for manslaughter, in comparison, showed a clear central tendency at 9 years and a relatively steep decline either side of the mode.

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11 *R v Eveleigh* [2003] 1 Qd R 398, 413 [53] (Fryberg J).

12 This is because the offence was not dealt with on indictment, did not receive a sentence long enough to fall under the scheme (based on the criteria under ss 161(1), 161B(1) and 161b(2) of the PSA), or because although eligible for a declaration under the scheme, a declaration was not made. See section 1.7.1 for how the MSO is determined.

13 For the definition of an 'eligible offence' for the purposes of this analysis, see discussion in Chapter 6.

The chapter reports the Council's finding that in almost half of all cases with an SVO declaration, an appeal was lodged. The SVO declaration was removed in 6.8 per cent of these appeals. The chapter finds that cases involving a mandatory SVO declaration were more likely to be appealed (48.1%) than cases where a discretionary declaration was made (37.8%).

Chapter 9 examines parole outcomes based on data provided by Queensland Corrective Services for the period from July 1997 to June 2020.

Nearly two-thirds of offenders convicted of a declared offence who applied for parole had their application for parole granted and were released to supervision in the community (63.0%). Close to one-quarter of offenders with an SVO declaration had their parole application refused (23.4%), with the remaining applications not having an outcome recorded.[14] There were 135 prisoners who were eligible for parole but did not apply for parole (17.9%).

In comparison, over three quarters of offenders (80.8%) sentenced for a Schedule 1 offence who did not receive an SVO declaration had their parole application granted, with less than 10 per cent of parole applications refused (9.0%).

Offenders sentenced for a sexual violence offence with an SVO declaration were the least likely to be granted parole (35.1% for maintaining and 38.1% for rape). On average, offenders sentenced for rape with an SVO declaration spent the longest time in custody beyond their parole eligibility date.

Offenders sentenced for a drug trafficking offence with an SVO declaration, were the most likely to be granted parole (75.9%) and, on average, were released almost immediately after reaching their parole eligibility date.

The chapter also examines parole eligibility dates for non-declared Schedule 1 offences, finding that they cluster around the one-third and half-way mark. This finding is consistent with the common practice in Queensland of setting parole eligibility at one-third to reflect a plea of guilty and the legislative requirement that offenders serve half of their sentence prior to being eligible for parole if no parole eligibility date is set.[15]

PART C – Impact and efficacy of the SVO scheme

Chapter 10 considers the impacts of the SVO scheme on head sentences for Schedule 1 offences and the setting of parole eligibility dates post-commencement of the scheme.

Based on analysis of sentencing remarks, stakeholder feedback and qualitative expert interviews, the Council found evidence that the SVO scheme is having a 'distorting effect'[16] on head sentences by reducing the sentence that might otherwise have been imposed. This is because it is a common practice for courts to sentence offenders towards the lower end of the established sentencing range for an offence where a declaration is made. A reduction in the head sentence may be viewed as necessary to take into account the consequences of a declaration being made as well as an offender's guilty plea and other mitigating factors (which ordinarily might be reflected by setting an earlier parole eligibility date).[17]

The Council further found evidence that the existence of the SVO scheme may increase the likelihood of parole eligibility being deferred when a declaration is not made, in circumstances where the making of a declaration is narrowly avoided.

In this sense, the SVO scheme is constraining the sentencing process for cases subject to the scheme as well as non-declared cases in which an SVO declaration was a possibility.

Chapter 11 examines the extent to which the SVO scheme is meeting its intended objectives of punishment, denunciation and community safety.

The making of a declaration increases the minimum time an offender must spend in custody, thereby promoting the purposes of punishment, denunciation and community protection. However, the Council found that the scheme achieves these purposes only in part and to a limited extent.

In particular, the fixed 80 per cent non-parole period does not support long-term community protection because it shortens the period an offender is subject to be supervised in the community, and may act as a disincentive for offenders to apply for parole. The reduction in head sentences resulting from the scheme further means that offenders are under sentence for a shorter period of time.

This is contrary to evidence that suggests that offenders who commit serious offences require more, rather than less time, under supervision to reduce the risks of reoffending.

