Queensland Sentencing Advisory Council

# Analysis of key Queensland Court of Appeal decisions and select sentencing remarks

## 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, October 2021

Background paper 3

This background paper explores key Court of Appeal decisions regarding the serious violent offences (SVO) scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld). It also reports on the Council's preliminary findings about how the scheme is understood and applied by the Supreme and District Courts of Queensland based on an analysis of sentencing remarks over a two-year period.

The paper is one in a series of background papers being released by the Queensland Sentencing Advisory Council as part of its current review of the SVO scheme. 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: Serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld)**

**Analysis of key Queensland Court of Appeal decisions and select sentencing remarks**

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**WARNING TO READERS:** This paper contains subject matter that may be distressing to readers. Explicit material concerning offences of violence and sexual offences drawn from the court judgments and sentencing remarks is referred to in this paper.

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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.

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## Abbreviations

| | |
|---|---|
| A Crim R | Australian Criminal Reports |
| A-G | Attorney-General |
| AJ | Acting Justice |
| CJ | Chief Justice |
| CLR | Commonwealth Law Reports |
| QDC | District Court of Queensland |
| DPP | Director of Public Prosecutions |
| DV | domestic violence |
| JA | Justice of Appeal |
| J/JJ | Justice/Justices |
| PSA | *Penalties and Sentences Act 1992* (Qld) |
| QCA | Queensland Court of Appeal |
| Qd R / QR | Queensland Reports |
| QSC | Supreme Court of Queensland |
| s/ss | section/sections |
| sch | schedule |
| SVO | serious violent offence under the SVO scheme |
| SVO scheme | serious violent offence scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) |

# Contents

# 1 Introduction

## 1.1 Background

This background paper analyses the development of Queensland case law in consideration of, and in response to, the serious violent offences (SVO) scheme. It also presents the findings of the Queensland Sentencing Advisory Council's analysis of first instance sentencing decisions in the Supreme and District Courts and what principles and factors commonly guide the approach taken by sentencing courts in applying the scheme.

The 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 review the operation and efficacy of the SVO scheme.[1] Of particular relevance to this paper, the Terms of Reference ask the Council to 'assess how the SVO provisions are impacting court sentencing practices', and to 'identify any trends or anomalies that occur in the operation of the SVO scheme that create inconsistency or constrain the sentencing process'.[2]

The history of the scheme, including relevant judicial interpretation, is discussed in detail in the Council's Background Paper 1: Serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld) – History of the serious violent offences scheme.[3]

In brief, the SVO scheme was introduced as the new Part 9A of the *Penalties and Sentences Act 1992* (Qld) ('the Act') through the enactment of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ('the Amending Act'). The Bill was introduced on 19 March 1997, gained assent on 3 April 1997, and came into operation on 1 July 1997.

The Amending Act enacted the following changes relevant to the scheme:

- the addition of the words 'and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration', following the words 'providing for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders' (a purpose of the Act);[4]
- the insertion of a definition of 'serious violent offence' as 'a serious violent offence of which an offender is convicted under section 161A';[5]
- the insertion of Part 9A of the Act (ss 161A-161C);[6]
- the amendments to the sentencing guidelines in section 9 of the Act to exclude the principle of 'imprisonment as a last resort' for offences that used violence or resulted in physical harm, and the inclusion of other factors to be taken into account by a Court in sentencing in those circumstances;[7] and
- the insertion of a schedule (now Schedule 1) containing a list of 'serious violent offences' for the purposes of sections 161A and 161B.[8]

The first published decision of the Court of Appeal to consider the scheme was *R v Lovell*.[9] The Court considered the amendments to section 9 of the Act and Byrne J made the following observation in this respect:[10]

> The 1997 amendments reflect a legislative conviction that less hesitation by the Courts in requiring a violent offender to undergo the rigours of imprisonment conduces to the protection of the community from the offender and from others who might be tempted to commit similar offences.

It is against this backdrop of fundamental changes to the Act that the case law has developed since the scheme's introduction in 1997.

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1 Terms of Reference: Serious Violent Offences Scheme in the *Penalties and Sentences Act 1992* (issued to the Queensland Sentencing Advisory Council on 9 April 2021).
2 Ibid.
3 Queensland Sentencing Advisory Council, *History of the serious violent offences scheme: A review of the serious violent offences scheme* (Background paper, August 2021) ('*History of the serious violent offences scheme*').
4 *Penalties and Sentences Act 1992* (Qld) s 3, as amended by *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ('PS(SVO)AA') s 4.
5 Ibid s 4, as amended by PS(SVO)AA (n 4) s 5.
6 Ibid, as amended by PS(SVO)AA (n 4) s 10.
7 Ibid s 9(2A), (3), as amended by PS(SVO)AA (n 4) s 6.
8 Ibid sch 1, as amended by PS(SVO)AA (n 4) s 17.
9 [1999] 2 Qd R 79; [1998] QCA 36.
10 Ibid 83.

## 1.2 When the SVO scheme applies

There are three circumstances in which an SVO declaration may be made under Part 9A of the Act:

1. If an offender is convicted on indictment of an offence listed in Schedule 1 of the Act ('Schedule 1 offence') (or of counselling, procuring the commission of, or attempting or conspiring to commit such an offence) and is sentenced to 10 or more years' imprisonment for the offence, calculated under section 161C of the Act, the offence **must** be declared a serious violent offence. If the Court fails to make that declaration the offender is nonetheless automatically convicted of a serious violent offence.
2. If an offender is convicted on indictment of a Schedule 1 offence (or of counselling, procuring the commission of, or attempting or conspiring to commit such an offence) and is sentenced to five or more, but less than 10 years' imprisonment for the offence, calculated under section 161C of the Act, the offence **may** be declared a serious violent offence.
3. If an offender is convicted on indictment of any offence (not limited to Schedule 1 offences) and is sentenced to a term of imprisonment of any length for the offence, and the offence:
   - involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or
   - resulted in serious harm to another person

   the offence **may** be declared a serious violent offence.

The practical consequence of an SVO declaration is that the offender must serve the lesser of 15 years or 80 per cent of the sentence before they are eligible to be released on parole.[11]

The SVO scheme operates within the broader context of Queensland sentencing law, including the general purposes and principles that guide sentencing in Queensland set out in the Act and that apply under the common law. For more information, see the Council's *Queensland Sentencing Guide*.[12]

## 1.3 Structure of this paper

**Part A** of this paper considers key Court of Appeal decisions that have guided the application of the scheme. This includes:

- consideration of the general principles that apply to the application of the scheme;
- principles of particular relevance to sentencing where the making of an SVO declaration is discretionary or, alternatively, required by law;
- how the relevant periods that determine when an SVO declaration may, or must, be made are to be calculated, as well as how an offender's parole eligibility date is determined when sentenced for both a declared SVO and a non-declared offence (where these sentences are to be served cumulatively); and
- practical issues that arise in the application of the scheme — such as application of the scheme where some (or all) offences pre-date the commencement of the scheme.

**Part B** presents the Council's findings from an analysis of sentencing remarks for cases sentenced in the Queensland Supreme and District Courts over the period 1 January 2019 to 28 February 2021 published on the Queensland Sentencing Information Service (QSIS) database. It considers the impact of the SVO scheme on the approach taken by sentencing judges to arriving at an appropriate sentence, the reasons why SVO declarations are commonly made, or not made, where discretionary, how the purposes of the scheme are understood and applied, and any problems identified. The methodology used for this analysis and limitations are set out in Appendix 1: Methodology for sentencing remarks analysis.

11 *Corrective Services Act 2006* (Qld) ('CSA') s 182.
12 Queensland Sentencing Council, *Queensland Sentencing Guide* (3rd ed, 2021).

# PART A: Key legal principles governing the application of the SVO scheme

# 2 General principles applying to the making of an SVO declaration and issues

## 2.1 Introduction

This section of the background paper explores the Queensland Court of Appeal decisions that have established legal principles to guide Queensland courts when sentencing in relation to the SVO scheme.

It considers relevant case law that has developed over time to help guide courts in sentencing under the SVO scheme provided for in Part 9A of the Act including:

- how to approach the task of deciding whether an SVO declaration will be made;
- the Court of Appeal's views on the practice of adjusting the head sentence down by setting a sentence towards the lower end of the sentencing range to take into account the making of an SVO declaration;
- the need to avoid giving offenders a 'double benefit' by both reducing the head sentence below 10 years (thereby avoiding the automatic application of the scheme) to take into account an offender's guilty plea or factors such as non-declarable pre-sentence custody, while at the same time using this as a basis on which to set an earlier parole eligibility date — unless there are other mitigating circumstances;
- how to avoid the dangers of applying a global penalty where only some offences are declared or declarable as SVOs;
- how the making of an SVO declaration limits the period an offender is under supervision in the community, and the need to take into account the potential benefits of parole in promoting community protection when deciding whether to make an SVO declaration; and
- recognising the ability of sentencing judges, in the proper exercise of their sentencing discretion, to consider the making of an SVO declaration — even when this is not raised initially in sentencing submissions.

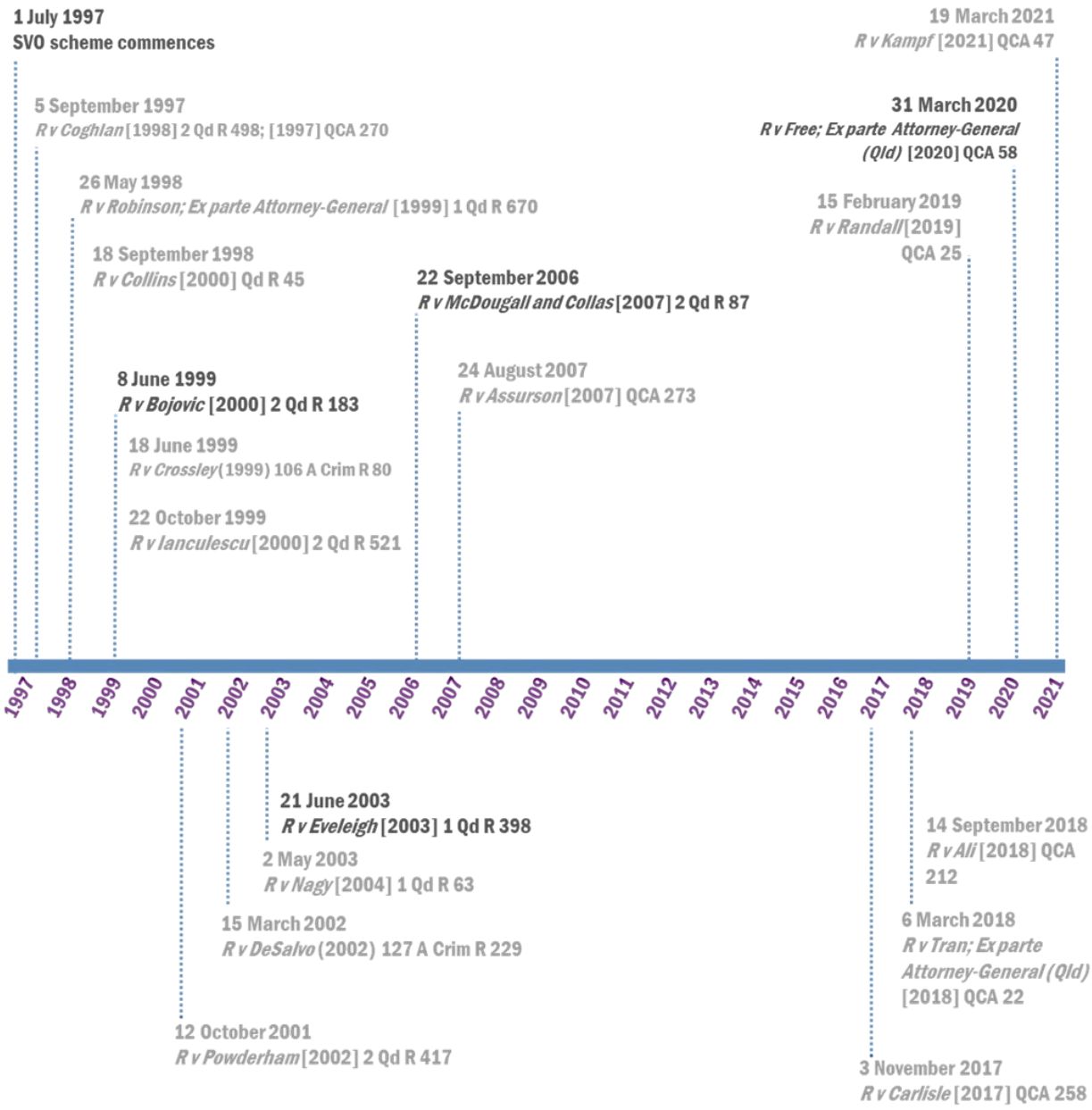
This section also considers the difficulties that arise in applying the principle of parity when sentencing co-offenders — some of whom are subject an SVO declaration, and others who are not.

Court of Appeal decisions discussed relevant to each issue are presented chronologically to illustrate how guidance on the application of the scheme has developed over time.

Figure 1 illustrates the development of case law during the period the SVO scheme has been in operation with a focus on key cases of significance discussed in this paper. It shows that the Court of Appeal issued significant guidance to sentencing courts in the years immediately following the scheme's introduction and the further development of case law occurring, in particular, in the period commencing from late-2017 to early 2021, including delivery of the Court of Appeal's judgment in *R v Free; Ex parte Attorney-General (Qld)*.[13]

13 (2020) 4 QR 80; [2929] QCA 58.

Figure 1: Key Court of Appeal decisions on the operation of the SVO scheme



## 2.2 Sentencing requires an integrated approach to arrive at a 'just sentence'

**Summary of the law:**
The sentencing process is a single integrated process in which consideration is required of all available sentencing options and all the circumstances. Where there is a discretion to make an SVO declaration, the exercise of that discretion is to be undertaken as part of the 'integrated process of arriving at a just sentence': *R v Free; Ex parte Attorney-General (Qld)* (2020) 4 QR 80; [2020] QCA 58 at [36].

A number of decisions of the Court of Appeal have confirmed that where consideration is given by a court to making an SVO declaration as part of the sentence, the same integrated process of 'instinctive synthesis' applies to the sentencing process as it does in all cases.

### 2.2.1 The power given to make an SVO declaration, where this is discretionary, in this context 'is simply another option that has been placed in the court's armoury'.[14] A consideration of all circumstances: *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219

A key decision that provided a consolidated form of guidance to courts on the application of the SVO scheme was R *v Eveleigh* ('*Eveleigh*')[15] — handed down some five years after the scheme was introduced.

The applicant, Mr Eveleigh, was sentenced to 8 years' imprisonment with an SVO declaration for the offence of enter dwelling with intent with circumstances of aggravation and a cumulative 12-months' imprisonment for an earlier suspended sentence he was ordered to serve as a result of his offending.[16]

Mr Eveleigh and a co-offender had entered the victims' home wearing balaclavas and gloves and carrying shortened shotguns. They held the couple and the woman's daughter at gun point and used duct-tape to immobilise them, while they accessed the safe to take jewellery and other items. They cut the telephone line in the house and left with the victims' property. When interviewed by police, the applicant falsely claimed the jewellery had not been taken, and claimed he had not loaded the firearm.

The effective 9-year sentence imposed by the sentencing judge was concurrent with 2 years' imprisonment imposed on a previous occasion. The applicant appealed the sentence on the basis that the sentence was manifestly excessive, not because of the head sentence, but due to the SVO declaration and the cumulative sentence.

The applicant was 32 years old with a significant criminal history including prior convictions for violence and home invasion-type property offending.

In dismissing the application for leave to appeal, Fryberg J observed that the position of the law as it related to SVO declarations was as follows:

1. The exercise of the sentencing discretion is an integrated process involving **a consideration of all of the circumstances of the case.**
2. The 1997 amendments provided judges with additional sentencing tools to use in the course of this process.
3. Those tools must be used as part of the overall sentencing process, not applied in the course of a separate step taken after the balance of the sentence is determined.
4. In considering what head sentence to impose, a judge should take into account the consequences of any exercise of the powers conferred by those amendments.
5. However, on the authorities as they presently stand, where that exercise of power is mandatory, adjustments may be made to the head sentence only within 'the range'.
6. The judge should also take into account all relevant sentencing principles, including relevant considerations set out in s. 9 of the *Penalties and Sentences Act 1992*, in formulating all aspects of the sentence, not solely in relation to the head sentence; but subject of course to the explicit terms of s. 9.
7. Where the making of a declaration is discretionary, the considerations which potentially may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing.
8. Where the making of a declaration is discretionary:

14 *R v Bojovic* [2000] Qd R 183, 191 [33].
15 [2003] 1 Qd R 398; [2002] QCA 219 ('*Eveleigh*').
16 He was also sentenced to lesser concurrent terms for armed robbery in company with actual violence, armed robbery, and unlawful use of motor vehicle with circumstances of aggravation.

(i) seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration;

(ii) seriousness of and violence (actual or threatened) in the course of the offence are relevant factors in deciding whether a declaration is appropriate;

(iii) seriousness of and violence (actual or threatened) in the course of the offence do not require the making of a declaration.

(iv) Where the making of a declaration is discretionary, the discretion is unfettered. In particular, it is not necessary that the circumstances of the case should take it beyond the 'norm' for cases of its type.

(iv) All aspects of a sentence must have a legitimate purpose.

(v) The sentencing judge should state the reasons for the sentence, both in terms of the nature of the components of the sentence and their severity. If the reasons are implicit in the remarks of the judge, the sentencing discretion will not be held to have miscarried. [17]

A further issue raised in the appeal was the point at which the applicant was eligible for parole given the cumulative 12 months' imprisonment. A majority of the Court of Appeal held that the applicant was eligible for parole after serving 80 per cent of the term of imprisonment imposed for the serious violent offence (i.e., 6.4 years, being 80% of 8 years).[18]

### 2.2.2 More than a consideration of 'beyond the norm': *R v McDougall; R Collas* [2007] 2 Qd R 87; (2006) 166 A Crim R 191; [2006] QCA 365

In *R v McDougall; R v Collas* ('*McDougall and Collas*'),[19] the Court provided important further guidance on the application of the SVO scheme.

The applicants, Mr McDougall and Mr Collas, each pleaded guilty to manslaughter and to wilfully damaging a motor vehicle. They also pleaded guilty to the dangerous operation of a motor vehicle which occurred prior to the manslaughter. Mr Collas, in addition, pleaded guilty to an unrelated offence of an assault occasioning bodily harm. The applicants were each sentenced to 8 years' imprisonment for the manslaughter offence and each were declared to have been convicted of an SVO (with lesser concurrent terms for the other offending). Mr McDougall also had three suspended sentences activated to be served concurrently. Both offenders applied for leave to appeal against the sentence imposed on the manslaughter offence on the ground that the SVO declaration rendered the sentence manifestly excessive in all the circumstances.

The facts of the manslaughter offence were that the victim, Tennant, was meeting another man, Page, at a shopping centre. McDougall, Collas and Page exchanged words while in their own vehicles before getting out of their vehicles. Tennant, while driving his vehicle, observed Page and the applicants and threatened McDougall and Collas that if they did not get back in their car, they would be killed. The applicants returned home and sought help from another man, McGuire. When they drove back to the shopping centre, they saw Tennant driving his vehicle out of the parking bay. McGuire drove his vehicle into Tennant's vehicle. McDougall got out and started hitting Tennant's vehicle with a metal bar he had brought with him. Collas took a torch from McGuire's vehicle and began to hit Tennant's vehicle. Tennant got out of his vehicle and began to move away when McGuire ran over to him and stabbed him once in the chest with a knife. Tennant was chased briefly by McDougall, who after being told by Tennant that he had been stabbed, returned to McGuire's vehicle. No assistance was rendered to Tennant who managed to run approximately 200 metres away from the car park before collapsing and dying on the roadway. There was no evidence that the applicants knew that McGuire had a knife.

The applicants pleaded guilty to manslaughter on the basis of an unlawful common purpose of a physical altercation involving a serious assault using weapons and an unlawful killing was a probable consequence, although neither actually used a weapon on the victim nor did him harm.

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17 *Eveleigh* (n 15) 430-431 [111] (Fryberg J) (emphasis added).

18 Ibid 442 [156] (Fryberg J, Mullins J agreeing). Cf *Eveleigh* (n 14), 402 [14] (McMurdo P) in which McMurdo P stated that it may be read as requiring the applicant to serve the combination of 80 per cent of the serious violent offence and 50 per cent of the cumulative sentence before being eligible for parole but stated 'I do not wish to express a concluded view'. Further submissions were invited and after the publishing of the decision, the Court of Appeal made a declaration that the proper interpretation was that the applicant was eligible for parole after serving 80 per cent of the serious violent offence term of imprisonment. Cf s 185 of the *Corrective Services Act 2006* (Qld) which provides guidance on parole eligibility for cumulative offences.

19 [2007] 2 Qd R 87; (2006) 166 A Crim R 191; [2006] QCA 365 ('*McDougall and Collas*').

Mr Collas was between 21 and 23 years old when the offences he was convicted of were committed and 24 years old at sentence. Mr McDougall was 23 years old at the time of all the offences and 25 years old when sentenced. Mr Collas had a prior conviction for an unlawful use of a motor vehicle and three offences related to dangerous drugs. Mr McDougall had a more significant criminal history including previous convictions for assault occasioning bodily harm, dangerous operation and unlawful use of a motor vehicle offences, a history of possession, supplying and production of dangerous drugs, unlawful possession of weapons and breaches of probation and suspended sentences.