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

15 CSA (n 3) s 184(2). There are legislated exceptions to this. See s 184 further.

16 See *Sprott* (n 8) [41] (Sofronoff P).

17 This approach was explained in *R v McDougall and Collas* [2007] 2 Qd R 87, [19].

Taking the various impacts of the scheme on sentencing practices and outcomes into account, the Council found that the scheme is not fully meeting its purposes of punishment, denunciation and longer-term community protection.

Chapter 12 explains how the scheme creates inconsistencies or constrains the sentencing process, drawing on findings from consultation, submissions received, and views expressed in expert interviews.

The mandatory operation of the scheme for sentences of 10 years and above constrains courts' ability to tailor a sentence to the individual circumstances of the offence and offender, potentially resulting in very different non-parole periods. This means that sentencing outcomes can vary greatly depending on whether a sentence is set at or above 10 years, or just below.

Stakeholders also raised concerns that the SVO scheme increases the complexity of sentencing for offences subject to it — including when a court is sentencing offenders for multiple offences, only some of which are listed in Schedule 1.

The limited guidance provided as to the circumstances in which a discretionary declaration should be made may also give rise to inconsistencies in the scheme's application. However, it also supports the exercise of courts' sentencing discretion.

Chapter 13 examines the SVO scheme's impact on victim and survivor satisfaction with the sentencing process based on expert interviews with victim support and advocacy organisations and prosecutors, submissions received and consultation forums with victims and survivors.

The scheme provides victims, survivors and their families with greater certainty that the offender will spend a long period in custody when a declaration is made. This is viewed as important by victims and survivors in recognition of the seriousness of the offending and harm caused by the offending, as well as for the purpose of their own protection and the protection of the broader community.

The Council found victim and survivor satisfaction appeared to be enhanced when a declaration was made. However, where a declaration was not asked for by the prosecution or made by the sentencing judge, victims and survivors found it difficult to understand why the offending was not considered to be 'seriously violent enough' to be recognised in this way, which led to feelings of anger, hurt and frustration.

While victims and survivors and victim advocacy and support organisations were supportive of some form of scheme being retained, equally it was clear they were dissatisfied with how the scheme is being interpreted and applied in practice.

Concerns expressed included the scheme's apparent effect in reducing head sentences, especially where head sentences are being reduced to under 10 years, the small number of cases receiving a discretionary declaration and the need for clear criteria to guide the making of discretionary declarations.

Victim and survivor stakeholders also wanted reassurances that offenders who commit serious violent offences have access to evidence-based rehabilitation programs and psychological support, both while in prison and in the community. If offenders are released on parole, they supported close and intensive supervision to reduce the risks of reoffending.

Chapter 14 considers the potential impact of the scheme on pleas, plea negotiations and rates of appeal. The Council found it difficult to determine whether the SVO scheme was impacting rates of guilty pleas, but found that the SVO scheme might be contributing to more appeals against sentence, especially in cases that received a mandatory declaration.

Other impacts identified by stakeholders included the scheme's potential to impact on community satisfaction and public confidence and costs to the system associated with the deferral of parole eligibility to 80 per cent.

PART D – Reforms to the SVO scheme

Chapter 15 sets out the fundamental principles which shaped the Council's approach to this review and its advice and recommendations. These are:

- Principle 1: Reforms to sentencing and parole laws should be evidence-based with a view to promoting public confidence.
- Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld).
- Principle 3: Sentencing outcomes arising from the operation of the SVO scheme should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.
- Principle 4: Parole serves an important purpose in helping prisoners successfully and safely reintegrate into the community and in minimising the likelihood of a person reoffending, thereby promoting community safety.
- Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.

- Principle 6: Any reforms should take into account likely impacts on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.
- Principle 7: The circumstances of each offender and offence are varied. Judicial discretion in the sentencing process is fundamentally important.
- Principle 8: Sentencing orders should be administered in a way that satisfies the intended purposes of the sentence. Services delivered under them, including programs and treatment, should be adequately funded and available across Queensland both in custody and in the community.
- Principle 9: Sentencing decisions for serious violent offences should be informed by the best available evidence of a person's risk of reoffending.
- Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) or be reasonably and demonstrably justifiable as to limitations.

Chapter 16 outlines the Council's case for reforming the SVO scheme.