In considering whether an SVO declaration should have been made, the Court of Appeal noted the various previous decisions in which the principles of an SVO had been considered[20] and stated:

> Differences of view and emphasis have emerged in those decisions, with the principal disagreement being as to whether the discretion to declare that an offender has been convicted of a serious violent offence can arise when the circumstances of the case do not take it beyond the 'norm' for offences of that type. A secondary issue has been whether the exercise of the discretion has resulted in a 'two step' or an 'integrated' sentencing process. The joint judgment of the High Court in *Markarian v. R*. (2005) 215 A.L.R. 21318 discourages focus on those terms, and encourages the view that a sentencing court take into account all relevant considerations, and only relevant considerations.
>
> As the High Court stated in *Markarian v. R*., the sentencing process is an integrated process directed to the determination of a just sentence. The exercise of the discretion conferred by s. 161B(3) of the *Penalties and Sentences Act* thus falls to be exercised as part of, and not separately from, the conclusion of the process of arriving at a just sentence.[21]

In respect of the considerations for setting a parole eligibility date, the Court of Appeal said:

> The considerations which may lead a sentencing judge to conclude that there is good reason to make a recommendation apt to bring forward the offender's eligibility for parole will usually be concerned with the offender's personal circumstances which provide an encouraging view of the offender's prospects of rehabilitation, as well as due recognition of the offender's co-operation with the administration of justice.
>
> The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the [*Penalties and Sentences Act 1992*] having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence.[22]

The Court of Appeal has more recently sought to move away from this notion of 'the norm' in *R v Free; Ex parte Attorney-General* ('*Free*').[23]

The outcome of Mr McDougall and Mr Collas' appeals, and the Court's reasons, are discussed later in this paper in sections 3.1.2, 3.2.3 and 4.1.2 of this paper.

### 2.2.3 Rejection of the 'two-step' approach: *R v Saunders* [2007] QCA 93

The correctness of adopting an integrated approach when considering the application of the SVO scheme was affirmed by the Court of Appeal in *R v Saunders*.[24]

The applicant, Mr Saunders, pleaded guilty to trafficking in methylenedioxymethamphetamine ('MDMA') and methylamphetamine over a 6-month period as well as charges of producing cannabis, supplying several drugs, and possessing dangerous drugs. The sentences imposed were 8 years' imprisonment (with an SVO declaration) for the trafficking in dangerous drugs charge and lesser concurrent terms of imprisonment for the other offences.

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20 *R v Collins* [2000] 1 Qd R 45*; R v Bojovic* [2000] Qd R 183; *R v DeSalvo* [2002] QCA 63; *Eveleigh* (n 14); *R v Bidmade* [2003] QCA 422; *R v A* [2003] QCA 538; *R v Orchard* [2005] QCA 141; *R v Cowie* [2005] 2 Qd R 533; *R v BAW* [2005] QCA 334; *R v BAX* [2005] QCA 365; *R v Lewis* [2006] QCA 121; *R v Mitchell* [2006] QCA 240.

21 *McDougall and Collas* (n 19) 95 [16]– [17] (Jerrard JA, Keane JA, Holmes JA).

22 Ibid 97 [20]–[21] (emphasis added).

23 [2020) 4 QR 80; [2020] QCA 58 ('*Free*'). See section 2.2.7 of this paper.

24 [2007] QCA 93.

The sentencing judge explained his exercise of the discretion to make an SVO declaration in a way that was clearly consistent with a two-step, not integrated, approach:

> Since I am satisfied that a notional starting point for the sentence is 10 years or perhaps slightly more for the criminality involved in this matter, which would carry an automatic serious violent offender declaration, it is an easier solution to impose an actual head sentence that is less than 10 years but with a serious violent offender declaration which is discretionary in that instance, to take into account the totality principle, the fact that you have spent time in custody that cannot be formally taken into account, the plea of guilty and other matters in your favour… and the fact that you have committed a breach of suspended sentence.[25]

The Court of Appeal found that the sentencing judge had erred in approaching the exercise of his discretion in two steps: initially considering the head sentence and then, once a determination was made that the head sentence should be less than 10 years' imprisonment, a decision not to make an SVO declaration to achieve what the judge considered to be an appropriate date for the recommendation of parole.[26] The Court of Appeal observed the need for a sentencing court 'to take into account all relevant considerations as part of an integrated process directed to the determination of a just sentence'.[27]

In re-exercising its sentencing discretion, the Court of Appeal noted that 'any lesser sentence would not recognise the overall criminality of the offending conduct and would not take into account the consequences of its concurrent nature'.[28] For this reason, the Court reimposed the same head sentence of 8 years' imprisonment with parole eligibility after having served the equivalent of 80 per cent of the sentence, but set aside the SVO declaration.

### 2.2.4 Applying *McDougall and Collas*' principle of a 'good reason' to delay parole eligibility: *R v Assurson* [2007] QCA 273[29]

The principles articulated in *McDougall and Collas* were applied in *R v Assurson ('Assurson')*[30] which considered both the issue of whether an SVO declaration should be made in the absence of sentencing submissions, and circumstances in which parole eligibility should be delayed.

The applicant, Mr Assurson, pleaded guilty to several drug offences including trafficking in methylamphetamine, cocaine and MDMA.

Counsel at first instance agreed that, had the applicant not pleaded guilty, the sentence imposed would have been between 12 to 13 years' imprisonment (which would have required him to serve 9.6 years before becoming eligible for parole). On that basis, the applicant's counsel submitted that a sentence of 9 years' imprisonment with parole eligibility after serving one-half would be appropriate to reflect the late plea of guilty. The sentencing judge disagreed and stated that eligibility after 4.5 years (instead of 9.6 years) was too great a reduction given the lateness of his plea of guilty and instead, sentenced him to 9 years' imprisonment with an SVO declaration (requiring him to serve at least 80% or 7.2 years).

The Court of Appeal concluded that the sentencing judge had erred by not giving consideration as to whether the circumstances of the offence were such that the making of the declaration was warranted.[31] In re-exercising the sentence discretion, the Court of Appeal placed weight on the fact that the prosecution had not sought the declaration and consequently the applicant's counsel had not addressed it. The Court of Appeal concluded that it ought not make a declaration in these circumstances and instead set parole eligibility after serving 5.5 years of the

25 Ibid [20].
26 Ibid [21]. See also *R v Smith* [2019] QCA 33, [15]-[23]. In *R v Smith*, the Court of Appeal similarly found error in the sentencing judge's two-step approach of deciding an appropriate head sentence before turning to whether to exercise the discretion to impose an SVO declaration at [23].
27 Ibid [21], discussing *McDougall and Collas* (n 19).
28 Ibid [23].
29 See also *R v Assurson* [2007] QCA 350 which amended the orders pronounced on 24 August 2007 (*R v Assurson* [2007] QCA 273) to reflect the pre-sentence custody.
30 [2007] QCA 273 ('*Assurson'*).
31 Ibid [16]–[18].

nine-year sentence.[32] The 'good reason'[33] for delaying eligibility past the statutory 'one-half'[34] in this case was the lateness of his plea coupled with the seriousness of the crimes.[35]

This case demonstrates the impact that the parties' submissions may have on sentencing outcomes.[36]

### 2.2.5 The requirement to serve 80 per cent is a relevant consideration in the integrated approach: *R v Benjamin* [2012] QCA 188

In *R v Benjamin*,[37] members of the Court reached different conclusions as to whether the making of an SVO declaration was appropriate in the circumstances.

The applicant, Mr Benjamin, attacked a 19-year-old woman, who was unknown to him, as she was out jogging in the evening. He tackled her from behind, knocked her to the ground and raped her. The victim suffered injuries to her face and body and had limited memories of the attack because she suffered a concussion and/or lost consciousness. The attack had a significant impact on the victim.

The applicant was 25 years old at the time of the offence and 28 years old at the time of sentence. He had a good work history but a criminal history that featured convictions for violence and breaching a domestic violence order.

In separate judgments, Henry and North JJ and McMurdo P concluded that the head sentence of 11 years was manifestly excessive. All three judges reimposed a head sentence of 9 years' imprisonment. Henry and North JJ in the majority (McMurdo P dissenting) made an SVO declaration. North J expressed the view that the violence used 'amply justifies the declaration'.[38] Henry J noted that the starting point for this case was at the lower end of a range of 10-14 years' imprisonment[39] however, given 'the use of a significant degree of violence' an SVO declaration was warranted and further, the requirement to serve at least 80 per cent of the sentence was a relevant matter in 'the integrated process of determining a just sentence'.[40] His Honour concluded, in arriving at a 9 year head sentence with an SVO declaration, that the primary considerations in sentencing this offender were the protection of the community; general deterrence; and the personal circumstances of the victim.[41]

In dissent, McMurdo P concluded that because 'nothing about it takes it into the more serious examples of rape offences', and because Mr Benjamin had a limited criminal history, good work history and was 'a suitable candidate for parole and rehabilitation', the offending did not warrant the making of a declaration.[42]

### 2.2.6 Paramount objective of sentencing is a just sentence in all the circumstances: *R v Randall* [2019] QCA 25

The principles guiding the exercise of the discretion to make an SVO declaration were also considered in *R v Randall*.[43]

Mr Randall, a serving police officer, killed his 10-week-old son with a single forceful punch to the stomach which caused extensive internal injuries. He lied to his wife, police, and health professionals by telling them that the injuries were caused by a misapplication of CPR. The applicant pleaded guilty to manslaughter on the eve of his murder trial and admitted that he had punched his son after becoming frustrated that: he had been refused a job transfer; his daughter and wife were unwell with the flu; and his son was crying and irritable. While the decision to punch the

32 Ibid [20]–[23].
33 See *McDougall and Collas* (n 19).
34 When a court does not set a parole eligibility date, parole eligibility is determined under section 184 of the *Corrective Services Act 2006* (Qld). This section applies to prison sentences of more than 3 years, and of any length for a sexual offence, as well as in other stated circumstances. If no parole eligibility date is set, the prisoner's parole eligibility date is the day after which the prisoner has served half of the period of imprisonment to which they have been sentenced. Section 184 is subject to section 185, which sets out general rules that apply where sentences imposed are subject to the operation of different sections, including where these sentences are to be served cumulatively — for example a sentence for a declared serious violent offence, and a sentence for a non-declared offence.
35 *Assurson* (n 30) [22]–[23].
36 But see *R v Cardwell* [2021] QCA 112 at [21] in which the Court of Appeal noted that while submissions of the parties have to be given great weight, the proper sentence is one that the judge determines is required by law. This case is discussed in section 2.7.1.
37 [2012] QCA 188.
38 *R v Benjamin* [2012] QCA 188, [8]–[9].
39 Ibid [78]–[80].
40 Ibid [81].
41 Ibid [84], referring to the sentencing principles in since repealed *Penalties and Sentences Act 1992* (Qld) s 9(4), now *Penalties and Sentences Act 1992* (Qld) s 9(3).
42 Ibid [4].
43 [2019] QCA 25.

child was spontaneous, the Court found that the applicant had a few moments to reflect on his decision as he moved into a crouched or bent position to strike his son.

The sentencing judge imposed a sentence of 9 years' imprisonment with parole eligibility after having served 5 years. His Honour was not persuaded that an SVO declaration ought to be made but was of the view that structuring the sentence with parole eligibility after serving one half (4.5 years) would give 'undeserved weight' to what was a very late plea of guilty with no evidence of remorse.[44] In doing so, his Honour noted that, had the applicant not pleaded guilty, the appropriate sentence would have been one of 11 years' imprisonment, which carries an automatic SVO declaration.[45]

The applicant appealed this sentence on the basis that postponing eligibility to a date later than the statutory 'one-half' did not adequately reflect his plea of guilty and further, its postponement past the 'one-half' was not necessary to protect the community.[46] The Court of Appeal dismissed both arguments and concluded that there were no errors in sentencing.

The Court of Appeal referred to the cases of *R v McDougall; R Collas*[47] and *R v Assurson*[48] as authority for the principle that the 'paramount objective of sentencing' is the achievement of a just sentence in all the circumstances and further, the postponement of parole eligibility past the statutory one-half is a permissible exercise of judicial discretion 'provided that there is a good reason for doing so'.[49] The Court went on to say that:

> Because of the many different kinds of offences, the infinite kinds of circumstances surrounding the commission of offences and the limitless kinds of offenders, both the discretion as to length of imprisonment and as to the fixing of a parole date cannot possibly be circumscribed by judge-made rules so as to preclude consideration of whatever relevant factors might arise in a particular case. It may be common to impose a head sentence by having regard mostly to the circumstances surrounding the commission of the offence and to fix the actual period of custody by reference to an offender's personal circumstances. But there is no rule of law that requires that to be done in every case. In the absence of a statute that prescribes the way in which an offender should be punished, sentencing judges have always regarded all of the elements of a sentence to be flexible. They will continue to do so in order to arrive at a just sentence in all the circumstances.[50]

### 2.2.7 The integrated process affirmed: *R v Free; Ex parte Attorney-General (Qld)* (2020) 4 QR 80; [2020] QCA 58

The principles set down in earlier decisions regarding how the discretion to make an SVO declaration should be exercised were restated and clarified in the 2020 decision of the Court of Appeal in *R v Free; Ex parte Attorney-General (Qld)*.[51]

After following a seven-year-old girl and her mother around a department store for 20 minutes, the respondent, Mr Free, approached the child by telling her that he was a friend of her mother's.[52] He took her to bushland approximately 30 minutes away, laid her on the ground and removed her outer clothing and shoes. He touched and rubbed her vagina on both the top of her underwear and on her bare skin.[53] The child was returned by the respondent to the shopping centre entrance and reunited with her mother after one hour and 23 minutes. She did not disclose the sexual offending to her parents or police.[54] The respondent made admissions to touching the complainant's vagina and DNA analysis later identified his bodily fluids. The respondent told police that he had had fantasies about young girls and on this day, 'the dark urge had taken over'.[55] The child and her mother suffered significant trauma because of the offending.[56]

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44 *R v Randall* [2019] QCA 25, [33] (Sofronoff P, Morrison JA and Burns J).
45 Ibid. Because manslaughter is a Schedule 1 offence, this would have meant that the applicant would have automatically been required to serve 80 per cent of the sentence before becoming eligible for parole.
46 *R v Randall* [2019] QCA 25, [28] (Sofronoff P, Morrison JA and Burns J).
47 *McDougall and Collas* (n 19).
48 *Assurson* (n 30).
49 Ibid [37], [39]–[42].
50 Ibid [38] (Sofronoff P, Morrison JA, and Burns J).
51 *Free* (n 23) See also, 'Case in Focus. *R v Free; Ex parte A-G (Qld)* [2020] QCA 58; (2020) 4 QR 80. Case law summary', *Queensland Sentence Advisory Council* (Web Page, 9 June 2021). https://www.sentencingcouncil.qld.gov.au/education-and-resources/case-in-focus.
52 Ibid 87 [7].
53 Ibid 88 [16].
54 Ibid 86 [6].
55 Ibid 88 [15].
56 Ibid 89 [21].

Mr Free pleaded guilty to the offences of taking a child under 12 years for an immoral purpose, deprivation of liberty and indecent treatment of a child under 12. The sentencing judge at first instance imposed a sentence of 8 years' imprisonment with parole eligibility after serving one-third of the sentence. The Attorney-General appealed on the basis that the sentence imposed was manifestly inadequate (ground 1) and the judge erred in failing to make an SVO declaration in respect of the offence of taking a child for an immoral purpose (ground 2).

The Court of Appeal considered it appropriate to address both grounds of appeal together and made the following findings:

- The exercise of discretion is something which is required to be undertaken as an integrated process of arriving at a just sentence, not separately from it,[57] and it is not necessarily limited to those cases which fall outside a so-called 'norm' for a particular offence.[58] The sentencing judge erred in focussing on whether the offending was 'outside the norm' rather than considering the circumstances of the case more broadly including matters in sections 9(1),[59] 9(2)[60] and, primarily, 9(6)[61] of the *Penalties and Sentences Act 1992* (Qld) which may mitigate or aggravate the offending.[62]
- The sentencing discretion in this case was affected by a second error, namely that the sentencing judge moved directly from concluding that an SVO declaration was inappropriate to making an order that he be eligible for parole after serving the 'conventional one-third' without considering whether there were factors favouring a later release date.[63] In referring to the case of *R v Randall*[64] (summarised in section 2.2.6 above), the Court of Appeal noted that the discretion to fix a parole eligibility date is unfettered and there can be no mathematical approach to fixing a date.[65]
- Thirdly, the starting point of 8 years' imprisonment was too low and therefore the term of imprisonment had already been substantially discounted to allow for the plea of guilty and cooperation.[66]

In re-exercising its sentencing discretion, the Court of Appeal unanimously concluded that a sentence of 8 years' imprisonment with no SVO declaration and no recommendation for parole (i.e., parole eligibility after serving four years) was a just sentence in all the circumstances. The circumstances focussed upon by the appellate Court included: the positive mitigating features of his cooperation and early plea of guilty; the serious nature of his offending; the need for deterrence and denunciation; and community protection.[67]

More about this case can be found in sections 2.6.2 and 3.1.3.

### 2.2.8 Permissible for judge to come to an initial view about appropriate sentence before undertaking integrated process: *R v Fischer* [2020] QCA 66

In *R v Fischer*,[68] the Court rejected the identification of a provisional sentence before considering whether or not to postpone parole eligibility by making a declaration was itself evidence of error, with reference to earlier statements made in *Free* regarding the exercise of the discretion to delay parole eligibility.

The applicant, Mr Fischer, pleaded guilty to several offences including trafficking in dangerous drugs, supplying weapons, possession of weapons and dangerous drugs, unlawful use of motor vehicles and fraud-related offences.

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57 Ibid 93–4 [36] (Philippides JA, Bowskill and Callaghan JJ), citing *Markarian v The Queen* (2005) 228 CLR 357, [37]; *Barbaro v The Queen* (2014) 253 CLR 58, [34]; *Director of Public Prosecutions v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, [4]–[7]; *McDougall and Collas* (n 19), [17] and [19].

58 *Free* (n 23) 96 [46] (Philippides JA, Bowskill and Callaghan JJ).

59 This section lists the only purposes for which sentences may be imposed: punishment that is just in all the circumstances; rehabilitation; deterrence; community denunciation and community protection.

60 These are matters that the Court must have regard to, generally, which include: imprisonment is a last resort; the maximum penalty; the seriousness of the offence, including its effect on victims; the offender's antecedents; the assistance of the offender in the investigation of their offence or others; totality; time spent in custody; compliance with previous court orders.

61 This concerns matters where a sexual offence has been committed against a child, which include: the age of the child; the effect on the child; the nature of the offence; the need to protect children; the relationship between the child and adult; deterrence; the offender's prospect of rehabilitation; the offender's antecedents; the offender's remorse; any medical, psychiatric, or other report relating to the offender.

62 *Free* (n 22) 98 [49] (Philippides JA, Bowskill and Callaghan JJ),

63 Ibid 99 [55]

64 [2019] QCA 25.

65 Ibid citing *R v Randall* [2019] QCA 25, [43].

66 Ibid 99-100 [56] – 103-4 [73]. This observation that the appropriate sentence was not less than 10 years is significant because the Attorney-General was not appealing the head sentence of 8 years (only the parole eligibility date).

67 Ibid 107 [89] (Philippides JA, Bowskill and Callaghan JJ).

68 [2020] QCA 66.

The trafficking was described by the Court of Appeal as substantial and involved the sale of methylamphetamine in one ounce and greater quantities, as well as the sale of MDMA. The trafficking featured the use of violence and was made more serious by Mr Fischer purchasing and selling firearms.[69]

The applicant was addicted to methylamphetamine and had a criminal history featuring drugs and fraud offences. The sentencing judge imposed a head sentence of 9 years and 8 months' imprisonment (with an SVO declaration) for the trafficking offence and lesser concurrent sentences for both the activation of a suspended sentence and the remaining offences.

In delivering the lead judgment with which the other judges of the Court of Appeal agreed, Sofronoff P dismissed the applicant's contention that the sentencing judge had engaged in what his Honour described as the 'forbidden two-step manner'.[70] His Honour noted that 'sometimes, and perhaps often, such questions cannot be addressed until a provisional term of imprisonment has been articulated.'[71] He observed:

> In some cases, the factors affecting the discretion may arise from the objective facts of the offending. Such factors may demonstrate that the postponement of parole eligibility is called for by reason of the need for general deterrence, or the need for prominent denunciation, despite there being a perceived benefit for the community in an offender's early release under supervision.

In other cases, such as the present, the relevant reasons to make a declaration may arise from the prisoner's personal circumstances, such as a recent rejection of supervision in earlier cases, and the need for personal deterrence. In any of these cases, it may be that only once a provisional conclusion is reached about a term of imprisonment that a sensible consideration can then be given to the question of whether or not to postpone the parole eligibility date by making a declaration. The question may be answered differently depending upon the proposed term of imprisonment that is foreshadowed, and the decision that a declaration is desirable may itself affect the term that is finally decided upon.[72]

His Honour went on to make the following observations in respect of the 'integrated process' of sentencing, referring to the principles enunciated in *Free*[73] with respect to the postponement of parole eligibility:

> The expression 'integrated process' was one that was adopted to distinguish the correct process from the discredited and incorrect process of taking a number of years as a starting point and then adding or subtracting from that number to reflect the influence of relevant factors until a final number, the appropriate sentence, has been reached: see *Markarian v The Queen* (2005) 228 CLR 357 at paragraph 39. The expression does not dictate that it is impermissible for a Judge to take stock, during a point in the Judge's reasoning process, in order to determine whether or not, upon the assumptions stated to that point in the sentencing remarks, a particular condition attaching to the sentence would or would not be appropriate.
>
> It must be remembered that often, sentencing remarks follow upon the consideration that has already been given to sentence, and follow upon a conclusion about the appropriate sentence already having been reached in the Judge's mind. An inquiry of this kind by a sentencing Judge may, for example, reveal that an assumption – say, a proposed sentence of nine years – would be too severe if coupled with a declaration. In my view, nothing more than that was involved in this case.[74]

The application for leave to appeal was refused.

### 2.2.9 Recent decision applying the integrated approach: *R v SDM* [2021] QCA 135

The 'integrated approach' was referred to most recently with approval in *R v SDM,*[75] with reference to earlier statements made in *McDougall and Collas* and *Free*.[76] This decision is discussed in section 3.2.5 below.

69 Ibid 2–3.
70 Ibid 4.
71 Ibid 5–6.
72 Ibid 5.
73 *Free* (n 22).
74 *R v Fischer* [2020] QCA 66, 5–6.
75 [2021] QCA 135.
76 Ibid [42] (Mullins JA, Fraser JA and Henry J agreeing).

## 2.3 Permissible to sentence towards the 'lower end of the applicable range' and/or reduce the head sentence where an SVO declaration is made

**Summary of the law:**

As part of the integrated approach to sentencing, courts may consider that, in fashioning a sentence that is just in all the circumstances where an SVO declaration is made, the offender should be sentenced towards the lower end of the applicable range and/or the head sentence that would otherwise have been appropriate should be reduced. *R v Bojovic* [2000] 2 Qd R 183; (1999) 113 A Crim R 1; [1999] QCA 206; *R v Ali* [2018] QCA 212

This section of the paper considers what impact an SVO declaration may have on the head sentence imposed. The Court of Appeal has affirmed that, as part of the integrated approach to sentencing, courts may determine that the offender should be sentenced towards the lower end of the applicable sentencing range and/or the head sentence should be reduced on the basis that parole eligibility is to be delayed through the making of an SVO declaration. This is consistent with the integrated approach to sentencing discussed in section 2.2.1 above.

### 2.3.1 What might be appropriate depending upon whether an SVO declaration is made or not made: *R v Bojovic* [2000] 2 Qd R 183; (1999) 113 A Crim R 1; [1999] QCA 206

In *R v Bojovic*,[77] handed down two years after the scheme came into operation, the Court of Appeal discussed the impact that the decision to make (or not make) an SVO declaration might have when arriving at a sentence that is just in all the circumstances.

The appellant, Mr Bojovic, was convicted of manslaughter, after he killed a man by punching him several times in the face, in response to having been attacked by the deceased. The applicant had a 'fairly extensive' criminal history which included convictions for assault occasioning bodily harm, assault and indecent assault.[78] He appealed his sentence of 10 years' imprisonment (which attracted an automatic SVO declaration) on the basis that it was manifestly excessive.

The Court of Appeal decided that 'subject to the question of whether a further declaration of conviction of serious violent offence ought to be made, consistency would suggest that a sentence in the order of eight years' imprisonment would be appropriate'.[79]

In considering whether an SVO declaration ought to be made, the Court stated:

> While the mandatory requirements of s161B(1) will inevitably interfere with the courts' capacity to maintain parity and consistency, the same problem does not exist in relation to sentences under s161B(3) where an additional sentencing discretion has been conferred. In such matters the courts have the power to maintain reasonable consistency between sentences, although they will of course heed the additional emphasis that has now been placed on protecting the community from violent offenders. As an example, if according to ordinary principles a violent offence seems to call for a sentence of between six and eight years, and it is one where the discretion to make a violent offender declaration arises, such that it might but not must be made, the sentencing judge has the discretion in the event that a declaration is to be made, to impose a sentence toward the lower end of the applicable range. Conversely if the judge is to give the offender the benefit of declining to make such a declaration, it might be appropriate to consider imposing a sentence towards the higher end of the range. If this were not done, it is difficult to see how the sentencing judge could properly discharge his or her duty under s9 of the Act. A just sentence is the result of a balancing exercise that produces an acceptable combination of the purposes mentioned in s9(1)(a) to 9(e) of the Act.
>
> In our view it is not appropriate that a declaration be made unless the overall sentence will be seen to be reasonably consistent with attaining the normal objectives of punishment…[80]

The Court of Appeal ultimately came to the conclusion that a declaration was not appropriate for Mr Bojovic in circumstances where the essential feature of the offending was an 'over-reaction in the course of self-defence' and the risk of reoffending seemed remote.[81] The appeal against sentence was allowed, the sentence set aside and replaced with one of 8 years' imprisonment with no recommendation for parole (meaning he would be eligible for parole after serving half of his sentence).[82]

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77 [2000] 2 Qd R 183.
78 Ibid 188 [22] (de Jersey CJ, Thomas JA, and Demack J).
79 Ibid 190 [26].
80 Ibid 191–192 [34]–[35] (de Jersey CJ, Thomas JA, and Demack J) (emphasis added).
81 Ibid.
82 No SVO declaration made; required to serve half of the sentence before becoming eligible for parole.

### 2.3.2 A general rule but not an obligation: *R v Cowie* [2005] 2 Qd R 533; [2005] QCA 223

In *R v Cowie*,[83] the Court clarified that while sentencing an offender towards the lower end of the sentencing range where the making of a declaration was required operated as a 'general rule', there was no requirement of courts to do so.

This case concerned a mandatory SVO declaration for offences including torture and kidnapping, where the sentence imposed after trial was 12 years' imprisonment. The applicant conceded that the appropriate sentencing range was 10-12 years' imprisonment, and therefore an SVO declaration was inevitable, but argued that the applicant should have been sentenced to the lower end of the range because of that inevitability.

The Court of Appeal stated that where the sentence imposed for a Schedule 1 offence is inevitably 10 years or greater, the fact that the applicant will serve at least 80 per cent of their sentence before becoming eligible for parole is relevant to the integrated sentencing process in determining that which is just in all the circumstances.[84]

The Court went on to say that, while there is a general rule that the court should sentence at the lower end of the appropriate range where there is a mandatory declaration, it would be contrary to the purpose of the SVO scheme to oblige a sentencing judge to sentence at the lower end of the range and generally lessen sentences as a result.[85] The appeal was dismissed.

### 2.3.3 Sentence must be reduced to take account of mitigating factors where there is SVO: *R v Ali* [2018] QCA 212

One of the reasons that sentences tend to be reduced when the mandatory declaration aspect of the SVO scheme comes into play is the inability to take into account factors in mitigation by setting an earlier parole eligibility date. This particular consequence of the SVO scheme was discussed in *R v Ali*.[86]

The applicant, Mr Ali, was found guilty after trial of the attempted murder of his former partner. This was a domestic violence offence ('DV offence').[87] Prior to the trial he had pleaded guilty to common assault going armed in public so as to cause fear, and dangerous operation of a motor vehicle (DV offence). He was sentenced to 10 years' imprisonment for the attempted murder (DV offence) and concurrent terms for the other offences.[88]

Leave to appeal was sought on the basis that the sentencing judge made an error of fact,[89] and if accepted by the Court, in re-exercising the sentencing discretion the Court would find that the sentence of 10 years (with an automatic SVO declaration) was manifestly excessive.[90]

The applicant and the victim commenced a relationship in 2012. In mid-2015, the applicant ended their relationship, however around one month later he called her multiple times seeking to reconcile the relationship. She was not interested in doing so. The following month, the victim was driving into her street when she noticed the applicant driving on the wrong side of the street and accelerating towards her. She swerved to the side and stopped, and he drove into her vehicle head on with sufficient force to cause the airbags to inflate. She jumped from her vehicle and shouted for help. He retrieved a machete from his vehicle and cornered her nearby. The victim injured her hand in a struggle for control of the machete. He then struck her five to seven times to the head and shoulders and she fell to the ground. Her neighbours intervened and he swung his machete towards one of them, narrowly

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83 [2005] 2 Qd R 533; [2005] QCA 223.

84 Ibid 538 [19] (Keane JA and McMurdo J). See also *R v Dang* [2018] QCA 331, 11-12 [39], summarised in section 2.9.3 of this paper.

85 *R v Cowie* [2005] 2 Qd R 533, 538 [19]. See also *R v Carrall* [2018] QCA 355 ('*Carrall*'), [18].

86 [2018] QCA 212.

87 The indictment charged the applicant with attempted murder, in the alternative unlawful wounding with intent to do grievous bodily harm, in the alternative unlawful wounding. The applicant pleaded guilty to unlawful wounding, which was not accepted by the Crown in discharge of the indictment and so the trial proceeded. See section 9(10A) of the Act which states that 'the court must treat the fact that it is a domestic violence offence as an aggravating factor'. An offence involves 'domestic violence' if, first, the offender shares a relevant relationship (intimate personal, family or informal care) with the victim and secondly, if that relationship is abusive (physically, sexually, emotionally, psychologically or economically), threatening, coercive, or must control or dominate the second person in another way and cause them to fear for their safety or wellbeing (or someone else's): *Domestic and Family Violence Protection Act 2012* (Qld) ss 8 and 13.

88 Mr Ali was sentenced to 2 years' imprisonment for the dangerous operation of a motor vehicle (a domestic violence offence); 3 years for the common assault; and 3 years' imprisonment for the going armed in public so as to cause fear.

89 As to the length of time that the applicant held an intention to kill.

90 It was conceded by the applicant that, if the Court of Appeal did not find that there was an error of fact, the sentence of 10 years was within the appropriate sentencing range.

missing them. The victim suffered a laceration to her head and a superficial fracture to her skull. She had other abrasions and bruising on her back, shoulders, hands and toes from the struggle.

The sentencing judge found that the applicant held the intention to kill from the time he drove down the street to the final blow with the machete. The applicant contended that the jury's verdict was consistent only with the intent to kill being formed when he struck the complainant with the machete for the first time. The Court of Appeal found that it was both logical and rational for the sentencing judge to infer from the evidence that the intent to kill manifested at the point of the dangerous driving.[91]

Despite the applicant not pressing the argument of manifest excess where the factual error was not found, Burns J delivered judgment as to the appropriateness of the sentence and provided a general range of 10-17 years' imprisonment for attempted murder.[92]

The Court of Appeal noted that, ordinarily, a prolonged attack on a defenceless woman, involving multiple blows with a machete, would attract a sentence of 'considerably in excess of (10) years'. However, the mitigating features personal to Mr Ali (absence of criminal history, some cooperation, the presence of a mental health disorder, and communication barriers in custody) meant that the sentence had to be reduced.[93] It was noted by Burns J that the only way to arrive at a sentence that is just in all of the circumstances, where the sentence is 10 years or more and there are mitigating features, is to reduce the head sentence.[94]

The appeal was allowed to the extent of a legal error in relation to the sentence imposed for the going armed in public so as to cause fear offence, but the appeal was otherwise refused.[95]

### 2.3.4 Reflecting the plea of guilty for a party to offending: *R v Wales* [2019] QCA 64

The challenges of arriving at a sentence that is just and appropriate is further complicated when sentencing co-offenders – particularly when some offenders are convicted on the basis of being a party to the offending, and others as the principal offenders.

In *R v Wales,*[96] the applicant, Mr Wales, was sentenced to 9 years' imprisonment for manslaughter and a concurrent term of 4 years' imprisonment for burglary by breaking, whilst armed, with violence, in company, with property damage. Mr Wales was sentenced on the basis that he and two co-offenders formed a common intention to prosecute an unlawful purpose[97] (a home invasion robbery). An SVO declaration was made in relation to both offences.

The applicant and two co-offenders formed a plan to violently rob the victim, a cannabis supplier, of drugs. One co-offender armed himself with a samurai sword, the other with the scabbard of the sword, and the applicant with a pool cue. The offenders wrapped shirts around their heads as makeshift balaclavas and attempted to break down the victim's door. The victim, who was with a friend, opened the door and struck the applicant to the head with a wooden bat before forcing the door closed again. The co-offender began stabbing the sword through the door and struck the victim, who was holding his body against the door, penetrating his lung.. The applicant and the co-offender who delivered the blow entered the home (whilst the other co-offender stood watch outside). The applicant struck the victim's friend with the pool cue and threatened the friend before he ran from the house and called police. The offenders stole a quantity of cannabis upon leaving. The victim died about 40 minutes later from his wound. The applicant did not admit his involvement to police when arrested.

The applicant sought leave to appeal on the basis that the sentencing judge erred by failing to adopt an integrated approach to sentencing, and that the imposition of an SVO declaration was manifestly excessive when regard was had to the sentence imposed on the applicant's co-offenders. The principal offender who struck the blow was sentenced, after trial, to 12 years' imprisonment, which was not disturbed upon appeal.[98] The 'lookout' was sentenced to 5 years' imprisonment with parole eligibility after serving one-third of his sentence in circumstances where he provided 'unusually significant' cooperation (beyond that of the early plea of guilty on an *ex officio* indictment).[99]

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91 *R v Ali* [2018] QCA 212, [23] (Burns J, Fraser and Gotterson JJA agreeing).
92 Ibid [27].
93 Ibid [29].
94 Ibid [28].
95 The maximum penalty for the offence of going armed in public so as to cause fear is 2 years' imprisonment; the applicant was sentenced to 3 years' imprisonment at first instance. On appeal, the applicant was resentenced to 2 years' imprisonment.
96 [2019] QCA 64.
97 *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code') s 8.
98 *R v Geissler* [2019] QCA 63. The 12-year sentence attracted an automatic SVO declaration, requiring him to serve 9.6 years' imprisonment before becoming eligible for parole.
99 *R v Wales* [2019] QCA 64, [13].

The Court of Appeal agreed that the sentencing discretion miscarried on the basis that a sufficient discount was not given to reflect the plea of guilty and non-declarable pre-sentence custody, and on that basis the Court of Appeal had to exercise its sentencing discretion afresh.[100]

The Court of Appeal agreed with the sentencing judge that the applicant's offending should attract a more serious penalty than that of the 'lookout' but came to the conclusion that the appropriate sentence was one of 9 years with a parole recommendation after serving one-half of the sentence[101] to reflect the plea of guilty and the applicant's role as a party to the offending.

### 2.3.5 A lower head sentence with an SVO declaration: *R v Lawler* [2020] QCA 166

In *R v Lawler,*[102] the Court of Appeal dismissed an appeal against an 8-year sentence with an SVO declaration made in relation to an offence of manslaughter.

Mr Lawler, pleaded guilty to the manslaughter of his friend's de facto partner. The deceased had been hiding in a bush outside the applicant's home and confronted Mr Lawler, his partner, and the deceased's partner as they left Mr Lawler's unit. The deceased was upset about his partner socialising with Mr Lawler. The deceased was holding a bottle of vodka and a torch. There was a struggle involving an exchange of blows and both suffered facial injuries. They briefly separated before Mr Lawler tackled the deceased and they struggled again. During the second struggle, Mr Lawler announced that he would stab the deceased and then stabbed him five times in the lower chest, stomach, lower back, neck, and forehead. The stab wound to his chest caused his death. Mr Lawler ran back into his unit. The deceased's partner called 000 but paramedics were unable to resuscitate him.

Mr Lawler was sentenced on the basis that his use of the knife was not premeditated and that, in response to the provocative behaviour of the deceased, Mr Lawler unnecessarily used the knife and inflicted two fatal wounds with an intention to kill or at least do grievous bodily harm.

Mr Lawler was considered to have good prospects of rehabilitation and he had a good work history, the support of his family and an irrelevant criminal history. The sentencing judge imposed 8 years' imprisonment with an SVO declaration. The appeal was concerned not with the sentence of 8 years but with the making of the SVO declaration.

The Court of Appeal concluded that the sentencing judge had not erred and had acknowledged the need for an integrated process. The Court commented that this was extremely violent offending that required the making of the declaration and, in weighing that against the initial act of self-defence against the deceased and the continued struggle which provoked the use of the knife and Mr Lawler's personal circumstances, the sentence imposed was appropriately at the lower end of the range with an SVO declaration.[103]

## 2.4 The need to avoid a 'double benefit' except in certain circumstances

**Summary of the law:**

When sentencing under the SVO scheme, courts generally are not to give a 'double benefit' to an offender for factors such as a plea of guilty and non-declarable pre-sentence custody by reducing both the head sentence and the parole eligibility date where this has resulted in the automatic application of the scheme being avoided – although there may be some mitigating circumstances that warrant this. *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22; *R v Cumner* [2020] QCA 54

This section examines Court of Appeal decisions that discourage the giving of a 'double benefit' to an offender by reducing both the head sentence and the parole eligibility date to take into account an offender's plea of guilty and other mitigating features in circumstances where the automatic application of the scheme (due to the sentence length) has been narrowly avoided.

The circumstances where a double benefit may be warranted are discussed below.

100 Ibid [10] (Fraser JA, Morrison and McMurdo JJA agreeing).
101 As opposed to 80 per cent.
102 [2020] QCA 166.
103 Ibid [61]–[62].

### 2.4.1 'Double benefit' may be warranted in some circumstances: *R v Tran; Ex parte Attorney-General* (Qld) [2018] QCA 22

The Court of Appeal's decision in *R v Tran; Ex parte Attorney-General* (Qld)[104] is authority for the proposition that in some cases where a sentence would have been 10 years' imprisonment or more but has been reduced below 10 years because of a plea of guilty, there may be a basis for affording a 'double benefit' for the guilty plea in the form of a further reduction of the non-parole period from the statutory one-half. However, there must be some circumstances to warrant such an approach.[105]

The Court of Appeal did not provide an exhaustive list of those circumstances but listed some discretionary factors including genuine remorse, the youth of the offender and successful steps towards rehabilitation.[106] Mr Tran did not have those features in his favour. He was 33 years old at the time of offending and 36 at the time of sentence. His offending was commercially motivated. He entered a late plea of guilty and failed to attend his first sentence hearing, and was at large on an arrest warrant for approximately 4.5 months.

The Court allowed the Attorney-General's appeal against a sentence of 9.5 years' imprisonment with parole eligibility after serving one-third of the sentence and resentenced the respondent to 9.5 years' imprisonment with parole eligibility after serving half of his sentence (4 years and 9 months).

### 2.4.2 Avoiding the 'double benefit' where there is non-declarable custody: *R v Cumner* [2020] QCA 54

The avoidance of a potential 'double benefit' by both reducing the head sentence and setting of an earlier parole eligibility date also was discussed in *R v Cumner*.[107] This concerned an appeal against sentence in circumstances where the sentencing court took into account non-declarable pre-sentence custody in reducing both the notional head sentence, and the notional non-parole period had an automatic SVO declaration been made.

The applicant, Mr Cumner, pleaded guilty to several offences including trafficking in dangerous drugs and unlawful possession of a motor vehicle. He appealed on the basis that there were errors in the exercise of the sentencing discretion which meant that the head sentence of 9 years and 5 months' imprisonment with parole eligibility after serving 6 years (approximately 64%) was manifestly excessive.

At the original sentence, the judge took into account the seriousness of the offending during the 18-month period of trafficking. When he was arrested, Mr Cumner had in his possession $60,000 cash and a large quantity of drugs. His plea of guilty was late and did not indicate remorse. He was 47 and 48 at the time of offending and 51 years old at the time of sentencing and had children. He had a criminal history and was addicted to methylamphetamine.

The sentencing judge concluded that the appropriate starting point was 12 years[108] before taking into account the 2 years and 7 months of pre-sentence custody that was not declarable.[109] There were no further mitigating factors such as remorse or steps to rehabilitation that ought to have been taken into account in further ameliorating that notional sentence.[110] Had he been sentenced to 10 years and 2 years cumulatively (a total of 12 years), he would have been eligible for parole after serving 8 years and 8 months.[111] The sentencing judge subtracted the non-declarable time[112] from both the notional 12 year head sentence and the notional non-parole period of 8 years and 8 months, arriving at a head sentence of 9 years and 5 months with parole eligibility at 6 years.[113]

It was argued by the applicant that this approach of direct proportionality was inconsistent with the approaches taken in *R v Carlisle*[114] and *R v Tran; Ex parte Attorney-General (Qld).*[115] The Court of Appeal did not agree and held that the sentence was not manifestly excessive and was a sound exercise of the sentencing discretion. The Court said this about the need to avoid a double benefit in this matter:

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104 [2018] QCA 22.
105 *R v King* [2020] QCA 9, 9, citing *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22.
106 *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22, [41]–[42] (Philippides and McMurdo JJA, and Boddice J).
107 [2020] QCA 54.
108 Ibid [51]. A notional sentence of 10 years' imprisonment for the trafficking offence and a notional cumulative sentence of 2 years' imprisonment for the unlawful use of motor vehicle.
109 Ibid [52]. See also, discussion of sentencing approaches where there is non-declarable custody in sections 2.4.2 and 2.8 of this paper.
110 Ibid [64].
111 Ibid. 80 per cent of 10 years is 8 years; one-third of two years is 8 months.
112 2 years and 7 months.
113 6 years is 2 years and 8 months less than the 'notional' non-parole period.
114 [2017] QCA 258. See discussion of this case under section 2.8.10 of this paper.
115 [2018] QCA 22. See discussion of this case under section 2.4.1 of this paper.