In summary these are:

- The SVO scheme's application may be impacting its operation and efficacy.
- The SVO scheme delivers on its objectives only in part and to a limited extent.
- The SVO scheme creates unnecessary complexity and unintended consequences.
- The SVO scheme contributes to victim dissatisfaction when a declaration is not made.
- The SVO scheme may limit rights protected under the *Human Rights Act 2019* (Qld).

Chapter 17 sets out the different options and alternative models considered by the Council, and why it recommends the introduction of a presumptive scheme. It also includes a brief assessment of human rights implications for each option considered by the Council.

The Council considered the following options:

- Option 1: Leave the scheme unchanged;
- Option 2: Modify the scheme to be presumptive in some cases, and discretionary in others;
- Option 3: Abolish the scheme entirely — with or without other reforms as to how parole eligibility dates are fixed;
- Option 4: Reform the scheme to be wholly mandatory; or
- Option 5: Reform the scheme to be wholly discretionary; or
- Option 6: Reform the scheme to be wholly presumptive (**the recommended option**).

The Council ultimately found that:

- a minimum non-parole period scheme should be retained for offenders convicted of serious offences due to the high harm these offences cause, warranting a significant proportion of the sentence being served in custody to reflect the seriousness of these offences; and
- a presumptive scheme balances competing interests and objectives best, compared to the other options considered by the Council.

Chapter 18 sets out the Council's recommended reforms to the SVO scheme in detail.

Rename the scheme the 'serious offences scheme'

The Council's view is that the scheme's name communicates what type of offending the scheme is targeted at in the interests of promoting community understanding and guiding courts and legal practitioners on its proper application. Stakeholders were supportive of a name change and made a number of suggestions explored in the chapter.

The Council recommends that the scheme should be renamed the 'serious offences scheme' to avoid the scheme's current narrow focus on whether an offence has involved the use of 'serious violence'.[18] The removal of the term 'violent' recognises that not all offences included in the scheme are inherently violent; such as serious drug offences, but all are serious given they cause, or carry a significant risk of causing, a high level of harm.

Do not legislate the objectives of the scheme

The Council concluded that it is unnecessary, and potentially unhelpful, to set out the scheme's objectives in a legislative way. The Council's view is that the extrinsic materials supporting the introduction of the proposed reforms should make clear the intention of the scheme to ensure the minimum period to be served in custody reflects the seriousness of these offences with reference to the sentencing purposes of punishment, denunciation, deterrence

[18] The Council found that the focus on 'serious violence', in practice, has resulted in only a very small proportion of convictions for sexual violence offences being declared serious violent offences where the court had discretion to do so. This is discussed in detail in section 12.9.5 of this report.

and community protection. The general principles and factors which a court must have regard to in sentencing, including those listed in section 9 of the PSA, would continue to apply under the new scheme.

Adopt a threshold of greater than 5 years for the scheme's presumptive application, but retain the 10-year threshold for serious drug offences

The 10-year threshold for mandatory declarations under the current scheme was widely criticised during consultations and in submissions as being arbitrary and having the potential to result in very different minimum non-parole periods to be served, depending on whether a sentence is set at 10 years or above, or just below. On this basis, victims and survivors and victim support agencies were particularly critical of the range for discretionary declarations of 5 years to less than 10 years.

The Council concluded that a new sentencing threshold of over 5 years should be applied. The Council's view is that a sentence of greater than 5 years for offences that will be captured under the new scheme is a more accurate measure of offence seriousness. Setting the scheme to apply presumptively to sentences of greater than 5 years for SVO schedule offences captures those sentences where immediate imprisonment is the only sentencing option available to a court and avoids creating a displacement effect to partially suspended sentences.

As serious drug offences are in a very different category to the other offences proposed to be included in the reformed scheme and are not inherently violent, the Council determined that the current 10-year threshold should be retained. This will limit the application of the scheme to cases in which significant quantities of drugs were trafficked on a commercial basis, and involving the most serious instances of aggravated supply and production.

The Council also recommends changes to how the specified years of imprisonment will be calculated for the purposes of the new presumptive scheme.