> to impose a lower non-parole period would distort the sentence and effectively convey a double benefit by not only reducing the non-parole period by the period of pre-sentence custody, but also avoiding the impact of the requirement to serve 80 per cent... Under the sentence actually imposed the period of six years is less than 80 per cent.[116]

## 2.5 Sentencing approaches where there are several offences

**Summary of the law:**

A global sentence (a sentence imposed, most commonly for the most serious offence, that reflects the overall criminality involved in a series of offences) should not be imposed where only some of the offences being sentenced would attract an SVO declaration, unless the fact those convictions are not declarable or have not been declared is taken into account in reducing what would otherwise have been the global sentence imposed. *R v Derks* [2011] QCA 295; *R v Baker* [2021] QCA 150

This section explores Court of Appeal decisions where an offender has been sentenced for multiple offences and the approach to be taken where only some of those convictions for those offences are serious enough to warrant, or can be subject to, an SVO declaration.

### 2.5.1 Two approaches where there are several distinct, unrelated offences: *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175

The general approach to the sentencing for multiple offences in Queensland was set out by the Court of Appeal in *R v Nagy* ('*Nagy*').[117]

The sentences appealed by Mr Nagy were not captured by the SVO scheme. However, observations made by members of the Court are relevant to the approach to sentencing more generally, which impact on the operation of the scheme.

Mr Nagy was sentenced at first instance to 5 years' imprisonment for three counts of assault occasioning bodily harm and 4 months' imprisonment for offences of unlawful use of a motor vehicle and breaking and entering premises and stealing. The sentences were to be served concurrently with one another and parole eligibility was set after serving 2 years (40%) of the sentence.

Williams JA summarised the principle from previous Court of Appeal and High Court of Australia authorities[118] in this way:

> Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between cooffenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted.[119]

The majority of the Court of Appeal concluded that 5 years' imprisonment was too high a sentence for the assault charges when viewed as individual offences[120] and too disparate to the sentences imposed on Nagy's co-offenders,[121] but not too high for this applicant given the totality of his offending.[122] The majority considered that the appropriate structuring of the sentences was the imposition of 2 and 3 years' imprisonment to be served cumulatively on each other, with earlier parole eligibility after serving 18 months to properly reflect the early plea of guilty.[123]

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116 *R v Cumner* [2020] QCA 54, [68].
117 [2004] 1 Qd R 64; [2003] QCA 175 ('*Nagy*').
118 See *Kellerman v Pecko* [1998] 1 Qd R 419; *R v Crofts* [1999] 1 Qd R 386; [1998] QCA 60; *R v Gilles, ex parte Attorney-General* [2002] 1 Qd R 404; [2000] QCA 503; *Pearce v The Queen* (1998) 194 CLR 610; *Griffiths v The Queen* (1989) 167 CLR 372; *R v Sheppard* [2001] 1 Qd R 504; [2000] QCA 57; *R v Hammoud* (2000) 118 A Crim R 66; *R v Lemene* (2001) 118 A Crim R 131.
119 *Nagy* (n 117) 72–3 [39] (Williams JA, Jerrard JA agreeing at 78 [66], Muir J agreeing at 80–81 [72]).
120 Ibid 73–4 [41]–[48] (Williams JA)].
121 Ibid 75–7 [49]–[59] (Williams JA).
122 Ibid 77 [61] (Williams JA, Muir J agreeing).
123 Ibid 77–8 [62]–[64] (Williams JA, Muir J agreeing).

Jerrard JA, in the minority, agreed with the non-parole period of 18 months but was of the view that the sentences ought to be 18 months and 3 years' imprisonment served cumulatively.[124] His Honour agreed with the summary by Williams JA, referred to above, of the two permissible sentencing approaches and made an observation about the difficulty that may arise where sentencing is captured by the SVO scheme. Jerrard JA expressed the view that, in circumstances where there are two or more distinct episodes of offending involving both Schedule 1 and non-Schedule 1 offences, a global sentence of 10 or more years attaching to the Schedule 1 offence to reflect the totality of offending may not be appropriate in circumstances where the Schedule 1 offence alone would otherwise attract a sentence of less than 10 years. This is because the automatic SVO declaration would be triggered, requiring the offender to serve 8 years before becoming eligible for parole. Conversely, if a sentence of 9 years was imposed in respect of a Schedule 1 offence and a cumulative sentence of one year was imposed on the non-Schedule 1 offence, this would not trigger the automatic SVO declaration[125] and parole eligibility could be set at a much earlier point.[126]

### 2.5.2 Where there are Schedule 1 and non-Schedule offences: *R v Derks* [2011] QCA 295

The potential difficulties of setting a global sentence in the circumstances described in *Nagy*[127] by Jerrard JA were discussed in the later decision of *R v Derks*.[128]

The applicant, Mr Derks, pleaded guilty at an early stage to manslaughter, stealing, three counts of unlawfully using a motor vehicle, dangerous operation of a motor vehicle, unlawful possession of a motor vehicle, dangerous operation of a motor vehicle with a circumstance of aggravation and driving without a licence as a repeat offender. The applicant stole a vehicle and drove dangerously past a police breath test site, causing police to pursue the vehicle. The applicant, adversely affected by alcohol, drove at speed on the wrong side of the highway in the early hours of the morning. The Court described the collision with the victim's vehicle as inevitable because this section of the highway was separated by a heavily treed median strip.

The applicant had a poor criminal and traffic history. He was young, had taken some steps towards rehabilitation while in custody and had written letters to the victim's family demonstrating remorse.

The Court of Appeal discussed the two most common approaches to sentencing where the offender has committed a series of offences that constitute one or more episodes of offending:

1. The judge imposes a global head sentence on the most serious offence to reflect the seriousness of all the offending; or
2. The judge imposes two or more cumulative sentences.[129]

The benefit of the first approach is that it avoids the possibility of the judge not sufficiently ameliorating the cumulative sentences to reflect issues of totality, resulting in an unjust sentence. The first approach is complicated, however, in circumstances where the head sentence for an offence to which an SVO declaration attaches is increased on this basis and there is other offending for which a declaration is not (or cannot be) made.

The Court of Appeal found that the sentencing judge in this matter erred by imposing a 13 year global sentence and not stating that there had been a reduction to take into account the non-SVO declarable offending (for which the applicant would have otherwise been eligible for parole well before serving 80%).[130] McMurdo P noted:

> It is especially important for sentencing judges to make this distinction where, as here, youthful offenders have pleaded guilty, shown remorse and taken steps towards their rehabilitation so that the time spent in the community on parole after a lengthy jail sentence can be lawfully maximised. This is in the community interest, both in the rehabilitation of the offender and in protection of the public.[131]

In re-exercising its sentencing discretion, the Court imposed a sentence of 11 years' imprisonment on the manslaughter[132] together with a cumulative 2-year sentence for the dangerous operation of a vehicle while intoxicated, with parole eligibility after having served 80 per cent of the 11 years, plus one-third of the 2 years. The practical effect of this substitution to the sentence was that, while the overall sentence remained the same, the

124 Ibid 78 [65].
125 See *R v Powderham* [2002] 2 Qd R 417, [10].
126 *Nagy* (n 117) 79 [68].
127 [2004] 1 Qd R 63.
128 [2011] QCA 295.
129 Ibid [26] (McMurdo P, White JA and Fryberg J agreeing).
130 Ibid [26]–[28] (McMurdo P, White JA agreeing); 13 [44] (Fryberg J, White JA agreeing).
131 Ibid [37].
132 A Schedule 1 offence, thereby attracting a requirement to serve at least 80 per cent (approximately 8 years and 9 months) before eligible for parole.

applicant became eligible for parole approximately one year earlier than the original sentence (about 9.5 years rather than 10.4 years).

### 2.5.3 Applying *Nagy*: *R v Baker* [2021] QCA 150

The recent decision of *R v Baker*[133] applied the principle discussed above when reducing a sentence imposed for the most serious offence sentenced of malicious act with intent.

The applicant, Mr Baker, was convicted of 22 offences comprised of several distinct sets of offending committed over a period of nine days. The offending commenced after Mr Baker was confronted by unhappy customers who complained about the poor quality of cannabis Mr Baker had sold them. Over a period of 9 days, Mr Baker used a gun to shoot at multiple vehicles and three people. He also pointed the gun at three other people but did not shoot. The most serious offending occurred when he shot one man through the thigh at close range, in the course of the victim being assaulted by Mr Baker and two other men. He was ultimately arrested three days later with methylamphetamine. He was also convicted of several charges of unlawfully using a motor vehicle and assaulting correctional officers with a liquid whilst in custody.

The applicant had a significant criminal history although with no previous convictions for violence. The applicant breached a suspended sentence with this offending.

The sentencing judge reasoned that the starting point for the shooting in the thigh (a charge of malicious act with intent) was 8 to 9 years' imprisonment if that was the sole offence. The other offending would have, in the judge's view, attracted a sentence of 6 to 7 years' imprisonment. Reducing an otherwise cumulative sentence of 14 to 16 years' imprisonment for considerations of totality and his plea of guilty, the sentence ultimately imposed was a head sentence of 11 years' imprisonment with lesser concurrent terms of imprisonment for the other offences.

The Court of Appeal held that the sentencing judge erred in raising the head sentence that would have otherwise been imposed for the shooting in the thigh (8 to 9 years) to one of 11 years' imprisonment to take into account the other offending. This was an error because, in structuring the sentence in this way, this automatically attracted an SVO declaration and there was very little moderation of the minimum time that the applicant would have to serve in custody before being eligible for parole.[134]

The Court of Appeal referred to the discussion in *Nagy* and the need for caution when fixing a head sentence for one offence to reflect the overall criminality in circumstances where that approach would result in an unjust sentence (and instead, an approach involving cumulative sentences may need to be used to ensure a just sentence).

The Court resentenced the applicant to 9.5 years' imprisonment with an SVO declaration for the charge of malicious act with intent.[135]

## 2.6 Supervision in the community necessarily reduced by the SVO scheme

**Summary of the law:**

Where the SVO scheme is applied, it means that an offender will serve a much longer period in custody before being eligible for parole than if not subject to a declaration — which is of vital significance to the offender, and is also of significance to the community. *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116

Community protection is not achieved only by the actual incarceration of an offender, but also by the oversight of the Parole Board, before that person is released on parole, and by the supervision of that person, on parole, if released, for the remainder of their sentence. Allowing the possibility of a date for eligibility for parole at an earlier stage (than 80%) has two potential benefits: first, to provide the prisoner a basis for hope and, in turn, an incentive for rehabilitation; and, in appropriate cases, to enable a longer period of conditional supervision, outside of the custodial environment, which may provide greater community protection in the long term. *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58; (2020) 4 QR 80

133 [2021] QCA 150.
134 Ibid [17]–[24].
135 *R v Baker* [2021] QCA 150, [25]–[26] (McMurdo JA, Fraser JA agreeing, Henry J dissenting).

### 2.6.1 Later parole eligibility is significant to the community as well as the offender: *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116

The significance of the operation of the SVO scheme in delaying an offender's parole eligibility date was discussed in *R v Sprott; Ex parte Attorney-General (Qld)*.[136]

The Attorney-General appealed concurrent sentences of 9.5 years' imprisonment (parole eligibility at 4.5 years) for two attempted murder offences on the basis that the sentences imposed were manifestly inadequate.[137] The respondent, Mr Sprott, was intoxicated when he 'had a severe argument with his partner'.[138] Believing police were on their way, he decided he should go and 'finish off' his mother because 'they [his mother and her partner] killed my son'.[139] When he arrived at his mother's house, Mr Sprott began hitting her with a glass bottle and pulling at her head. When his mother's partner tried to intervene, the respondent violently attacked him by repeatedly punching him in the face and then stomping on his head. The respondent then turned his attention back to his mother and lifted her by the throat, flung her into a cabinet, smashed a pot plant on her face and punched her at least five times to the face. The attack was only brought to an end when a neighbour struck the respondent and knocked him unconscious. Police arrived and the respondent spat blood and saliva at them. When interviewed by police he admitted that he had intended to kill both victims.[140]

As a child, the respondent was placed in the care of his grandmother due to the neglect and drug use of his mother. His intellectual capacity was 'borderline level' and he was diagnosed with depression and anxiety, and had previously attempted suicide.

The respondent had a poor relationship with his mother. Several years earlier, his mother's dog had bitten the foot of the respondent's two-year-old son. This further eroded the relationship between the respondent and his mother further. Around this time, the respondent assaulted his mother. He pleaded guilty to the assault and was sentenced to probation. The respondent had limited contact with his children after that incident. The following year, his mother's dog attacked and killed his son and the respondent's mother did not tell him of his son's death, and neither she nor her partner apologised for his death. Instead, they taunted the respondent during the funeral. The respondent's mental health deteriorated.

As a teenager he began to drink heavily but remained consistently employed up until his arrest. Positive character references were tendered by his current partner and other associates. The psychologist who prepared a report for sentencing was of the view that the respondent's mental condition was the primary and significant contributing factor in his forming an intention to kill his mother and her partner, and that his risk of reoffending was not very high if kept away from his mother and her partner.

At sentencing the judge took into account the 'unusual' and 'weighty' mitigating factors personal to the respondent.[141] In particular, 'the respondent's state of health was caused by his mother's lifelong neglect of him, and was greatly contributed to by both his victims' irresponsibility that had led to the little boy's death, and by their almost incredible callousness afterwards.'[142] The sentencing judge found that his offending was opportunistic and accepted that his mental state was directly related to his intention to kill and that this was not a matter in which the protection of the community loomed large. Giving effect to the seriousness of the offending, the principles of general and personal deterrence and the unusual mitigating circumstances, his Honour imposed a lenient sentence which the Court of Appeal accepted was not manifestly inadequate in the circumstances.

The President of the Court of Appeal made the following observation about the significance of a reduced period of supervision where an SVO declaration is made:

> To a prisoner the difference between parole eligibility after four and a half years and parole eligibility after eight years is of vital significance. From the community's point of view the difference is also significant. The continued incarceration of a prisoner, rather than the release of that prisoner for the purpose of reintegration as a useful

136 [2019] QCA 116.
137 The respondent also pleaded guilty to one count of burglary with circumstances of aggravation, two counts of serious assault on police and one count of contravening a domestic violence order. The sentences imposed for these offences were for lesser periods of imprisonment than those imposed for the attempted murder offences and they were not in question on the appeal.
138 *R v Sprott; Ex Parte Attorney General (Qld)* [2019] QCA 116, [32].
139 Ibid [32]–[33].
140 These admissions were crucial to the Crown proving the element of intent to kill; but for these admissions, he may not have been found guilty of attempted murder but an alternative charge such as malicious act with intent.
141 *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116, [42] (Sofronoff P, Gotterson JA and Henry J agreeing).
142 Ibid [40].

> and welcome member of society in the face of an offender's cooperation with authorities or other powerful mitigating factors, may be contrary to the public interest.[143]

The President also commented on the effect of the SVO scheme on sentencing:

> But for the distorting effect of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld), which introduced the regime under which prisoners sentenced to 10 years or more must serve at least 80 per cent of the sentence before being eligible for parole, this was a case which might have been dealt with by the imposition of a sentence of 10 to 12 years accompanied by a parole eligibility date after about four years. But that option was unavailable.[144]

### 2.6.2 Community protected by incarceration as well as supervision on parole: *R v Free; Ex parte Attorney-General (Qld)* (2020) 4 QR 80; [2020] QCA 58

*Free*[145] discussed above in section 2.2.7, has become a commonly cited case authority on the principles to be applied when determining if it is appropriate to make a declaration in circumstances where this decision is discretionary.

The Court, in affirming that community protection was of paramount importance in a case such as this, observed that community protection is not achieved only by incarceration but also by supervision on parole.[146] Further, allowing the possibility of parole at a point earlier than 80 per cent of the sentence:

> has two potential benefits: first, to provide the prisoner a basis for hope and, in turn, an incentive for rehabilitation; and, in appropriate cases, to enable a longer period of conditional supervision, outside of the custodial environment, which may provide greater community protection in the long term.[147]

In the context of the circumstances that applied in this case, the Court determined that an 8-year sentence with no SVO declaration, but no recommendation for eligibility for parole, was appropriate. In reaching this conclusion, the Court referred to the fact that it was not yet known how Mr Free would respond to treatment programs whilst in custody, as well as to the importance of his 'extensive cooperation' and early plea of guilty being 'recognised in a tangible way in the sentence imposed'.[148]

This case is further discussed in section 3.1.3 of this paper.

## 2.7 Sentencing judge not bound by the parties' submissions

**Summary of the law:**

The decision to consider whether an SVO declaration should be made is within the proper exercise of a sentencing judge's discretion to arrive at an appropriate sentence as required by law, even if no submissions addressing this issue initially have been made at sentence by the parties. *R v Cardwell* [2021] QCA 112

### 2.7.1 The proper sentence is determined by the judge as required by law: *R v Cardwell* [2021] QCA 112

While not a case that involved consideration of the SVO scheme, the general principles that apply to the exercise of judicial discretion were discussed in *R v Cardwell*.[149]

Mr Cardwell appealed a sentence of imprisonment suspended after serving a period of actual custody on the basis that the sentence was manifestly excessive. The applicant pointed to the fact that the prosecutor at first instance indicated that it was not a case which required actual custody.[150]

The Court of Appeal considered the sentencing judge's response (that this was a case that required a period of actual custody) and concluded that this was a sound exercise of sentencing discretion. The Court of Appeal stated

143 Ibid [18].
144 Ibid [41].
145 *Free* (n 23).
146 Ibid 108 [91].
147 Ibid citing *Bugmy v The Queen* (1990) 169 CLR 252, 536 (Dawson, Toohey and Gaudron JJ) and *R v Collins* [2000] 1 Qd R 45, [1] (McMurdo P).
148 Ibid 108 [91]–[92].
149 [2021] QCA 112.
150 Ibid [21] (Sofronoff P, Mullins JA and Bradley J agreeing).

the importance of judicial discretion in sentencing, even in the face of contrary submissions from both parties, in the following terms:

> It is proper for a judge to form a preliminary view about a possible sentence and to express that view in the face of a prosecutor's submission that greater leniency ought to be shown. A sentencing judge is not bound to sentence within the range advocated by defence counsel at the lower end of a range and prosecuting counsel at the higher end of a range. A judge has a duty to impose the correct sentence notwithstanding the submissions of the parties. Of course, submissions have to be given great weight but, in the end, the proper sentence is one that the judge determines is that which is required by law.[151]

### 2.7.2 Application of the principle in *Cardwell*: *R v MJB* [2021] QDC 170

In the District Court decision of *R v MJB*,[152] the prosecution did not initially submit for an SVO declaration at the sentence hearing. The sentencing judge adjourned the hearing and requested further submissions on the appropriate parole eligibility date and whether an SVO declaration should be made. His Honour published written reasons for the sentence and applied *R v Cardwell*[153] as authority for the proposition that he was not bound by the parties' submissions at first instance and was entitled to invite further submissions on whether an SVO declaration ought to be made.[154] His Honour ultimately concluded that an SVO declaration was not appropriate in the circumstances and set a parole eligibility date after the applicant served half of a 7-year sentence.

## 2.8 Reflecting non-declarable pre-sentence custody in head sentence where an SVO declaration is made

**Summary of the law:**

Where an SVO declaration is made, the head sentence should be reduced to take into account non-declarable pre-sentence custody, consistent with the principle of totality. *R v Carlisle* [2017]

The Court of Appeal's position is that, where an SVO declaration is made (and therefore the offender is not eligible for parole until serving 80% of the sentence) and where there is non-declarable pre-sentence custody, it is necessary to reduce the head sentence to reflect the fact that, if the non-declarable custody formed part of the sentence, the offender would be eligible after serving 80 per cent of that notional sentence.[155]

Prior to its amendment in 2020,[156] discussed below, section 159A of the Act read:

> If an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence **and for no other reason** must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders (emphasis added).

The practical consequence of this provision was that, if an offender was held in custody for anything other than the offences for which they were being sentenced (for example, serving a previous sentence or on remand for other offences), the pre-sentence custody could not be formally declared as time served under the sentence. Using a hypothetical to illustrate:

- On 1 January 2019, an offender is arrested and remanded in custody for a burglary offence which will be contested at a trial listed in late 2020;
- On 2 January 2019, the offender is further charged with and remanded for a drug trafficking offence;
- On 1 January 2020, the offender pleads guilty to drug trafficking at a sentence hearing.

The one year that the offender spent on remand for both offences cannot be declared at the sentence for drug trafficking because the offender is in custody for another reason (the burglary offence). The sentence imposed for the trafficking offence would not start on 1 January 2019 but instead, on 1 January 2020. The year the offender spent on remand in 2019 could only be 'taken into account' by the sentencing judge (for example, by reducing the sentence for the trafficking offence from imprisonment of four years to three years).

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151 Ibid.
152 [2021] QDC 170.
153 [2021] QCA 112.
154 Ibid [112].
155 *R v Carlisle* [2017] QCA 258, 10 [52]–[53], as discussed in *R v Armitage; R v Armitage; R v Dean* [2021] QCA 185, 10–11 [27].
156 *Justice and Other Legislation Amendment Act 2020* (Qld) s 64.

### 2.8.1 Reducing the head sentence while avoiding the 'double benefit': *R v Carlisle* [2017] QCA 258

In a judgment handed down by the Court of Appeal in 2017, *R v Carlisle* ('*Carlisle*'),[157] the applicant appealed the sentence of 10 years' imprisonment imposed by the sentencing judge for drug trafficking.

The applicant, Mr Carlisle, contended that the starting point of a notional sentence of 12 years' imprisonment was manifestly excessive and the 2 year reduction by the sentencing judge did not adequately reflect his plea of guilty nor the time served in pre-sentence custody that was non-declarable.[158]

While the Court of Appeal did not state whether, in the Court's view, the starting point of 12 years was manifestly excessive,[159] the Court agreed that the 10-year sentence imposed was manifestly excessive having regard to the very early plea of guilty and the 'significant consequence' of an automatic SVO declaration.[160] The Court resentenced the applicant to 9 years' imprisonment with parole eligibility after serving 4 years. The Court's reasoning was this:

- If it is accepted that 12 years' imprisonment (before taking into account the early plea of guilty and non-declarable pre-sentence custody) is not manifestly excessive, and the sentence is reduced to 10 years (as it was in this case) taking those two factors into account, the effective sentence is 10 years + one year of non-declarable time, which is 11 years;[161]
- The resulting sentence - an effective 11-year sentence which automatically triggers the SVO scheme, requiring the applicant to serve at least 8.8 years (essentially 9 years) before becoming eligible for parole - is manifestly excessive having regard to similar cases. A sentence of just less than 10 years' imprisonment is appropriate having regard to the non-declarable pre-sentence custody, but before taking into account the early plea of guilty;[162]
- An offender in these circumstances cannot necessarily expect to receive a 'double benefit'[163] of a reduction to the head sentence as well as parole eligibility after serving only one-third. The exercise of the discretion to make an SVO declaration is not necessary to reflect the seriousness of the conduct in this case. Taking all circumstances into account (his early plea of guilty, the seriousness of his offending, his role as a subsidiary in the trafficking business, his addiction to drugs and his substantial steps towards rehabilitation while in custody), parole eligibility after serving approximately 45 per cent of the sentence (four years) was a just sentence.[164]

In 2020, section 159A(1) of the Act was amended to remove the words 'and for no other reason'.[165] Two Justices of the Supreme Court of Queensland in two separate judgments have concluded that this means that it is now 'open to the Court to formally declare time the offender has been held in custody, even where that is in respect of a previous sentence of imprisonment'.[166] The Court of Appeal has not yet considered the applicability of this amendment to section 159A. However, should the Court of Appeal affirm this interpretation, it is unlikely that this issue of taking into account non-declarable custody will arise as often in the future.

It is possible that this legislative amendment will result in a greater number of automatic SVO declarations being made because notional head sentences will be, less frequently, reduced to take into account non-declarable custody. On the other hand, courts may choose not to declare this time, although permitted to, taking into account the consequences should a sentence exceed 10 years' imprisonment for a Schedule 1 offence, or offences.

157 [2017] QCA 258 ('*Carlisle*').
158 The applicant had been on remand for just over a year for both the offences for which he was sentenced and for other offences.
159 *Carlisle* (n 157) [104].
160 Ibid [103].
161 Ibid.
162 Ibid.
163 Ibid [109].
164 Ibid [109]–[112].
165 *Justice and Other Legislation Amendment Act 2020* (Qld) s 64.
166 *R v Whitely* [2021] QSC 154 (Bowskill J), cited by *R v Stewart* [2021] QSC 187, 7 [30] (Henry J).

## 2.9 The impact of the SVO scheme on parity with co-offenders

**Summary of the law:**

Once a serious violent offence declaration is appropriately made in one case for an offender but not made in another involving a co-offender, the principle of parity that would ordinarily apply consistent with principles of equal justice has little scope for operation. *R v Crossley* (1999) 106 A Crim R 80; [1999] QCA 223

### 2.9.1 Parity with co-offenders has little scope for operation where SVO scheme applies: *R v Crossley* (1999) 106 A Crim R 80; [1999] QCA 223

As briefly discussed in section 2.3.4, the operation of the SVO scheme becomes more complex when the sentencing of co-offenders is concerned. The scheme, in some circumstances, operates inconsistently with the principle of parity as where the making of an SVO declaration is automatic for one offender, but not for another (due to their sentence falling below 10 years), rough equivalency or consistency between sentences for co-offenders cannot be achieved.

The principle of parity requires a court to assess differences between co-offenders including their 'age, background, criminal history, general character and the part each has played'[167] to ensure any sentence imposed does not give rise to an 'unjustifiable disparity' in contravention of the 'equal justice norm'.[168]

In *R v Crossley*,[169] the applicant, Mr Crossley, submitted that the sentence imposed on him was manifestly excessive because it lacked parity with the sentence imposed on his co-accused. This was the first Court of Appeal decision to consider the effect of the SVO scheme on the parity principle.

In separate judgments, Pincus and McPherson JJA observed that the principle of parity requires comparison not only of the head sentence but also the period of actual custody, but the principle is qualified by the statute.[170] McPherson JA was of the view that, where one of two co-offenders is captured by the SVO scheme and the other is not, the fact that one offender must serve 80 per cent of the sentence before becoming eligible for parole must be ignored.[171] Pincus JA took the view that the common law parity principle cannot overcome the 'explicit statutory direction' that requires a minimum non-parole period.[172]

### 2.9.2 Endorsing *Crossley*: *R v Mikaele* [2008] QCA 261; *R v Meerdink* [2010] QCA 273 and *R v Maksoud* [2016] QCA 115

#### *R v Mikaele* [2008] QCA 261

In *R v Mikaele*,[173] one of the applicant's grounds of appeal was the lack of parity between the sentence imposed on Mr Mikaele and the other adult co-offender, Mr Isaako, whose offence was not declared an SVO.

The applicant pleaded guilty to the offence of doing grievous bodily harm with intent to do grievous bodily harm, as well as three unrelated offences of robbery with various circumstances of aggravation and two unrelated offences of wilful damage. The applicant was sentenced to 9 years' imprisonment for the offence of grievous bodily harm which was declared as an SVO and concurrent terms for the other offences.

The grievous bodily harm offence involved an unprovoked attack on an adult male at a train station by a group of young and adult offenders which resulted in the complainant suffering a closed brain injury, facial fractures, post traumatic amnesia, a collapsed lung and ongoing headaches.[174] After the initial attack on the complainant and the co-offenders had withdrawn, Mr Mikaele alone engaged in further acts of gratuitous violence. The applicant was considered a principal offender.[175] Mr Isaako was 'sentenced on the basis that he was a party to the intent to cause grievous bodily harm but he did not personally have that intent'[176] and was sentenced to 7 years' imprisonment,

167 *Green v The Queen* (2011) 244 CLR 462, [31] (French CJ and Crennan and Kiefel JJ).
168 Ibid [32].
169 (1999) 106 A Crim R 80; [1999] QCA 223.
170 *R v Crossley* (1999) 106 A Crim R 80, 86-7 [25]-[27] (Pincus JA, McPherson JA agreeing at 88 [34], McMurdo P not deciding); [1999] QCA 223, applying *Postiglione v The Queen* (1997) 189 CLR 295, 302 (Dawson and Gaudron JJ).
171 *R v Crossley* (1999) 106 A Crim R 80, 87 [27].
172 Ibid 88 [34].
173 [2008] QCA 261.
174 Ibid [18] (MacKenzie AJA, Keane JA and Douglas J agreeing).
175 Ibid [34].
176 Ibid [23].

with parole eligibility after serving 3 years.[177] The applicant submitted that notwithstanding the fact that the applicant had a higher level of responsibility compared to Mr Isaako, the disparity in the parole eligibility of the applicant compared to the co-offender caused by the SVO declaration was disproportionate.[178]

In *R v Mikaele,* the Court of Appeal stated that *Crossley*: 'is authority for the conclusion that, once a serious violent offence declaration is appropriately made in one case but not made in the other, the principle of parity that would ordinarily apply has little scope for operation'.[179]

The Court concluded that while there was 'no dispute that the sentencing judge sentenced on the basis that the applicant's head sentence would be appropriately towards the bottom end of the range for the offence':

> the mere fact that there will be a substantial disparity between the eligibility dates for parole, accounted for by the different sentencing regimes, cannot, of itself justify exercising the discretion against making a declaration, in a case where the head sentence and making a declaration are appropriate, simply to avoid the consequences of the declaration.[180]

In the circumstances, because his offending 'went beyond the norm for offences of grievous bodily harm, it fell within the proper scope of a serious violence offence declaration'.[181]

### *R v Meerdink* [2010] QCA 273

In *R v Meerdink*,[182] the applicant appealed on the ground that his sentence was manifestly excessive due to the disparity in parole eligibility dates with his co-offender, Mr Pearce.

Mr Meerdink was found guilty of manslaughter after trial. He was sentenced to 10 years' imprisonment which carried an automatic SVO declaration. The co-offender, Mr Pearce, pleaded guilty to manslaughter prior to the murder trial. He was sentenced to 9 years' imprisonment with parole eligibility after serving 4 years. The circumstances of the offence are that the deceased, the applicant and Mr Pearce were all intoxicated and had run into each other in Maryborough on a night out. They parted ways but soon after there was a verbal confrontation between the deceased and the offenders while the offenders were in the churchyard. The applicant and Mr Pearce appear to have been asking the deceased to leave. The deceased left but returned shortly after, at which point Mr Pearce confronted him. The deceased fled and Mr Pearce and the applicant gave chase. Mr Pearce tackled the deceased to the ground. The applicant and Mr Pearce proceeded to violently assault by kicking and punching[183] 'for six or so minutes'.[184]

The Court recognised the factors present in Mr Pearce's case which were 'largely absent'[185] for the applicant, including: a timely plea of guilty; an 'absence of past violent offending';[186] insight into the offending; genuine remorse; and prospects of rehabilitation.

When refusing the application, White JA observed:

> As *McDougall and Collas* itself demonstrates, a close analysis of the participation of each offender in the offence, their antecedents and prospects for rehabilitation, will all impact on what is a just sentence. This is what the learned sentencing judge did in this case, carefully weighing the relevant factors. That his Honour did not make a declaration pursuant to s 161B(3)(b) in respect of Pearce did not require him to "avoid" the consequences of Part 9A for the applicant.[187]

### *R v Maksoud* [2016] QCA 115

In *R v Maksoud*,[188] the applicant appealed on the ground that his sentence was manifestly excessive One of the applicant's arguments in support of that ground was the influence that the co-offender's sentence (the sentence imposed on Mr McGinniss) had on the sentencing judge when attempting to achieve parity between the offenders.

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177 Ibid.
178 Ibid [35].
179 Ibid [36].
180 Ibid [37].
181 Ibid.
182 [2010] QCA 273.
183 Ibid [12].
184 For example, QDC 2020/28.
185 Ibid [38].
186 Ibid.
187 Ibid (McMurdo P and Jones J agreeing).
188 [2016] QCA 115.

Mr Maksoud and his co-offenders, Mr Thompson and Mr McGinniss, engaged in the business of trafficking dangerous drugs for a period of 9 to 10 months. Mr McGinniss worked as a courier under Mr Thompson's direction. The applicant and McGinniss also sourced and supplied drugs and collected money for Mr Thompson. The applicant appeared to have a 'close working relationship' with Mr Thompson, which distinguished him from the other employees.[189] The applicant also began his own trafficking business.

Mr Maksoud was sentenced to 10 years' imprisonment and an SVO declaration was made. He was a young offender, aged 18 to 21 years old at the time of sentence, entered timely pleas of guilty and had a minor criminal history. Mr McGinniss was sentenced prior to Mr Maksoud, thus raising the issue of parity. He received a sentence of 10 years' imprisonment with an automatic SVO declaration. McGinniss was somewhat older than Mr Maksoud at the time of the offending.

Gotterson JA observed that 'the sentencing remarks indicate that parity with McGinniss's sentence played a highly influential role in setting the applicant's sentence'.[190] The court agreed that a just sentence for one offender should not be harshened 'to achieve a perceived parity or comity'.[191] The Court of Appeal ultimately allowed the appeal, substituting the sentence of 10 years' imprisonment with one of 9 years' imprisonment with parole eligibility after serving 3 years and 6 months, and set aside the SVO declaration.

### 2.9.3 Operation of the SVO scheme not inconsistent with the parity principle which still applies: *R v Dang* [2018] QCA 331

The Court of Appeal considered it unnecessary, in the later decision of *R v Dang*,[192] to decide whether *R v Crossley*[193] should be followed. The Court did, however, make the observation that if the legislature intended for parity (as a fundamental principle) to be substantially compromised or excluded, it should be expected that that legislative intention would have been clearly expressed[194] (and it was not).[195]

McMurdo JA accepted that the practical application of the parity principle can be affected by the SVO scheme and therefore it would not be inconsistent to sentence below what would otherwise be the appropriate range of penalties where an 80 per cent non-parole period is required to be served.[196]

# 3 Discretionary declarations

This section considers the particular considerations that apply when a court has discretion whether to make, or not make, an SVO declaration.

## 3.1 A move away from the proposition of 'outside the norm' or 'beyond the norm'

**Summary of the law:**

There is no requirement at law that an example of an offence must be beyond or outside 'the norm' for that type of offending to justify the making of an SVO declaration. Sentencing judges should instead be giving consideration to the broader question as to whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment require a longer period in actual custody before a person is eligible for parole than would otherwise be required. *R v Free; Ex parte Attorney-General* (Qld) [2020] QCA 58; (2020) 4 QR 80

189 Ibid [15].
190 *R v Maksoud* (above n 189) 54.
191 Ibid [61] (McMurdo P and Bond J agreeing).
192 [2018] QCA 331.
193 (1999) 106 A Crim R 80.
194 *R v Dang* [2018] QCA 331, [38] (McMurdo JA).
195 See Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997.
196 *R v Dang* [2018] QCA 331, [39] (McMurdo JA, Gotterson and Morrison JJA agreeing), citing *Green v The Queen* (2011) 244 CLR 462, 475-76 [33] (French CJ, Crennan and Kiefel JJ).

### 3.1.1 Declaration justified where it's beyond the norm: *R v DeSalvo* (2002) 127 A Crim R 229; [2002] QCA 63

As discussed in section 2.2.2, the concept of an offence being a 'more than usually serious, or violent, example of the offence' being 'outside "the norm" for that type of offence' as a basis on which to conclude an SVO declaration is warranted was highlighted in the decision of *McDougall and Collas*.

The first Court of Appeal case to refer to the need to identify 'offending outside the norm' in the exercise of the discretion to make an SVO declaration was *R v DeSalvo*.[197]

The applicant, Mr DeSalvo, was convicted after trial of manslaughter (and acquitted of murder). The offending occurred in the context of a drug transaction. The applicant was sitting in a car and the victim came up to him and spoke aggressively. The applicant felt threatened or provoked and got out of the car, lunged at the victim, and stabbed him once in the body. The applicant then drove off but did not go far before returning to help the victim and surrendered himself to police. He was sentenced to 8 years' imprisonment with an SVO declaration and appealed the making of the SVO declaration.

The sentencing judge made a factual finding that the applicant knew that the victim was unarmed and had intended to cause some harm, but not serious harm, when he stabbed the victim.

The applicant had a prior criminal history involving convictions for assault occasioning bodily harm. As against that, the applicant had shown remorse by returning to the scene and offered to plead guilty to manslaughter at an early stage.

The majority of the Court of Appeal concluded that the SVO declaration was not justified in the circumstances, and resentenced the applicant to 9 years' imprisonment with no recommendation for parole. The practical consequence was that the applicant was eligible for parole after serving 4.5 years' imprisonment (instead of 6.4 years).

Williams JA stated:

> There is no definition of 'serious violent offence' in the *Penalties & Sentences Act 1992*, and the inclusion of a particular offence in the Schedule of Serious Violent Offences clearly does not mean that the mere commission of such an offence warrants the making of a declaration that the conviction was of a serious violent offence. So much is made clear by the wording of s 161B(3) of the Act. The court is given an express discretionary power to declare the commission of an offence specified in that Schedule to be a conviction for a serious violent offence. That must mean that there is something about the circumstances of the offence in question which takes it **beyond the norm** and justifies the making of the declaration; such circumstance though need not be categorized as exceptional. Given the concentration on the 'offence' in ss 161A and 161B rather than on the 'offender', the criminal history of the offender will not ordinarily be a decisive consideration on the exercise of that discretion: R v Keating [2002] QCA 19.
>
> Almost by definition manslaughter is an offence involving violence, and more often than not the use of some weapon is involved in that violence. In consequence it is not sufficient to say that the mere presence of either or both violence and use of a weapon as one of the circumstances justifies the making of the declaration.[198]

McPherson JA, in a separate judgment, expressed the view that given that all but a few offences of manslaughter are serious and violent, general use of the declaration would 'leave very little scope for severely punishing those that are much worse than others'.[199]

### 3.1.2 Discretionary declaration will usually reflect offending 'outside the norm': *R v McDougall; R v Collas* [2007] 2 Qd R 87; (2006) 166 A Crim R 191; [2006] QCA 365

In *McDougall and Collas*, the Court in this joint judgment referred to *R v DeSalvo*[200] (summarised above) as authority for the principle that consideration must be given as to whether the offence has features that warrant the delaying of parole eligibility to 80 per cent.[201] In *R v DeSalvo* the Court of Appeal considered that there must be features that take it 'beyond the norm',[202] however the Court used less emphatic language in its observations in *McDougall and Collas* in suggesting:

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197 See also *Free* (n 23), 96 [44] (Philippides JA, Bowskill and Callaghan JJ).
198 *R v DeSalvo* (2002) A Crim R 229 ('*DeSalvo*'), 232 [15]–[16] (emphasis added).
199 Ibid 231–2 [8].
200 Ibid.
201 *McDougall and Collas* (n 18) 96 [19], citing *DeSalvo* (n 198).
202 *DeSalvo* (n 198). See also discussion of this case under section 3.1.1 of this paper.

> the exercise of the discretion will **usually** reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside "the norm" for that type of offence.[203]

In applying that principle to the circumstances of Mr McDougall and Mr Collas and their offending, the Court of Appeal distinguished Mr McDougall's conduct and history from that of Mr Collas. The Court allowed the application to appeal by Mr Collas (and removed the SVO declaration, with no recommendation for parole) but dismissed the application of Mr McDougall.

In respect of the applicant Mr Collas, the Court determined that there was no evidence that he knew how seriously hurt the victim was. Further, while Mr Collas had been behaving aggressively for a prolonged period of time he did not attempt to use a weapon. In those circumstances, he did not, unlike Mr McDougall, show 'that degree of callous disregard for others which makes protection of the community an especially relevant consideration in Mr McDougall's case'.[204] The Court considered that the declaration for these reasons was not warranted.

In respect of Mr McDougall, the Court of Appeal highlighted that he had chased the victim with a weapon, did not try to help the victim when he discovered that he had been stabbed and had a criminal history which 'suggested he was unlikely to respond to leniency'.[205] These features meant that the imposition of an SVO declaration was not manifestly excessive.

### 3.1.3 Focusing on offending beyond or outside 'the norm' is too narrow an approach: *R v Free; Ex parte Attorney-General* (Qld) (2020) 4 QR 80; [2020] QCA 58

The decision of *Free* marks a move away from what the Court refers to as being an overly narrow interpretation of the 'test' to be applied. The facts of this case and other important principles relevant to sentencing to come out of this case are summarised in sections 2.2.7 and 2.6.2 of this paper.

The Court of Appeal made the following observations in concluding that the sentencing judge erred in taking too narrow an approach in focusing on whether the offending was 'outside the norm' for the type of offending:

> The exercise of the sentencing discretion in the present case was affected by error, in particular in relation to the exercise of the discretion whether to make a serious violent offence declaration, by focussing on a perceived need to find factors which take the case outside the norm for the type of offence; rather than considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required.
>
> We hasten to add that we apprehend the approach taken by the learned sentencing judge in this case is likely to have been the approach regularly taken by sentencing courts, when considering the exercise of the discretion to make a serious violent offence declaration. That is, to focus on whether there are factors in the particular case which take it outside 'the norm' for the type of offence. That is a short-hand expression frequently invoked as a means of conveying the 'test' to be applied. It is the analysis invited on this appeal that has drawn our attention to the fact, and persuaded us, that **such focus is too narrow.**
>
> We also observe that, for a sentencing judge, it can be uncomfortable, to say the least, to be describing a 'norm' for an appalling offence – the present case is an obvious example; but there are many others. There is nothing normal or normative about this offending. It is shocking, and to speak of a 'norm' is justifiably jarring, for victims of the offending, and also for the broader community, let alone for the sentencing judge.
>
> ....
>
> The learned sentencing judge's focus on whether there were factors in the respondent's commission of the offence of taking a child for an immoral purpose 'which take it outside the norm for that appalling offence', obscured the need to also consider, as part of the integrated process, whether there were other factors, including factors relevant to community protection or adequate punishment, which warranted an order requiring the respondent to serve 80 per cent, as part of a just penalty. As submitted by the Attorney-General, an important consideration in this case was the need to protect the community from the risk of future offending by the respondent.[206]

The integrated sentencing approach taken by the Court of Appeal in this matter resulted in a sentence in which a discretionary SVO was not made but parole was not set at the 'customary one-third' mark following a guilty plea.[207]

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203 *McDougall and Collas* (n 19), 97 [20]–[21] (emphasis added).
204 Ibid 97 [23].
205 Ibid 98 [25].
206 Free (n 23) 98–9 [49]–[51], 99 [54] (Philippides JA, Bowskill and Callaghan JJ) (emphasis added).
207 For further discussion of this, see section 2.2.7 of this paper.