A new parole eligibility date range of 50–80 per cent

The fixed nature of parole eligibility under the current SVO scheme has been widely criticised due to its arbitrariness and the limited time it leaves for offenders to be supervised on parole. This is contrary to evidence that suggests offenders serving long sentences need a longer rather than shorter period of supervision to reduce their risks of reoffending.

The Council therefore recommends that once a declaration is made, a court should have discretion to set the parole eligibility date within a specified range of between 50 to 80 per cent. It considers this approach may have a number of benefits, including:

- reducing the need for courts to depart from making a declaration in order to achieve a just sentence, meaning that more declarations will be made;
- potentially lessening the impact of the fixed nature of the non-parole period in reducing head sentences as courts are better able to take those considerations into account by setting the parole eligibility within the range;
- better enabling courts to deliver individualised justice and take the individual circumstances of the offence and offender into account;
- improving courts' ability to allow for the principle of parity to be applied when sentencing co-offenders; and
- potentially reducing problems that sometimes arise in applying the scheme in conjunction with other mandatory sentencing provisions, such as under section 156A of the PSA.

Departure permitted where this is 'in the interests of justice'

While the Council recommends the reformed scheme should be applied presumptively, it supports courts being provided with a discretion to depart taking into account that the circumstances in which offences are committed are infinitely varied, as are factors personal to the offender.

The test the Council recommends is whether the court is satisfied that departure from the scheme would be 'in the interests of justice'. This concept is well known to the legal system and reflects the importance of achieving a just sentence in all the circumstances — which has been recognised by the Queensland Court of Appeal as 'the paramount objective of sentencing'.[19]

Why statutory guidance is required

There is currently limited statutory guidance in Part 9A of the PSA regarding when an SVO declaration should be made in circumstances where the decision is discretionary.

The Council recommends legislating a broad non-exhaustive list of statutory criteria in support of the operation of the new presumptive model on the basis that this will preserve judicial discretion, while increasing transparency and promoting a better understanding by victims and the broader community of the basis on which a decision not to make a declaration might be made or parole eligibility set towards the lower end of the new 50–80 per cent

19 *R v Randall* [2019] QCA 25, [37].

range. At the same time, casting these considerations in broad terms, as recommended by the Council, will preserve existing guidance contained in section 9, other sections of the PSA and under existing case law.

The factors recommended by the Council to be legislated focus on:

- the nature and seriousness of the offence, including any harm done to a victim and the circumstances in which the offence was committed;
- the culpability of the offender;
- the offender's prospects of rehabilitation;
- any cooperation with the investigation or prosecution;
- whether the offender pleaded guilty and the circumstances;
- the risk of serious harm to members of the community and the need to protect members of the community from that risk; and
- any other relevant circumstance.

The Council also recommends that the requirement for a court in sentencing an offender for an offence that involves the use or attempted use of violence against a child under 12 years, or causing the death of a child under 12 years, treating the age of the child as an aggravating factor, should be retained. This recognises the particular vulnerability and defencelessness of children.

Information available to courts to inform decision-making

There was general support by all stakeholders, including those representing the views of victims, survivors and their families, for suitable programs and interventions being made available to offenders in custody and in the community. A number commented on the importance of addressing factors associated with offenders' risk of reoffending given the scheme's primary objective of community protection, and potential for this to inform the sentencing process.

The Council acknowledges that the availability of programs will change over time and views about risk assessments, program and intervention availability should only ever be one of many factors for a court to consider.

The Council recommends that Queensland Corrective Services should consider how the information made available to legal practitioners and sentencing courts about available programs and other forms of interventions and support might be enhanced to better inform sentencing decisions.

A new schedule of offences

The Council applied specific criteria in determining which offences should be retained under the reformed scheme. These were whether the offence:

- had a significant maximum penalty;
- was triable only on indictment;
- involved the use or threatened use of violence;
- could result in or create conditions in which serious harm of a sexual or non-sexual nature could be caused to another person;
- was committed against a vulnerable victim;
- involved a special risk of serious consequence to the victim and/or the community.

The development of criteria is intended to increase certainty and confidence in the reformed scheme's application and was informed by the research on approaches in other jurisdictions and different objective measures of offence seriousness.

The Council recommends 44 offences be included in the new schedule, with some notable changes including:

- the inclusion of certain child exploitation material offences;
- the inclusion of the offences of choking, suffocation or strangulation in a domestic setting; aiding suicide; and female genital mutilation;
- the narrowing of the scheme's application to cases of aggravated sexual assault and dangerous operation of a vehicle causing death or grievous bodily harm;
- the removal of a number of less serious offences which do not have violence as an element or which commonly only involve a very low level of violence;
- the removal of repealed offences.

Repeal of discretionary power to make a declaration

The power to make a declaration for offences not listed in the Schedule has been very rarely used — and in the few cases it has been applied, was used almost exclusively for Schedule 1 offences where the sentence fell below 5 years (only one non-Schedule 1 offence received an SVO during the 9-year data period).[20]

Rather than retaining this provision, the Council considers it is preferable to rely on courts' existing power to postpone parole eligibility under the general provisions that apply to parole given it is rarely used. The Council therefore recommends the repeal of this power.

Transitional provisions

There is a general presumption under Queensland law that legislation will operate prospectively.[21]

While the new reformed scheme may place some offenders at a disadvantage through its presumptive application to sentences of greater than 5 years but less than 10 years, other offenders benefit from the presumptive (rather than mandatory) application and the recommended parole eligibility range of 50 to 80 per cent. Similarly, changes to the list of included offences may benefit some offenders, while disadvantaging others.

The Council recommends that the approach taken should ensure an offender is not placed at a disadvantage following the introduction of the proposed reforms.

Chapter 19 identifies broadly any potential financial and practical implications associated with the Council's recommendations, analyses the compatibility of the scheme with the *Human Rights Act 2019* (Qld) and advises on the impacts of the recommendations on the over-representation of Aboriginal and Torres Strait Islander peoples.

The Council's view is that its recommendations are either compatible with rights, or to the extent any aspects of the reformed scheme might be viewed as limiting any rights, such limitations are reasonable and demonstrably justified. The Council considered the right to liberty and security, the right to a fair hearing and the right to recognition and equality before the law to be the most central to its recommendations. A detailed analysis is contained in Appendix 14 of the report.

The Council shares stakeholder concerns about the potential for a presumptive test to place Aboriginal and Torres Strait Islander defendants, and other individuals who are marginalised or experiencing disadvantage, at a disadvantage. In particular, these groups may be less able to afford high-quality legal representation or pay for specialist reports in support of displacing the presumption that a declaration should be made. Therefore, the Council recommends that further consultation should occur prior to the commencement of the reforms regarding legal support and funding needs and the adequacy of existing funding.

Chapter 20 addresses a number of other issues identified by the Council in the course of this review related to the operation of the criminal justice system. This includes the recognition of victims' rights and information and support needs, post-sentence orders for offenders convicted of non-sexual violence offences, and the provision of mental health support services to offenders.

20 The non-Schedule 1 offence sentence related to a 7-year sentence imposed for an offence charged under s 419(4) of the Criminal Code (Qld) — Burglary with intent to commit an indictable offence where an indictable offence is committed (in this case, grievous bodily harm) — which is not an offence listed in Schedule 1: see *R v Smith* [2018] QCA 136. Some declarations made for Schedule 1 offences appear to have been made on the erroneous basis that a sentence for a Schedule 1 offence imposed cumulatively on an earlier-imposed sentence for a Schedule 1 offence, once the sentence exceeds 10 years, must be declared to be a serious violent offence.

21 Queensland Government, Department of the Premier and Cabinet, *Legislation Handbook* (2019) 28 '6.5 — General presumption that legislation will be prospective'.

List of Recommendations

1. Based on the Council's findings, the serious violent offences scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) should be retained and reformed.

2. A wholly presumptive model should replace the current split mandatory/discretionary SVO scheme.

3. The scheme should be renamed the 'serious offences scheme'. The term 'violent' should no longer be used in recognition that not all offences included in the scheme are inherently violent, but all are serious given they cause, or carry a significant risk of causing, a high level of harm.

4. The purposes of the new serious offences scheme should not be legislated. Instead:

a. the general principles and factors to which a court must have regard in sentencing, including those set out in section 9 of the *Penalties and Sentences Act 1992* (Qld), should continue to be applied; and

b. the extrinsic materials supporting the introduction of the proposed reforms should make clear the intention of the scheme to ensure the minimum period to be served in custody reflects the seriousness of these offences with reference to the sentencing purposes of punishment, denunciation, deterrence and community protection.