## 3.2 Considerations in deciding whether to exercise the discretion

**Summary of the law:**

There is no need for special factors justifying the exercise of the discretion to make an SVO declaration — provided the making of the declaration is warranted by the circumstances of the case and supported by proper reasons. *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219

The consequences of making a declaration must be taken into account when assessing whether the overall outcome is a just sentence. *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219

An offender's criminal history may be relevant to the exercise of discretion whether or not to declare a conviction for an offence to be a conviction of a serious violent offence. *R v Kampf* [2021] QCA 47

### 3.2.1 No need for 'special factors', and the consequences of declaration must be considered: *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219

As discussed above in section 2.2.1 of this paper, *Eveleigh* highlighted the integrated nature of the sentencing exercise – including in circumstances where a court is considering whether to make an SVO declaration in circumstances where the court has discretion to do so. The Court of Appeal stated:

> One corollary of the decision is that there is no need to search for special factors justifying the exercise of a distinct statutory discretion to make a declaration. An overall sentencing discretion is to be exercised; the discretion to make a declaration is simply an aspect of this overall discretion and is unfettered. Like every aspect of that discretion, its exercise must be warranted by the circumstances of the case and supported by proper reasons. However, the reasons may be interrelated, as what is required is an integrated sentence. A second corollary is that the sentencing judge is not free to disregard the consequences of making a declaration. Those consequences must be taken into account in assessing whether the overall outcome is a just sentence. [208]

### 3.2.2 Comparing cases – exercising the discretion in child sexual abuse cases: *R v BAW* [2005] QCA 334 and *R v BAX* [2005] QCA 365

The types of factors relevant to a court in considering whether to make a declaration and the discretionary nature of the exercise are illustrated by two cases, both delivered in 2005, involving similar very serious forms of child sex offending.

#### *R v BAW* [2005] QCA 334

In the case of *R v BAW*,[209] the applicant, BAW, committed several serious sexual offences against eight complainants across four decades: in 1964; between 1980 and 1985; in 1993; between 1994 and 2001; and between 1994 and 2003. The sentencing judge imposed a sentence of 7 years' imprisonment for each of the offences committed between 1980 and 1993; and 8 years' imprisonment for the remaining offences. All terms of imprisonment were ordered to be served concurrently. An SVO declaration was made in respect of three counts of maintaining a sexual relationship with a child, with a circumstance of aggravation, where the offending took place following the commencement of the scheme in 1997.[210]

The applicant's appeal, on the basis that both the head sentence of 8 years and the making of an SVO declaration was manifestly excessive, was dismissed.

This case is authority for the proposition that an SVO declaration should be reserved for the more serious convictions.[211] The Court of Appeal held that BAW's threats to kill the child and her family to prolong the sexual abuse justified the declaration, despite his plea of guilty and despite having made some admissions to offending

208 *Eveleigh* (n 15), 413 [53] (Fryberg J).

209 [2005] QCA 334.

210 The scheme is only applicable to offences which have occurred since its commencement in 1997. Offending prior to that date cannot receive an SVO.

211 *R v BAW* [2005] QCA 334, [28] (Jerrard JA, McMurdo P and Wilson J agreeing). See also *R v Collins* [2000] 1 Qd R 45. In that judgment, his Honour explained that 'Some particular reason or reasons must exist to satisfy the court that the declaration is warranted and that in all the circumstances the appropriate sentence is one, in this case of seven years, without remissions and with no parole eligibility until 80 per cent of the sentence is served' at 48 [14]. See also *R v Orchard* [2005] QCA 141.

against some of the children. [212] Although handed down post-*De Salvo*, there was no discussion in this case as to whether BAW's offending was or was not beyond 'the norm' for that type of offending.

### *R v BAX* [2005] QCA 365

The decision in *R v BAX*[213] was delivered only weeks after the decision in *R v BAW*, summarised above, by a differently constituted Court of Appeal (except for Jerrard JA, who sat on the Court for both decisions).

The applicant, BAX, was charged with three counts of maintaining a sexual relationship with a child with a circumstance of aggravation, for sexual offending against three of his four stepchildren when they were aged between four and seven years old. The applicant admitted that he had abused his oldest stepchild 100 to 150 times including penile rape; his youngest stepchild 50 to 100 times; and a male stepchild 20 to 50 times. He had also induced the boy to attempt to have intercourse with his sister.

On each of the three counts, the judge imposed a head sentence of 9 years' imprisonment with an SVO declaration. The applicant appealed on the basis that the imposition of an SVO declaration rendered the sentence manifestly excessive. The majority of the Court of Appeal concluded that the totality of this conduct justified the making of the declaration. [214] Jerrard JA, in dissent, was of the view that while there were grounds for the exercise of the discretion, the sentencing judge erroneously exercised the discretion given the applicant's detailed confessions and plea of guilty. [215] As was the case in *BAW*, there was no discussion or consideration by the Court given as to whether BAX's offending was or was not outside 'the norm'.

One year later, the significant decision of *McDougall and Collas* was delivered by the Court of Appeal. Jerrard JA acknowledged in that judgment that, in *BAW* and *BAX* (each with similar but not identical circumstances), his Honour took a different position in each of those cases as to whether the discretion was correctly exercised.

This decision demonstrates that the exercise of the discretion turns on the individual circumstances of each case and is part of the balancing exercise required in coming to a just sentence in all the circumstances.

## 3.2.3 Guidance in the exercise of the discretion: *R v McDougall; R Collas* [2007] 2 Qd R 87; (2006) 166 A Crim R 191; [2006] QCA 365

As discussed earlier in this paper in sections 2.2.2 and 3.1.2, the decision of *McDougall and Collas* was an important decision in summarising the principles to be applied by a sentencing court when determining whether an SVO declaration should be made, as well as the broader integrated approach to be adopted. The Court of Appeal listed these considerations as relevant to deciding whether to exercise the discretion to make an SVO declaration:

> It is where the making of a declaration is discretionary that a difference in views has arisen about whether declarations are available as a sentencing tool, when the circumstances are not beyond the norm for that offence. The following observations may assist sentencing courts:
>
> - the discretionary powers granted by s 161B(3) and (4) are to be exercised judicially and so with regard to the consequences of making a declaration;
> - a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole. By definition, some of the offences in the Schedule to the Act will not necessarily – but may – involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child;
> - the discrete discretion granted by s 161B(3) [and] (4) requires the existence of factors which warrant its exercise, but the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;
> - the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;
> - the law strongly favours transparency and accessible reasoning, and accordingly sentencing courts should give reasons for making a declaration, and only after giving the defendant an opportunity to be heard on the point;
> - for the reasons to show that the declaration is fully warranted in the circumstances it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them;
> - without that last feature, it may be difficult for the reasons to show that the declaration was warranted;

212 Ibid.
213 [2005] QCA 365.
214 Ibid [1]–[5] (McPherson JA, Fryberg J agreeing).
215 Ibid [26].

- where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly, the just sentence which is the result of a balancing exercise may well require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences;
- where the circumstances of the offence do not take it out of the 'norm' for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion.[216]

The reasoning as to why the Court upheld the original sentencing judge's exercise of the discretion for Mr McDougall (and, conversely, vacated the SVO declaration that had been made in respect of Mr Collas) is outlined in section 3.1.2 of this paper.

### 3.2.4 Comparing cases - the weighing up of the aggravating and mitigating features: *R v Tahir; Ex parte Attorney-General* [2013] QCA 294; *R v Pitt* [2017] QCA 13

Two different sentencing outcomes appealed to the Court of Appeal involved grievous bodily harm offences committed in the context of domestic and family violence outcomes illustrate how the discretion to make an SVO declaration is exercised, and the circumstances in which the failure to make an SVO declaration may render the sentence manifestly inadequate.

#### *R v Tahir; Ex parte Attorney-General (Qld)* [2013] QCA 294

In the case of *R v Tahir; Ex parte Attorney-General (Qld)*,[217] the respondent, Mr Tahir, was convicted on his own pleas of guilty of the grievous bodily harm[218] of his partner. When she returned home one evening, the respondent was intoxicated and 'motivated by unreasonable jealousy'[219] when he attacked her. He put her in a headlock, hit her head with an empty rum bottle seven or eight times, held a knife to her throat and mouth and pulled the knife across her face (cutting through the full thickness of her mouth and severing one quarter of her tongue), attempted to stab her and then dragged her into another room where he strangled her.[220] Neighbours tried to convince the respondent to let them inside. Instead, he called emergency services and pretended that he had found her injured. Subsequently, he grabbed her face and told her that if she told anyone the truth he would come after her family and told her 'you know what I'm capable of'.[221] Police arrived and forced open the door. The victim underwent surgery for extensive cuts to her scalp, face, tongue and right middle finger as well as reconstruction of her eye socket following the attack with the rum bottle. Her facial wounds caused permanent scarring.

The 21-year-old respondent had a limited criminal history that did not feature convictions for violence. He had favourable references and he had expressed remorse. A psychologist stated that without treatment for alcohol and drug abuse, he would be a moderate to high risk of reoffending against his partner and a moderate risk of committing further violent offences towards others.

The Attorney-General successfully appealed the sentence of 8.5 years' imprisonment with parole eligibility after serving one-third of the sentence,[222] on the basis that this was manifestly inadequate.

The Court of Appeal gave the following reasons for substituting a lower head sentence of 7 years with an SVO declaration:[223]

> the respondent's personal circumstances formed the decisive consideration in the sentencing judge's decision not to make the declaration… But the weight capable of being afforded to the respondent's personal circumstances was diminished by the significant and necessary qualification upon the sentencing judge's finding that the respondent was otherwise of good character and by the limited extent of the respondent's rehabilitation described in the psychologists' reports. It is difficult to see a sufficient justification for treating the aggregation of those matters as the decisive consideration for not making a serious violent offence declaration when regard is had to the extreme violence and seriousness of the respondent's offence and the severity of its

216 *McDougall and Collas* (n 19) [19] (Jerrard JA, Keane JA, Holmes JA).
217 [2013] QCA 294.
218 This matter pre-dated the amendments to the *Penalties and Sentences Act 1992* (Qld) s 12A which provided for the averment of offences as 'domestic violence offences' for recording purposes.
219 Ibid [6].
220 This matter pre-dated the creation of the offence of choking, suffocation or strangulation in a domestic setting (Criminal Code (Qld) s 315A).
221 Ibid [7].
222 I.e. after serving two years and 10 months.
223 Requiring him to serve 5 years and 7 months before becoming eligible for parole.

> consequences for the complainant. Even in the context of the lengthy term of imprisonment and the uncertainty about parole, the comparable sentencing decisions confirm the strong impression that the decision not to make the declaration coupled with the fixing of the early parole eligibility date must reflect an error in the exercise of the sentencing discretion. That error should be corrected in the interest of justice in this case and to ensure that this sentence is not relied upon as a comparable sentencing decision.[224]

### *R v Pitt* [2017] QCA 13

In *R v Pitt*,[225] the applicant was convicted of grievous bodily harm (a domestic violence offence) as well as property, drug, and bail offences. The appellant was sentenced to 6 years' imprisonment for the grievous bodily harm with an SVO declaration and lesser concurrent sentences for the other offences.

The applicant assaulted the complainant, his then partner, causing significant injuries including a severe traumatic brain injury. The complainant had to learn to walk and talk again, her personality changed and she required 24-hour care provided by family members until her death from an unrelated incident, six months later.

The applicant was 18 years old at the time of the offence and had a criminal history that featured previous convictions for violent robberies. He offended while serving a suspended sentence for those robberies.

The sentencing judge, in deciding to make an SVO declaration, had regard to the mitigating features of his young age and that there was some prospect for rehabilitation, as against the 'extreme violence' and its consequences for the complainant, as well as his recent relevant criminal history.[226] The sentence of 6 years' imprisonment was moderated to take into account his age and plea of guilty.[227]

The Court of Appeal considered that it was open to the sentencing judge to impose the declaration because the offending was more than usually serious and the mitigating factors, though relevant, were not sufficient to preclude the making of the declaration.[228] The Court referred to the decision of *R v Tahir; Ex parte Attorney-General*[229] (summarised above) as a case that may be more serious than the circumstances of this applicant.

This sentence was not disturbed on appeal.

## 3.2.5 Comparing cases – exercising the discretion in rape cases: *R v Kellett* [2020] QCA 199; *R v SDM* [2021] QCA 135

Two recent cases involving charges of rape also illustrate the types of factors that will tend to support the making of an SVO declaration, and circumstances in which this aspect of the sentence may be found to render the sentence manifestly excessive, resulting in the declaration being set aside on appeal.

### *R v Kellett* [2020] QCA 199

In *R v Kellett* ('*Kellett*'),[230] the appellant was convicted after trial of one count of rape and one count of grievous bodily harm (injuries arising out of the rape). He was sentenced to concurrent terms of 7 years' imprisonment for the rape and 6 years' imprisonment for the grievous bodily harm, with an SVO declaration for both offences. Kellett unsuccessfully sought to appeal both conviction and sentence.

The appellant and complainant were engaged in consensual sexual acts prior to the unexpected and violent penetration of the complainant's vagina with the appellant's fist, which continued after she began to scream in pain. The complainant suffered significant injuries and lost a substantial quantity of blood. The appellant accepted that he had inserted his fist but denied that it was non-consensual and further denied that it was sudden or that it involved two separate movements.[231]

At the sentence, the prosecution submitted that an appropriate sentence was 'towards the upper end of a range of seven or eight years'.[232] In response, the sentencing judge raised whether an SVO declaration should be made and the prosecutor stated that it was open to the sentencing judge to exercise that discretion in circumstances where

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224 *R v Tahir; Ex parte A-G* (Qld) [2013] QCA 294, [28] (Fraser JA, Holmes JA and Douglas J agreeing).
225 [2017] QCA 13.
226 Ibid [20] (McMurdo JA, Holmes CJ and Bond J agreeing).
227 Ibid [12], [19] (McMurdo JA). No submission was made on behalf of the applicant that the sentencing judge was wrong to refer to criminal history as a relevant consideration. Cf *R v Orchard* [2005] QCA 141, [26], [40] (McPherson JA), considered in *R v Kampf* [2021] QCA 47.
228 Ibid [21] (McMurdo JA, Holmes CJ and Bond J agreeing).
229 [2013] QCA 294.
230 [2020] QCA 199 ('*Kellett*').
231 This assertion was not accepted by the sentencing judge.
232 *Kellett* (n 230) [112] (Morrison JA).

the acts were reckless and indifferent and caused obvious pain.[233] The sentencing judge described the offending as 'brutal, degrading, forceful, injurious and… contemptuous, in my opinion, of the complainant.'[234]

Morrison JA concluded that, because the grievous bodily harm occurred during a violent rape, the sentences imposed (including the making of SVO declarations) were within the 'bounds of proper sentencing discretion'.[235]

### *R v SDM* [2021] QCA 135

In the later appeal of *R v SDM*,[236] the applicant pleaded guilty to three counts of rape (being domestic violence offences). He was sentenced to concurrent terms of 6 years, 6.5 years and 7 years' imprisonment. An SVO declaration was made in respect of the count which attracted the 7-year sentence. He applied for leave to appeal against sentence on the basis that the sentencing judge did not sufficiently ameliorate the sentence to take into account the plea of guilty and other mitigating factors, and on the basis that the SVO declaration rendered the sentence manifestly excessive.

The 41-year-old applicant and the victim had been in a relationship which ended on 17 January 2017. The victim allowed the applicant to stay in a spare bedroom of the home while he looked for new accommodation. Two days later, the applicant entered the victim's bedroom and insisted that they have sex. She initially said that she didn't think that was a good idea, and when he persisted, she told him 'No' multiple times. The applicant raped her vaginally and anally. He was rough and called her names during the offending. He then forced his whole fist into her vagina and repeatedly inserted his fist and boasted that he had just 'punched' her. This caused her excruciating pain, and she was unable to walk or sit down for a week and a half, at which point she made a complaint to police. She did not seek medical attention for the injuries.

The applicant had a criminal history that featured the violent twisting of a man's genitals. A psychiatrist had diagnosed the applicant with post-traumatic stress disorder (PTSD) several years earlier. He had been in the army and had been admitted to a psychiatric hospital on four occasions, including immediately after this offending. He abused alcohol and benzodiazepines. A psychiatrist who assessed him prior to sentencing provided a principal diagnosis of narcissistic personality traits, as well as PTSD for which he was in partial remission and prior substance abuse disorder. He was assessed as a below-average risk of reoffending and as someone who required long-term psychological therapy, and whose risks of deterioration would need to be managed in custody.

The aggravating features of the offending were: the applicant used 'additional force over and above the violence inherent in the (vaginal) rape';[237] there was 'physical aggression'[238] that coupled the anal rape; and the use of the fist was accompanied by the 'additional gratuitous humiliation'[239] when he boasted about having 'punched' her. It was distinguishable from *Kellett* on three main bases: there was no prior consensual activity between the applicant and victim;[240] there was the aggravating feature that this was domestic violence offending;[241] and against that, the rape in *Kellett* resulted in the commission of grievous bodily harm.[242] The mitigating features were limited to a timely plea of guilty, an absence of a history of sexual offending and (limited) insight demonstrated by the applicant to the psychiatrist.[243]

The Court of Appeal ultimately concluded that the imposition of an SVO declaration for this applicant rendered the sentence manifestly excessive. In re-sentencing, the Court was of the view that the head sentence should have been higher (7.5 years' imprisonment) with parole eligibility after serving one-half of the sentence.[244] The Court made this observation in setting the parole eligibility earlier than 80 per cent:

> Such a head sentence for count 3 (the rape with the fist) reflects a discount for the guilty plea and the other mitigating factors, but has regard to the overall criminality of the offending for all three counts and the aggravating factor that count 3 was a domestic violence offence. The effect of not setting the date for eligibility

233 Ibid.
234 Ibid 19 [96] (Morrison JA).
235 Ibid 22 [114], 23 [118] (Mullins JA agreeing, Jackson J not deciding).
236 [2021] QCA 135.
237 Ibid [21] (Mullins JA, Fraser JA and Henry J agreeing).
238 Ibid.
239 Ibid.
240 Ibid [21] and [41].
241 Ibid [37].
242 Ibid [47] citing *Kellett* (n 230).
243 Ibid [45]. What this meant practically was that a sentence of 7 years with parole eligibility after serving 5 years and 7 months became a higher head sentence of 7.5 years with parole eligibility after serving three years and nine months).
244 Ibid [49].

> for parole before one-half of the sentence has been served ensures the sentence as a whole provides for adequate punishment for the offending and has the potential to foster the applicant's treatment and rehabilitation over a parole period of sufficient length to give some prospect of those aims being achieved.[245]

The applicant was given the opportunity to withdraw his appeal[246] in circumstances where the head sentence was increased, but unsurprisingly he did not do so in circumstances where the period before which he could apply for parole was quite significantly reduced (after serving 3 years and 9 months, rather than about 5 years and 7 months).

### 3.2.6 Offender's criminal history may be relevant to the exercise of the discretion

The relevance of an offender's criminal history to the decision to exercise the court's discretion to make an SVO declaration has been considered by the Court of Appeal in a number of cases over the period of the SVO scheme's operation.

#### *R v DeSalvo* (2002) 127 A Crim R 229; [2002] QCA 63

In *R v DeSalvo*,[247] the Court of Appeal allowed an appeal against a sentence of 8 years' imprisonment with an SVO for the offence of manslaughter. The Court substituted a sentence of 9 years' imprisonment with no recommendation for parole.

In considering whether the applicant's prior criminal history supported the making of a declaration, McPherson JA noted that 'an offender's previous record of offending always operates as a factor… to increase the penalty imposed' and that 'an offender's criminal history may tend to show the offence for which the sentence is being imposed in a serious light, so that a need is perceived to protect the community'.[248] However the majority of the Court questioned whether prior convictions could be used to support the making of an SVO declaration where it is a declaration on the **offence** as opposed to the **offender.**[249] Applying it specifically to DeSalvo's criminal history which featured prior convictions for common assault: McPherson JA was of the view that his history did not afford a basis for the declaration;[250] Williams JA concluded more generally that the circumstances did not warrant a declaration;[251] whereas Byrne J, in dissent, stated that the circumstances (those being a deliberate attempt to cause injury while armed with a knife following a minor provocation, a criminal history of violence, and the need for deterrence) justified the declaration.[252]

This case is further explored in sections 3.1.1 and 3.1.2 of this paper.

#### *R v Orchard* [2005] QCA 141

In *R v Orchard*,[253] the applicant pleaded guilty to several offences including an armed robbery in company with violence for a robbery of a hotel at Woolloongabba in which the employees were threatened with a sawn-off rifle and in which the applicant threatened to kill one of the employees.

He was sentenced at first instance to a head sentence of 9 years' imprisonment with an SVO declaration. The applicant had an extensive criminal history which included a previous conviction for robbery in company with personal violence. The appalling criminal history was, in the Court of Appeal's view, the decisive factor in the sentencing judge's decision to impose an SVO declaration. The majority of the Court of Appeal concluded, for differing reasons, that the SVO declaration rendered the sentence manifestly excessive. The Court resentenced the applicant to 9 years' imprisonment with no recommendation as to parole.