5. The current distinction between sentences of 10 years or more, and those falling under 10 years for the purposes of the making of a serious offence declaration should be removed. The new scheme instead should apply in a presumptive way to sentences of imprisonment of greater than 5 years on conviction of an offender for a listed offence — with the exception of serious drug offences, to which a 10-year threshold should apply (see Recommendation 8)

6. Section 161C of the *Penalties and Sentences Act 1992* (Qld) should be repealed or amended to provide that:

For the purposes of calculating the specified years of imprisonment for the new scheme for an offence:

a. against a provision mentioned in schedule 1 (current schedule) or the new schedule (under the new scheme); or

b. of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1 or the new schedule;

an offender is sentenced to the specified years of imprisonment only if the offender is sentenced to a term of imprisonment of the specified years for that offence.

Note: *See Recommendation 24 regarding proposed transitional provisions.*

7. A court should be required to declare an offender convicted of a serious offence on imposing a sentence of imprisonment of greater than 5 years for a single charge for a listed offence, other than for a serious drug offence — to which a 10-year threshold should apply.

8. For serious drug offences, a court should be required to declare an offender convicted of a serious offence on imposing a sentence of imprisonment of 10 years or greater for a single charge for a listed drug offence.

9. On making a serious offence declaration, a court should be required to fix a parole eligibility date within a specified range of 50 to 80 per cent of the head sentence, provided that the non-parole period fixed does not exceed 15 years.

10. A court should be permitted to decline to make a declaration where the court is satisfied this is 'in the interests of justice'.

11. Section 161B(5) of the *Penalties and Sentences Act 1992* (Qld) should be retained under the new scheme with any necessary changes to reflect the new form of declaration. This section provides that in deciding whether to make a discretionary declaration under sections 161B(3) or (4) of the Act, if an offender is convicted on indictment of an offence —

a. that involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or

b. that caused the death of a child under 12 years;

the sentencing court must treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence.

12.1. Additional statutory guidance should be provided to courts to guide whether a declaration should be made and, on a court determining it appropriate to make such a declaration, where the parole eligibility date should be fixed.

12.2. The guidance provided to courts should be cast in broad terms in the form of a non-exhaustive list of matters to be considered, including:

a. the nature and seriousness of the offence, including any harm done to a victim, and circumstances in which the offence was committed, including any aggravating factors;

b. the culpability of the offender;

c. whether the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise;

d. the nature and extent of any cooperation with the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of such cooperation;

e. if the offender pleaded guilty to the charge of the offence or offences — that fact and the circumstances of the plea;

f. the risk of serious harm to members of the community and the need to protect members of the community from that risk;

g. any other relevant circumstance.

13. Queensland Corrective Services should consider how the information made available to legal practitioners and sentencing courts about available programs and other forms of interventions and support might be enhanced to better inform sentencing decisions, including:

a. the suite of programs and other interventions currently available to offenders both in custody and in the community and what types of issues and needs these are targeted at;

b. what programs and interventions are typically offered to offenders with specific risk and needs profiles that might be similar to those targeted under the new scheme, including the availability of culturally safe programs and interventions for Aboriginal and Torres Strait Islander offenders.

14. A new, stand-alone schedule of offences to which the new scheme applies should be introduced. This schedule should be separate to that which exists and is applied for the purposes of section 156A of the *Penalties and Sentences Act 1992* (Qld) (Cumulative sentences of imprisonment must be made in particular circumstances).

15. The following offences listed in Schedule 1 should be included in the new schedule that applies for the purposes of the reformed scheme:

- Indecent treatment of children under 16 (Criminal Code, s 210)
- Owner etc. permitting abuse of children on premises (Criminal Code, s 213)
- Carnal knowledge with or of children under 16 (Criminal Code, s 215)