McPherson JA echoed his Honour's remarks in *R v DeSalvo*[254] in expressing a view that 'the offender's prior record of violent convictions, if relevant, should not be allowed decisive weight in deciding to make such a declaration'.[255]

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245 Ibid.
246 Ibid [51] citing *Neal v The Queen* (1982) 149 CLR 305, 308.
247 (2002) 127 A Crim R 229; [2002] QCA 63.
248 *DeSalvo* (n 198), 231 (McPherson JA), citing *R v Keating* [2002] QCA 19.
249 Ibid 231 (McPherson JA, Williams JA agreeing, Byrne J dissenting), McPherson and Williams JJA citing *R v Keating* [2002] QCA 19.
250 Ibid 231.
251 Ibid 232.
252 Ibid 233.
253 [2005] QCA 141.
254 (2002) 127 A Crim R 229; [2002] QCA 63.
255 *R v Orchard* [2005] QCA 141, [7].

### *R v Woods* [2016] QCA 310

In *R v Woods*,[256] the elderly complainant inadvertently confronted an intruder (the appellant) in her home. He had a knife in his hand and said 'get out of my way, you stupid old bitch'[257] before striking her across the face with the knife. The wound required about 20 stitches. She made a good physical recovery but suffered significant emotional distress. The sentencing judge found that the complainant was not barring his exit and the use of violence was 'wanton and gratuitous'.[258]

The appellant was sentenced to 10 years' imprisonment for the burglary with intent, and 6 years' imprisonment for the grievous bodily harm, with no SVO declaration and no recommendation for parole.[259] The two sentences were to be served concurrently but cumulative on an earlier 3-year sentence for 49 other offences. The sentences were appealed on the bases that they were manifestly excessive and that the sentencing judge erred by improperly considering issues of totality.

It was significant to the sentencing judge that the appellant had an extensive criminal history which featured: several offences of burglary, including one in which he broke into the home of a 63-year-old woman and punched her to the face and neck, and another in which he broke into another woman's home and, when confronted by a neighbour, headbutted and punched him causing significant injuries to the neighbour's nose which required surgery; a robbery with violence in which the then 17-year-old appellant snatched an 80-year-old's handbag at a bus stop and threw her across the footpath, causing her to hit her face and temple and injure her hip; and an attempted robbery in which the appellant confronted a 53-year-old woman in her garage, put her in a chokehold and pressed a knife to her ribs. For that earlier offence of attempted robbery alone, he had been sentenced to 7 years' imprisonment.

Fraser JA delivered the lead judgment in this matter.[260] His Honour distinguished an exercise of the discretion where prior criminal history was a decisive factor, from an exercise of the discretion where an offender's history was one of several circumstances which justified the declaration.[261] For this appellant, the circumstances which supported the declaration were: the use of a knife in a reckless way without regard for the consequences; the wanton and gratuitous use of violence; and the appellant's prior convictions for violence.[262]

The appeal was refused.

### *R v Kampf* [2021] QCA 47

In *R v Kampf*,[263] the applicant pleaded guilty to armed robbery in company with personal violence, and grievous bodily harm. He and two co-offenders stole alcohol from a bottle shop before they attended a nearby hotel. His co-offender produced a gun and demanded money from an employee. The employee removed the gaming till and gave it to the co-offender. It was accepted by the prosecution that there was no pre-planning to the robbery but that once the applicant became aware that the robbery was happening in that part of the hotel, he involved himself by acting as a lookout. The applicant and his co-offenders then attended the bar area of the hotel and the co-offender again brandished the gun. A patron at the hotel recognised that it was a replica weapon and tried to wrestle it from the co-offender. The applicant struck the patron in the head three times with the bottle of alcohol that he had earlier stolen. The employee who had been robbed also tried to grapple with the co-offender before the applicant and his co-offenders fled the scene. The patron that the applicant assaulted suffered life threatening injuries including skull and eye-socket fractures, a subdural haematoma, and a small subarachnoid haemorrhage (a bleed located underneath one of the protective layers of the brain). He required surgery to relieve pressure on his brain.

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256 [2016] QCA 310.
257 Ibid [14].
258 Ibid [15], [26] (Fraser JA).
259 Burglary (other than in circumstances where section 419(3)(b)(i) or (ii) applies) is not an offence listed in Schedule 1, so the mandatory aspect of the SVO scheme was not enlivened. The sentencing judge had considered that if it was the grievous bodily harm alone, it would have been appropriate to impose 6 years with an SVO but because of the burglary, decided it was appropriate to reflect the criminality of both offences in the sentence of 10 years. This could have been structured in two ways: 6 years and a cumulative 4 years; or 10 years imposed on the less serious burglary offence. The sentencing judge chose the latter. In practical terms, this allowed for parole eligibility after serving the remainder of the 3 year term plus 5 of the 10 year term. If an SVO had been made on the 6 year sentence for the grievous bodily harm, the appellant would not have been eligible for parole until having served 6.8 years of the 10 years (4.8 years of the 6 year sentence and then 2 of the 4 cumulative years).
260 Philippides JA and Burns J agreeing.
261 *R v Woods* [2016] QCA 310, [28].
262 Ibid [29].
263 [2021] QCA 47.

The applicant was 34 years old at the time of offending had an extensive criminal history including: a serious assault against a police officer; an offence of going armed so as to cause fear which involved pointing a weapon at a passing motorist; and a further offence of going armed so as to cause fear as well as an offence of assault occasioning bodily harm, where the applicant demanded money from a motel manager and returned with a firearm which he used to hit the manager in the head. The applicant had been on parole for two weeks (for dishonesty offences, unlawfully using vehicles and failing to appear in court) when he committed the robbery and grievous bodily harm.

The appellant was sentenced to 4 years' imprisonment for his role in the robbery and 7 years' imprisonment with an SVO for the grievous bodily harm offence. He appealed the sentences on the basis that the head sentence of 7 years and the imposition of an SVO were manifestly excessive.

While the sentencing judge did not raise the applicant's criminal history in considering whether to make an SVO declaration, the applicant submitted on appeal that his history was 'arguably not relevant' and referred to the observations made by McPherson JA in *R v DeSalvo*[264] and *R v Orchard,*[265] as well as the decision in *R v Woods*,[266] summarised above. The Court of Appeal in this matter stated the principle to be followed:

> In sentencing an offender for an offence that involved the use of violence or that resulted in physical harm to another person, the Court is required to have regard primarily to the factors in s 9(3) of the *Penalties and Sentences Act 1992*. Some factors relate to the circumstances of the offence, including the nature or extent of the violence used. Other factors relate to the offender, such as the offender's past record, and the antecedents, age and character of the offender. The previous convictions of an offender must be treated as an aggravating factor if the sentencing court considers that they can reasonably be treated as such, having regard to the nature of the previous conviction and its relevance to the present offence and the time that has elapsed since the conviction.
>
> A declaration that the offender has been convicted of a serious violent offence is 'part of the sentence'.
>
> The task of sentencing involves taking into account all relevant factors and arriving at a single result. It follows that **an offender's criminal history may be relevant to the exercise of discretion whether or not to declare a conviction for an offence to be a conviction of a serious violent offence.**[267]

The application for leave to appeal against sentence was refused.

## 3.3 Discretionary declarations for any offence: s 161B(4) of the Act

Section 161B(4) provides:

> Also, if an offender is—
>
> (a) convicted on indictment of an offence—
>
> (i) that 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;
>
> the sentencing court may declare the offender to be convicted of a serious violent offence as part of the sentence.

Unlike sections 161A and 161B(3) which require that the offence is listed in Schedule 1 of the Act, a discretionary SVO declaration pursuant to section 161B(4) can be made for any offence if it features 'serious violence against another person' or 'resulted in serious harm to another person'.

There has been limited judicial discussion of this part of the SVO scheme, and data analysis undertaken by the Council indicates that the declarations are rarely made pursuant to this sub-section. Where this provision has been relied on, it has generally been on the basis that the court has imposed a sentence for an offence listed in Schedule 1 of below 5 years (the lower limit for the making of a declaration for a Schedule 1 offence specified under s 161B(3) of the Act).

### 3.3.1 No basis for a declaration: *R v Riley* [1999] QCA 128

In *R v Riley*,[268] the applicant, having been returned to custody due to the cancellation of his parole, became distressed and yelled obscenities at correctional centre officers. Several staff unsuccessfully tried to pacify him. When he began to headbutt the wall of the cell, causing his face to bleed, an officer sought to restrain him. During

264 (2002) 127 A Crim R 229, 231 [10]; [2002] QCA 63, [10].
265 [2005] QCA 141, [6].
266 [2016] QCA 310.
267 Ibid [57]–[59] (emphasis added).
268 [1999] QCA 128.

a struggle, the applicant bit the officer on the leg. It did not draw blood but caused soreness. Approximately two months later, during a routine search in custody, the applicant struck an officer on the nose, causing a small cut, a headache and swelling to his nose and face for several days.

He was sentenced to 12 months' imprisonment and a cumulative term of 2 years' imprisonment for the two assaults occasioning bodily harm against corrective services officers. The offences were declared to be serious violent offences pursuant to section 161B(4) of the Act. Neither the prosecution nor the applicant's lawyers were invited to make submissions as to whether SVO declarations should be made.

The Court of Appeal made the following observations about section 161B(4):

- 'serious harm', within the meaning of that sub-section, requires more significant harm than the harm caused to these two officers;[269] and
- a serious risk that the applicant will cause physical harm to members of the community is not a matter relevant to the existence of the discretion pursuant to this sub-section, but if other matters such as resultant serious harm or the use of serious violence raise the existence of the discretion then it is a factor relevant to the decision as to whether to exercise that discretion.[270]

The application and appeal were allowed and the previous orders and declarations set aside. The applicant was re-sentenced to 9 months' imprisonment on each offence, which were to be served cumulatively.

### 3.3.2 Serious harm does not have to result from violence: *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219

In *Eveleigh*,[271] the Court of Appeal noted in obiter dicta[272] that the reference to 'serious harm' in section 161B(4) does not require that the harm is the result of violence.[273]

The facts and outcome of this case are summarised at section 2.2.1 of this paper, and the matter is further discussed in section 3.2.1 of this paper.

## 3.4 Violence against, or causing the death of, a child under 12: an aggravating factor in deciding whether to exercise the discretion

In 2010, a further sub-section (5) was added to section 161B of the Act which provides that, where an offence involved the use of, procurement of, counselling of or conspiring to use violence against a child under 12 years or where the offending 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.[274]

### 3.4.1 Legislative instruction to give greater weight: *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* (2019) 3 QR 196; [2019] QCA 300

One of the few Court of Appeal decisions that has discussed the application of section 161B(5) of the Act since its introduction in 2010 is *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)*.[275]

Mr O'Sullivan and Ms Lee were charged with cruelty to, and the manslaughter of, the 22-month-old son of the respondent, Ms Lee. His name was Mason. The respondent, Ms Lee, was in a relationship with Mr O'Sullivan at the time. Mason suffered from terrible injuries and conditions over a prolonged period under the care of the respondents. These included: ulcerated lesions in his peri-anal region; cellulitis and swelling to his left leg; a healed fracture to the left tibia; abscesses to his right calf; skin infected by candida (a parasite); a separation of the tissue

269 Ibid 7 (Fryberg J, de Jersey CJ and Davies JA agreeing).
270 Ibid.
271 [2003] 1 Qd R 398; [2002] QCA 219.
272 See *Macquarie Dictionary* (online at 19 October 2021) 'obiter dictum' (def 2) which defines obiter dicta as 'an opinion by a judge in deciding a case, upon a matter not essential to the decision, and therefore not binding'.
273 *Eveleigh* (n 15) 408 (Fryberg J).
274 Section 161B(5), as inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2019* (Qld) s 7. See also *History of the serious violent offences scheme* (n 3) 19.
275 (2019) 3 QR 196; [2019] QCA 300. See also *R v Leslie (a pseudonym)* [2021] QCA 85, [11] (Davis J, Sofronoff P and Mullins JA agreeing). See also *R v MJB* [2021] QDC 170 in which Smith DCJA also discussed these legislative amendments and cited *R v O'Sullivan Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* (2019} 3 QR 196; [2019] QCA 300 as authority for the proposition that these legislative changes require courts to give greater weight to the aggravating effect where the offender inflicts violence on a child in a domestic setting, therefore increasing the range of appropriate sentences.

on the scalp, indicative of a forceful pulling or rubbing of his hair; a fractured tailbone; and bruising to his face, chest, abdomen, buttocks and legs. Low levels of methylamphetamine and amphetamine were found in his blood. The cause of death was a punch or punches to the abdomen which perforated and tore parts of his lower intestine, which led to inflammation and septicaemia, which became fatal due to an absence of medical treatment.

The respondents were sentenced on the basis that: O'Sullivan failed to obtain medical treatment for Mason and further, delivered the blow or blows which caused the injuries that killed him; and Lee neglected her son and left him in the care of O'Sullivan, knowing that O'Sullivan had previously caused Mason to be hospitalised, and failed to obtain medical treatment when she knew that he was gravely ill. The offences for both respondents were charged as domestic violence offences.

O'Sullivan and Lee were sentenced separately. At first instance, O'Sullivan received a head sentence of 9 years' imprisonment with parole eligibility after having served 6 years (therefore, no SVO declaration). Lee received a head sentence of 9 years as well with parole eligibility after having served 3 years. The Attorney-General appealed the sentences for both offenders on the ground of manifest inadequacy.

The appeal was dismissed with respect to Lee but was allowed in respect of O'Sullivan. He was resentenced to 12 years' imprisonment[276] and convicted and not further punished for the cruelty charge.[277] Due to the length of the sentence imposed, the making of an SVO declaration was automatic.

In reference to this and other legislative amendments,[278] the Court stated:

> This sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[279]

276 Pursuant to *Penalties and Sentences Act 1992* (Qld) s 161C, this attracts an automatic SVO declaration so he will not be eligible for parole until he has served 9.6 years.

277 At first instance he was sentenced to a concurrent term of 3.5 years' imprisonment for the cruelty charge. The Court of Appeal indicated that the cruelty exacerbated the offence of manslaughter and would be taken into account as part of the overall criminality in the setting of a head sentence for the manslaughter: *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* (2019) 3 QR 196, 246 [160]; [2019] QCA 300.

278 *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* (2019) 3 QR 196, 222-31 [68]-[90]; [2019] QCA 300 (Sofronoff P, Gotterson JA, Lyons SJA), citing: the insertion of *Penalties and Sentences Act 1992* (Qld) pt 9A (the SVO scheme); the insertion of the *Penalties and Sentences Act 1992* (Qld) ss 9(3), (4) which created an exemption to the principle that imprisonment is a last resort where the offending involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person or that result in physical harm to another person; the amendment of *Penalties and Sentences Act 1992* (Qld)s 9(1)(d) to replace the word 'does not approve of' with 'denounces' in this sentencing principle – 'to make it clear that the community, acting through the court, *denounces* the sort of conduct in which the offender was involved' (emphasis added); the replacement of the *Domestic and Family Violence Protection Act 1989* with the *Domestic and Family Violence Protection Act 2012* and various amendments made to that Act in subsequent years; and the insertion of *Penalties and Sentences Act 1992* (Qld) s 9(10A), which requires the Court to treat the fact that the offending was domestic violence offending as an aggravating feature.

279 *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* (2019) 3 QR 196, 231 [93]; [2019] QCA 300 (Sofronoff P, Gotterson JA, Lyons SJA).

# 4 'Automatic' declarations

This section sets out the considerations that apply when there is a requirement for a court under s 161B(1) of the Act to make an SVO declaration.

Declarations made under s 161B(1) are commonly referred to as 'automatic' declarations, as the application of the scheme is mandatory once a sentence for an offence or offences listed in Schedule 1 of the Act (or of counselling, procuring, attempting or conspiring to commit such an offence) exceeds 10 years' imprisonment, calculated in accordance with section 161C. While the sentencing court is required, by law, to make a declaration as part of the sentence, a failure to do so does not affect the fact that the offender has been convicted of a serious violent offence.[280]

## 4.1 Sentence should not be reduced or restructured to subvert the intention of the scheme

**Summary of the law:**

A sentence should not be structured to evade the consequences for parole that the SVO scheme requires mandated by statute. *R v Carrall* [2018] QCA 355

While a sentence should not be reduced to less than 10 years where a sentence of less than 10 years would be outside the 'range' of appropriate penalties, the fact that a sentence of 10 years or more attracts a mandatory minimum non-parole period cannot be ignored in the integrated sentencing process. *R v Eveleigh* [2003] 1 Qd R 398; [2002] QCA 219

### 4.1.1 Sentencing pre 1997 and post 1997: *R v Booth* [2001] 1 Qd R 393; (1999) 105 A Crim R 288; [1999] QCA 100

The introduction of the SVO scheme brought about a significant change in the point at which offenders sentenced to imprisonment for 10 years or more for certain serious offences were eligible to apply for parole. These changes are discussed in Background Paper 1.

In *R v Booth*,[281] the Court of Appeal reduced the term of imprisonment imposed on the applicant from 12 to 10 years to take into account matters of totality, and made these observations about the then-recent introduction of the SVO scheme:

> [The applicant] cannot insist on the same level of sentence, or the same expectation of early release, as that which prevailed before the statutory sentencing regime was changed in 1997. In his case, the harsher or more severe sentence, to which he is now required to submit, was not the consequence of any error in sentencing discretion on the part of the judge below, but of a change in the law, which it is not part of the proper function of the sentencing court to be astute in avoiding by imposing a reduced sentence designed to defeat or frustrate it.[282]

In this case, the applicant had been sentenced to 12 years' imprisonment (attracting an automatic SVO declaration) for several offences, cumulative on previous sentences totalling 9.25 years which were imposed six years earlier.

### 4.1.2 Guidance in considering the consequences of an automatic SVO declaration: *R v McDougall; R Collas* [2007] 2 Qd R 87; (2006) 166 A Crim R 191; [2006] QCA 365

In *McDougall and Collas* (summarised in sections 2.2.2, 3.1.2 and 3.2.4 of this paper), the Court of Appeal stated that the relevant considerations for a court, where it imposes a sentence where the sentence is 10 years or more and an automatic SVO declaration must be made, include the following:

- that sentencing is a practical exercise which has regard to the needs of punishment, rehabilitation, deterrence, community vindication, and community protection.
- that courts cannot ignore the serious aggravating effect upon a sentence, of an order of 10 years rather than, say, nine years. The inevitable declaration if the sentence is 10 years or more is relevant in the

280 *Penalties and Sentences Act 1992* (Qld) s 161B(2).
281 [2001] 1 Qd R 393.
282 Ibid 401 (McPherson JA, Thomas and White JJA agreeing).

consideration of what sentence is 'just in all the circumstances', in order to fulfil the purpose of sentencing which is prescribed s. 9(1) of the Act;

- but that courts should not attempt to subvert the intention of pt 9A of the Act by reducing what would otherwise be regarded as an appropriate sentence;
- with the result, as described by Fryberg J. in *R. v. Eveleigh* [2003] 1 Qd.R. 398, that while a court should take into account the consequences of any exercise of the powers conferred by the pt 9A, adjustments may only be made to a head sentence which are otherwise within the 'range' of appropriate penalties for that offence; and
- the court should also take into account the relevant sentencing principles set out in s. 9 of the Act.[283]

Affirming the Court's position in the earlier case of *R v Eveleigh*,[284] the Court noted that while a sentence should not be reduced to less than 10 years where a sentence of less than 10 years would be outside the 'range' of appropriate penalties, the fact that a sentence of 10 years or more attracts a mandatory minimum non-parole period cannot be ignored in the integrated sentencing process.

### 4.1.3 An attempt to subvert the scheme: *R v Carrall* [2018] QCA 355

More recently in *R v Carrall ('Carrall')*,[285] the Court of Appeal affirmed that a judge must have regard to the mandatory non-parole period when fashioning the sentence,[286] and the operation of the SVO scheme may result in a sentencing judge exercising the discretion to sentence at the lower end of the range,[287] but the sentencing judge is not obliged to sentence at the lower end of the range. [288]

The appeal concerned a 10-year sentence imposed for drug trafficking and other drug-related offending. The applicant seemingly accepted that 10 years' imprisonment was not excessive but argued that the requirement to serve 80 per cent was.[289] The applicant could not submit that the sentencing judge failed to take the mandatory non-parole period into account because her Honour had expressly made reference to this consideration.

On appeal, the applicant sought that the head sentence be reduced to less than 10 years or, in the alternative, that the applicant be re-sentenced to 9.5 years' imprisonment for the trafficking and a cumulative term of 6 months' imprisonment for the other two offences to avoid the operation of the SVO scheme.[290]

The Court of Appeal characterised the appeal as 'an invitation to structure a sentence to evade the consequence for parole that is mandated by the statute' and noted that this is something that the Court will not do.[291] The appeal was dismissed.

### 4.1.4 An attempt to subvert the scheme where there was distinct, unrelated offending: *R v Lowien* [2020] QCA 186

The Court of Appeal in *R v Lowien*,[292] dismissed an appeal on similar grounds to *Carrall,* but in circumstances where his prior offending was unrelated to his most serious charge of trafficking in dangerous drugs and had occurred some years prior.