- Abuse of persons with an impairment of the mind (Criminal Code, s 216)
- Procuring young person etc. for carnal knowledge (Criminal Code, s 217(1))
- Procuring sexual acts by coercion etc (Criminal Code s 218(1))
- Taking child for immoral purposes (Criminal Code, s 219(1))
- Incest (Criminal Code, s 222)
- Maintaining a sexual relationship with a child (Criminal Code, s 229B)
- Procuring engagement in prostitution of a person who is not an adult or who is a person with an impairment of the mind (Criminal Code, s 229G(2))
- Manslaughter (Criminal Code, ss 303(1) and 310)
- Attempted murder (Criminal Code, s 306)
- Conspiring to murder (Criminal Code, s 309)
- Killing unborn child (Criminal Code, s 313)
- Disabling in order to commit indictable offences (Criminal Code, s 315)
- Stupefying in order to commit indictable offence (Criminal Code, s 316)
- Acts intended to cause GBH and other malicious acts (Criminal Code, s 317)
- Grievous bodily harm (Criminal Code, s 320)
- Torture (Criminal Code, s 320A)
- Administering poison with intent to harm, if the poison or noxious thing endangers the life of, or does grievous bodily harm to, the person to whom it is administered or by whom it is taken (Criminal Code, s 322(a))
- Wounding (Criminal Code, s 323)
- Dangerous operation of a vehicle in circumstances of aggravation under s 328A(4) (causing death or grievous bodily harm, including while adversely intoxicated or excessively speeding or taking part in an unlawful race, or if the offender leaves the scene of the incident knowing or ought to have reasonably known the other person has been killed or injured) (Criminal Code, s 328A(4))
- Rape (Criminal Code, s 349)
- Attempt to commit rape (Criminal Code, s 350)
- Assault with intent to commit rape (Criminal Code, s 351)
- Sexual assault, with a circumstance of aggravation (Criminal Code, (ss 352(2) and 352(3))
- Kidnapping (Criminal Code, s 354(1))
- Kidnapping for ransom (Criminal Code, s 354A)
- Robbery (Criminal Code, ss 409 and 411)
- Attempted robbery (Criminal Code s 412)
- Burglary, with circumstance of aggravation (Criminal Code, ss 419(3)(b)(i) and s 419(3)(b)(ii))
- Trafficking in dangerous drugs (*Drugs Misuse Act 1986* (Qld), s 5)
- Supplying dangerous drugs (*Drugs Misuse Ac 1986* (Qld), s 6)
- Producing dangerous drugs (*Drugs Misuse Act 1986* (Qld), s 8).

16. The following offences listed in Schedule 1 should not be included in the new schedule that applies for the purposes of the reformed scheme:

- Riot (Criminal Code, s 61)
- Threatening violence (Criminal Code, s 75)
- Escape by persons in lawful custody (Criminal Code, s 142)
- Misconduct with regard to corpses (Criminal Code, s 236(2))
- Carrying or sending dangerous goods in vehicle (Criminal Code, s 317A (1))
- Obstructing rescue or escape from unsafe premises (Criminal Code, s 318)
- Endangering the safety of person in a vehicle with intent (Criminal Code, s 319)
- Attempting to injure by explosive or noxious substances (Criminal Code, s 321)
- Bomb hoaxes (Criminal Code, s 321A)
- Failure to supply necessaries (Criminal Code, s 324)
- Endangering life of children by exposure (Criminal Code, s 326)
- Dangerous operation of a vehicle (except if charged under s 328A(4)) (Criminal Code, s 328A)
- Assaults occasioning bodily harm (Criminal Code, s 339)
- Serious assaults (Criminal Code, s 340)
- Sexual assaults (except if charged under ss 352(2) and 352(3)) (Criminal Code, s 352(1))
- Cruelty to children under 16 years (Criminal Code, s 364)

- Taking control of aircraft (Criminal Code, s 417A)
- Unlawful assembly, riot and mutiny (*Corrective Services Act 2006*, s 122 and repealed equivalent (*Corrective Services Act 2000*, s 92(2))
- Other offences (*Corrective Services Act 2006*, s 124(a) and repealed equivalent (*Corrective Services Act 2000*, s 94(a)).
- (Repealed) Unlawful anal intercourse (Criminal Code, s 208)
- (Repealed) Unlawful sodomy (Criminal Code, ss 208(1)-(2))
- (Repealed) Conspiracy to defile (Criminal Code, s 221)
- (Repealed) Incest by man (Criminal Code, s 222)
- (Repealed) Incest by adult female (Criminal Code, s 223)
- (Repealed) Preventing escape from wreck (Criminal Code, s 318).

17. The following offences not currently listed in Schedule 1 should be included in the new schedule that applies for the purposes of the reformed scheme:

- Involving child in making child exploitation material (Criminal Code, s 228A)
- Making child exploitation material (Criminal Code, s 228B)
- Distributing child exploitation material (Criminal Code, s 229C)
- Possessing child exploitation material (Criminal Code, s 228D)
- Knowingly participating in the provision of prostitution with a circumstance of aggravation (where the person involved in the provision of prostitution is not an adult or is a person with an impairment of the mind) (Criminal Code, s 229H(2)
- Aiding suicide (Criminal Code, s 311)
- Choking, suffocation or strangulation in a domestic setting (Criminal Code, s 315A)
- Female genital mutilation (Criminal Code, s 323A)
- Child-stealing (Criminal Code, s 363)
- Abduction of a child under 16 (Criminal Code, s 363A).

18. The scheme should also apply to offences of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in the new schedule — consistent with the operation of the current SVO scheme.

19. Section 161B(4) of the *Penalties and Sentences Act 1992* (Qld), which permits a court to make a declaration for offences not listed in Schedule 1, or a Schedule 1 offence for a sentence of less than 5 years, provided certain criteria apply, should be repealed.

20. The new scheme should apply to offenders sentenced for an offence included in the new schedule but not listed in Schedule 1 only if the act or omission constituting the offence occurred on or after the commencement of the new provisions.

21. If a court sentences an offender post-commencement of the new scheme for an offence listed in Schedule 1 that is not included in the new schedule, the offender should not be subject to either the existing SVO scheme or the new scheme regardless of whether the offence or conviction happened before or after the commencement of the new scheme. Instead, the offender should be sentenced in accordance with general provisions applying to parole.

22. If a court is sentencing an offender post-commencement of the new scheme for an offence listed in both the new schedule and the currently applying Schedule 1, the following should apply:

a. If the act or omission constituting the offence occurred on or after the commencement of the new scheme, the new scheme should apply;

b. If the act or omission constituting the offence occurred prior to the commencement of the new scheme, but post commencement of the existing SVO scheme, the court should decide whether the person is to be sentenced under the current SVO scheme or under the new scheme. The court should be required to ensure that the offender is not placed at a disadvantage as to where the parole eligibility date is fixed, consistent with the principle against retrospective punishment.

23. The repeal of section 161B(4) of the *Penalties and Sentences Act 1992* (Qld) should come into effect from the date of commencement and apply whether the offence or conviction for the offence or offences happened before or after its repeal.

24. The repeal of, or amendments to, section 161C of the *Penalties and Sentences Act 1992* (Qld) should come into effect from the date of commencement and apply whether the offence or conviction for the offence or offences happened before or after its repeal and whether a person is sentenced under the current scheme (if still in operation) or under the new scheme.

25. As part of any implementation strategy developed by the Department of Justice and Attorney-General for the new serious offences scheme, further consultation should be undertaken to assess the legal support needs of disadvantaged defendants and identify any additional legal funding or support required to minimise potential unintended impacts of the reformed scheme. This consultation should include legal stakeholders providing direct representation for Aboriginal and Torres Strait Islander defendants and other defendants who are marginalised or are experiencing disadvantage. The consultation process should include consideration of the adequacy of existing funding both in support of defendants' legal representation and to fund the preparation of any required specialist reports.

26. The Attorney-General should request that the Council, or another suitable entity, undertake a review of the operation and efficacy of the new scheme after the scheme has been in operation for a period of 5 years or another appropriate period deemed suitable. This review should consider and report on matters including:

a. the proportion of eligible cases that attract a declaration;

b. the offences that most commonly result in a declaration being made;

c. the distribution of sentences of imprisonment and parole eligibility dates for both declared and non-declared offences; and

d. what types of factors are referred to by a court when deciding to make or not make a declaration.

This review should include an analysis of how the scheme is impacting on Aboriginal and Torres Strait Islander peoples and other marginalised or disadvantaged groups. It should also involve consultation with victims and survivors, relevant support and advocacy groups and legal stakeholders.

Queensland Sentencing Advisory Council