The applicant sought leave to appeal concurrent terms of imprisonment imposed for trafficking in dangerous drugs, burglary and assault occasioning bodily harm offences. He was also convicted and not further punished in relation to an offence of supplying dangerous drugs and some summary offences. The trafficking offence attracted the head sentence of 10 years' imprisonment and was captured by a mandatory SVO declaration.

The applicant appealed on two grounds: the sentence of 10 years was imposed to reflect all of the criminality and this was an error because the burglary offence was not one that could attract an SVO; and that the sentencing judge

283 *McDougall and Collas* (n 19) 95 [18].
284 [2003] 1 Qd R 398; [2002] QCA 219.
285 [2018] QCA 355 ('*Carrall*').
286 Ibid [19] (Sofronoff P), citing *R v Herford* (2001) 119 A Crim R 546, [19] (Williams JA).
287 Ibid citing *R v Brown* (2000) 110 A Crim R 499, [32] (Moynihan SJA and Atkinson J).
288 Ibid citing *R v Cowie* [2005] 2 Qd R 533, [19]; [2005] QCA 223 (Keane JA and McMurdo J). See section 2.3.2 of this paper which summarises the case of *R v Cowie.*
289 *Carrall* (n 285) [17] (Sofronoff P, Jackson and Bowskill JJ agreeing). The SVO declaration was, of course, an unavoidable consequence of the imposition of a 10-year sentence. The applicant also appealed on three other grounds: that the sentencing judge's discretion under the *Evidence Act 1977* (Qld) miscarried; that the factual basis on which he was sentenced was not supported by the evidence; and that the sentencing judge failed to take into account the delay and the rehabilitation taken during the period between arrest and sentence.
290 This would avoid the operation of the *Penalties and Sentences Act 1992* (Qld) s 161C because the other two offences (supplying a dangerous drug and possessing a thing used in trafficking) are not listed in Schedule 1 of the Act.
291 Ibid [23] (Sofronoff P), citing *R v Crossley* (1999) 106 A Crim R 80, [30] (McPherson JA).
292 [2020] QCA 186.

made an error of fact in relation to his trafficking offending. The error of fact was conceded by the respondent Crown and on this basis, the Court of Appeal gave leave to appeal and had to re-exercise its sentencing discretion.

The applicant argued that the Court should re-sentence the applicant to 9 years' imprisonment for the trafficking and a cumulative 12 months' imprisonment for the burglary offence.[293] The Crown relied on the case of *Carrall* (summarised above in section 4.1.3) to argue that the sentencing structure proposed by the applicant would improperly circumvent the effect of the SVO scheme. However, unlike *Carrall* (in which the applicant was convicted of similar drug offending related to his trafficking), the applicant here was convicted of an unrelated burglary and assault that occurred more than a decade prior to the trafficking. The Court in this matter described *Carrall* as authority for the proposition that the Court will not structure a sentence to evade the mandatory non-parole period that is required by the legislation.

The Court of Appeal in this matter ultimately concluded that the comparable authorities did not demonstrate that a sentence of less than 10 years was required for it to be a just sentence, and on this basis the appeal was dismissed.[294]

## 4.2 Reflecting mitigating features where there is a requirement to serve at least 80 per cent

**Summary of the law:**

Because mitigating circumstances cannot be taken into account by making an early recommendation for release on parole where the SVO scheme automatically applies, the appropriate approach is to reflect mitigating circumstances, such as a plea of guilty, in the head sentence. *R v Carlisle* [2017] QCA 258

### 4.2.1 Reducing the sentence to less than 10 years: *R v Carlisle* [2017] QCA 258

A key challenge for courts in applying the SVO scheme is how to reflect an offender's plea and other factors in mitigation where the making of a declaration is mandatory.

The Court of Appeal in *R v Carlisle* ('*Carlisle*')[295] described, in this way, the quandary of how to reflect mitigating features where there is a mandatory non-parole period of 80 per cent:

> If… a nominal sentence of 12 years' imprisonment before account was taken of mitigating circumstances was not manifestly excessive, then a reduction of only nine months or possibly one year from that starting point on account of mitigating circumstances was manifestly inadequate, particularly for a 'very early plea'. It led to an effective sentence of 11 years or slightly more, and a non-parole period of nine years once account is taken of pre-sentence custody. If only a slightly greater discount had been given for the very early plea then an actual sentence of less than 10 years would have been imposed and the applicant would not have received an automatic serious violent offence declaration. The error in making a manifestly inadequate reduction on account of a very early plea had significant consequences…[296]

The Court later went on to say:

> Upon analysis of the comparable cases, I conclude that, as a result of inadequate account being taken of the applicant's very early plea of guilt, he did not receive a sentence of less than 10 years. The consequence was an automatic non-parole period of nine years rather than a non-parole period appropriate to a head sentence of less than 10 years. This resulted in a manifestly excessive sentence.[297]

This case is discussed further at section 2.8.1 of this paper with respect to the way in which the Court of Appeal deals with non-declarable pre-sentence custody.

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293 The applicant submitted that the term of imprisonment for the assault occasioning bodily harm offence should not be made cumulative, because assault occasioning bodily harm is listed in Schedule 1 and as a result, the overall cumulative sentence of 10 years would attract an SVO declaration.

294 *R v Lowien* [2020] QCA 186, [47] (Philippides JA, Sofronoff P and Fraser JA agreeing).

295 [2017] QCA 258 ('*Carlisle*').

296 Ibid [103].

297 Ibid.

### 4.2.2 Applying *Carlisle: R v Leslie (a pseudonym)* [2021] QCA 85

In *R v Leslie (a pseudonym)*,[298] the applicant sought leave to appeal an effective 9-year sentence with parole eligibility after serving 4 years for aiding[299] sexual offending by her husband against her children over a period of about four years.

The Court of Appeal noted that the sentencing judge had reduced the head sentence from 10.5 years to 9 years to take into account the mitigating circumstances, and that this was consistent with the principle enunciated in *Carlisle* that mitigating features cannot be reflected in a recommendation for early parole if the sentence was 10 years or longer.[300]

The appeal was dismissed.

298 [2021] QCA 85.
299 Pursuant to the Criminal Code (Qld) s 7.
300 *R v Leslie (a pseudonym)* [2021] QCA 85, [15] (Davis J, Sofronoff P and Mullins JA agreeing).

# 5 Calculation of number of years of imprisonment

## 5.1 Calculation of the head sentence

**Summary of the law:**

For the purposes of ss 161A and 161B(3) of the Act, the specified years of imprisonment is calculated only by reference to offences sentenced **on the same day**. *R v Powderham* [2002] 2 Qd R 417; (2001) 124 A Crim R 514; [2001] QCA 429

The provisions that apply to a declared SVO under section 182 of the *Corrective Services Act 2006* do not prevent a court from sentencing an offender for a non-declared SVO offence that is cumulative on the earlier SVO sentence, resulting in them having to serve more than 15 years' imprisonment before becoming eligible to apply for parole. *R v Lacey* [2013] QCA 292

The calculation of the specified years of imprisonment should not take into account offences that pre-date the operation of the scheme. *R v Stable (a pseudonym)* [2020] QCA 270

One of the issues that arises for sentencing courts in applying the SVO scheme is determining, in circumstances where some sentences are to be served cumulatively on others, whether this triggers the requirement to make an SVO declaration due to the sentence reaching, or exceeding, the 10 year threshold.

For the purposes of sections 161A and 161B(3) of the Act, with respect to the making of either an automatic or discretionary declaration based on the specified years of imprisonment, is to be calculated by reference to s 161C of the Act. Section 161C reads as follows:

> 161C Calculation of number of years of imprisonment
>
> (1) This section applies for deciding whether an offender is sentenced—
>
> (a) under section 161A(a)—to 10 or more years imprisonment (the specified years of imprisonment); or
>
> (b) under section 161B(3)—to 5 or more, but less than 10, years imprisonment (also the specified years of imprisonment);
>
> for an offence—
>
> (c) against a provision mentioned in schedule 1; or
>
> (d) of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1.
>
> (2) An offender is sentenced to the specified years of imprisonment if—
>
> (a) the offender is sentenced to a term of imprisonment of the specified years for the offence; or
>
> (b) the term of imprisonment to which the offender is sentenced for the offence is part of a period of imprisonment of the specified years imposed on convictions consisting of the conviction on which the offender is being sentenced and any 1 or more of the following—
>
> (i) a conviction of an offence mentioned in subsection (1)(c) or (d);
>
> (ii) a conviction declared to be a conviction of a serious violent offence under section 161B.
>
> (3) For subsection (2), whether the offender is sentenced to the specified years of imprisonment must be calculated as at the day of sentence.[301]

### 5.1.1 Calculation only applies to sentences imposed on the same day: *R v Powderham* [2002] 2 Qd R 417; (2001) 124 A Crim R 514; [2001] QCA 429

In *R v Powderham* ('*Powderham*'),[302] the applicant was sentenced to 9 years' imprisonment for an offence of manslaughter and a concurrent term of 4 years' imprisonment for arson. The manslaughter and arson were committed while Mr Powderham was on parole for offences, including burglary,[303] for which he had been previously sentenced to 3 years' imprisonment. Section 156A of the Act provides that the 9 year term of imprisonment must be served cumulatively on the 3 year term.

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301 Emphasis added.
302 [2002] 2 Qd R 417; (2001) 124 A Crim R 514; [2001] QCA 429 ('*Powderham*').
303 An offence in Schedule 1.

The sentencing judge made an SVO declaration because her Honour was of the view that it automatically followed the imposition of an effective 12-year sentence for Schedule 1 offences.[304] The sentencing judge made it clear that, but for its automatic application, a declaration would not have otherwise been made for the manslaughter offence[305] The applicant challenged this interpretation of section 161C.

The Court concluded that, given that the uncertainty and ambiguity of section 161C (particularly the words 'the day of sentence'), and given that the imposition of an SVO declaration is penal and prejudicial, the provision should be construed narrowly to only include those sentences imposed on the **same day**.[306]

The appeal was allowed and the SVO declaration set aside.

### 5.1.2 Affirming *Powderham*: *R v Dutton* [2005] QCA 17

In *R v Dutton*,[307] the Court of Appeal affirmed the position in *R v Powderham.*

The applicant was sentenced to terms of imprisonment totalling an effective 10 years, for one count of sexual assault, one count of rape, one count of exposing an intellectually impaired person to an indecent act, two counts of indecent acts in a public place, one count of attempted rape, one count of sexual assault with an aggravating circumstance, one count of going armed so as to cause fear, and one count of wilful damage.

The sentence for the rape was 7 years' imprisonment with an SVO declaration. The sentences for six of the offences (involving different complainants) were made concurrent with each other but cumulative on the 7 year rape sentence. Because one of those six offences (an attempted rape, for which he received a sentence of 3 years) is in Schedule 1 of the Act, section 161C of the Act was enlivened and the applicant had to serve 80 per cent of the whole 10 year period.[308] This was not what the sentencing judge had intended (his Honour had intended to confine the SVO declaration only to the 7-year sentence) and this amounted to an error.[309]

The Court of Appeal, in re-sentencing, fashioned the sentence to preserve the intention of the sentencing judge. The sentences of 3 years' imprisonment imposed on three of the offences, which were made cumulative on the 7-year sentence, were reduced to 2.5 years' imprisonment. This meant that the applicant would be eligible for parole after serving approximately 6 years and 10 months (nearly 7 years) in custody.[310]

### 5.1.3 Cumulative sentences imposed on separate dates can exceed 15-year non-parole period: *R v Lacey* [2013] QCA 292

Although the SVO scheme sets a 15 year 'ceiling' on an offender's parole eligibility date (80%, of 15 years, whichever is less),[311] an offender's parole eligibility date may exceed this. The application of a later parole eligibility date (that is, one beyond 15 years or 80% of the sentence imposed for the offence declared as being an SVO) is expressly contemplated by sections 182(3) and 182(4) of the *Corrective Services Act 2006* (Qld) ('CSA'). Section 182(3) provides:

> Despite subsections (2) and (2A), if a later parole eligibility date is fixed for the period of imprisonment under the *Penalties and Sentences Act 1992*, part 9, division 3, the prisoner's parole eligibility date is the later date fixed under that division.

Section 182(4) states that this general rule is subject to section 185 — which sets out how a prisoner's parole eligibility date is to be determined where two or more provisions governing this under the CSA (being ss 182, 182A, 183 and 184) would otherwise apply.

The circumstances in which parole eligibility might extend beyond 15 years or 80 per cent of the sentence attracting the SVO declaration include:

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304 Burglary and commit an indictable offence (section 419(4) of the Criminal Code) and manslaughter are both listed in sch 1 of the *Penalties and Sentences Act 1992* (Qld).

305 *Powderham* (n 302) 418 [3] (McPherson JA, Chesterman and Douglas JJ agreeing).

306 Ibid 417, 422 (McPherson JA, Chesterman and Douglas JJ agreeing).

307 [2005] QCA 17.

308 *R v Dutton* [2005] QCA 17, [14] (McPherson JA, McMurdo P and Jerrard JA agreeing), applying *Powderham* (n 302).

309 Ibid. The sentencing judge had intended that the applicant be eligible for parole after serving 7 years and 1 month (80% of 7 years plus one-half of 3 years), as opposed to 8 years (80% of 10 years).

310 Because the effective sentence is less than 10 years, section 161C is not enlivened. The applicant will be eligible for parole after serving 80 per cent of the 7 year sentence (approximately 5 years and 7 months) because the SVO declaration on that offence remains, followed by 50 per cent of 2.5 years (1 year and 3 months).

311 *Corrective Services Act 2006* (Qld) s 182(2). Different rules apply under s 182(2A) where an offender is convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation and the offender is sentenced to a term of imprisonment for a serious violent offence under s 161R(2) of the *Penalties and Sentences Act 1992* (Qld).

- where an offender is sentenced to imprisonment for an offence or offences with an SVO declaration ordered to be served cumulatively on an existing sentence of imprisonment the offender is already serving, and where an offender is already subject to an SVO declaration, and the offender is sentenced to imprisonment for a new offence that is ordered to be served cumulatively.

This was the outcome in case of *R v Lacey*.[312] Dionne Lacey was sentenced in 2009 to 10 years' imprisonment for manslaughter, which was an effective 12-year sentence because there was 2 years of non-declarable pre-sentence custody. He and his brother Jade Lacey attended a home for the purposes of a drug transaction, and Dionne shot a man and killed him.

Dionne was subsequently sentenced in 2010 to 6 years' imprisonment with an SVO declaration,[313] to be served cumulatively on the 10 year term of imprisonment. This resulted in an effective sentence of 18 years (two years of non-declarable custody, 10 years' imprisonment and 6 years' imprisonment), with parole eligibility after having served 14.8 years.[314] The facts in relation to the 6-year sentence were that Dionne and his brother entered a home in relation to a drug transaction. They assaulted a man with baseball bats and demanded $13,000 accompanied by threats to kill. When he did not pay, they ordered him to dig his own grave and Jade assaulted him by shooting the gun near his head multiple times and shot the man through his hand. They detained him overnight and drove him to various places to obtain money from him, before dropping him at a service station. During this offending Jade also fired a handgun in the direction of an associate's girlfriend. The 6-year sentence attached to an offence of torture, with lesser concurrent sentences for the other offences.[315]

In 2013, Dionne was sentenced for several offences including three armed robberies, in company, with personal violence. He and his brother conducted a drug trafficking business. During a drug transaction, Dionne produced a handgun and threatened three victims. One of the victim's legs was grazed by a bullet after Dione discharged the firearm. For the three offences of armed robbery, Dionne was sentenced to terms of 2 years' imprisonment to be served concurrently with each other but cumulatively on the effective 18-year sentence,[316] making it an effective 20-year sentence with parole eligibility after 16.4 years.[317]

Section 182(2) of the CSA provides that the parole eligibility date under an SVO declaration is the lesser of 80 per cent of the term of imprisonment or 15 years. The imposition of cumulative sentences across three sentencing dates resulted in the curious result that his non-parole period could lawfully be greater than 15 years. Had he been sentenced for all the offences at one time and received a head sentence equal to or less than 18 years and 8 months,[318] or had he even pleaded guilty to murder instead of manslaughter,[319] he may have been eligible to apply for parole after serving 15 years.

The majority of the Court of Appeal upheld the effective 20 year sentence with parole eligibility after serving 16.4 years on this basis:

> In the assessment of whether there was good reason to impose a cumulative sentence, the seriousness of the applicant's present offending outweighed his youth and the potential impact of further punishment on his rehabilitation prospects. But his youth and the effect on his rehabilitation prospects remained relevant to the determination of by how much the existing period of imprisonment should be extended.
>
> The sentencing judge moderated the sentences she considered would have been appropriate had the totality principle not loomed so large. The sentences her Honour imposed, which increased his period of imprisonment by two years and increased the period before which he will be eligible for parole by about 19 months, were just and appropriate in all the circumstances.[320]

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312 [2013] QCA 292.

313 The SVO declaration was made with respect to the offences of: assault occasioning bodily harm whilst armed and in company; threatening violence at night; and torture.

314 2 years of non-declarable pre-sentence custody plus 80 per cent of 16 (12.8) years.

315 There was also an offence of wounding with intent, for which the applicant was convicted and not further punished because the criminality was encompassed in the torture offence.

316 The other sentences imposed at the same time, to be served concurrently with each other and the previous sentences, included: 5 years' imprisonment for trafficking in dangerous drugs and 15 months for assault occasioning bodily harm. He was convicted and not further punished for possessing cocaine and mobile telephones.

317 2 years of non-declarable pre-sentence custody plus 80 per cent of 16 (12.8) years plus 80 per cent of 2 years (1.6 years).

318 80 per cent of 18 years and 8 months is 15 years.

319 Until 2012, the minimum non-parole period for murder was 15 years. It was increased to 20 years pursuant to *Corrective Services Act 2006* (Qld) s 181(2)(c), as amended by *Criminal Law Amendment Act 2012* (Qld) s 7.

320 *R v Lacey* [2013] QCA 292, [59]–[60] (Wilson J, Douglas J agreeing, McMurdo P dissenting).

### 5.1.4 Endorsement of cumulative sentences: *R v RBD* [2020] QCA 136

*R v RBD*[321] involved multiple offences to which SVO declarations attached, and the imposition of cumulative sentences.

The complainant ended her relationship with the applicant. The following day, the applicant commenced a course of offending against her by choking her while she slept, causing her to lose consciousness, and sexually assaulting her whilst she was unconscious. The applicant was charged with this offending one week later and granted bail on the condition that he not contact the complainant. The applicant stalked the complainant for a month by contacting her by telephone, social media and by breaking into her home on multiple occasions. One month after the choking and sexual assault, the applicant broke into the complainant's unit and locked the complainant's friends in a spare room. He brought a knife into the bedroom where the complainant was sleeping and punched her face until she lost consciousness and lost control of her bladder. He removed her clothing and sexually assaulted her whilst unconscious. He then carried the complainant to his vehicle outside whilst she was semi-conscious and naked and bound her wrists and covered her mouth with duct tape. He drove for several hours before raping her. Approximately 12 hours after the ordeal began, police located the applicant's vehicle and pursued it. The applicant drove off the side of a mountain range and the vehicle rolled down an embankment. The complainant suffered significant injuries including fractures to vertebrae, bruising and swelling to the face and neck. The applicant was also convicted of several summary offences including contraventions of a domestic violence order, breaches of bail and dishonesty offences.

The sentencing judge imposed cumulative sentences for three 'sets' of offending, with SVO declarations on all the Schedule 1 offences:

- 2 years' imprisonment for the sexual assault (with an SVO declaration) and a 2 year concurrent sentence for the choking;
- 8 years' imprisonment for the rape and burglary offences, both with SVO declarations (and lesser concurrent terms of imprisonment for other offences on that date); and
- 2 years' imprisonment for the dangerous operation of a vehicle with an SVO declaration.

Practically, this meant that the applicant would only be eligible to apply for parole after serving 9.6 years of a 12-year sentence.

The sentencing judge discussed what his Honour would have otherwise imposed for each offence alone, and the discounting exercise his Honour had undertaken to fashion a cumulative sentence that wasn't crushing.[322] In discussing the appropriate sentence, his Honour concluded that it was most appropriate that the sentences be made cumulative as a matter of 'sentencing principle' and as a matter of general deterrence to those who continue to offend.[323]

The applicant submitted to the Court of Appeal that the overall sentence ought to have been reduced to one of 10 years to reflect that the applicant would not be eligible for parole until serving 80 per cent for the other offences that did not attract an SVO declaration. This argument was not accepted by the Court of Appeal.[324]

The Court of Appeal agreed with the sentencing judge's approach and found that the sentence, while heavy for a young man with minor criminal history, was not manifestly excessive given the seriousness of the offending.[325]

### 5.1.5 Care to be taken where offences pre-date the SVO scheme: *R v Stable* (a pseudonym) [2020] QCA 270

In *R v Stable* (a pseudonym),[326] the applicant pleaded guilty to 20 sexual offences, committed over four periods of time: 1985 – 1989 (offences against his daughter); between 2008 and 2009 (an offence against his daughter); 2012-2014 (offences against two of his granddaughters); and 2016-2017 (offences against his daughter and three granddaughters).

The sentencing judge ordered that he serve cumulative sentences of: 5.5 years' imprisonment for an offence of attempted carnal knowledge on a date between 1988 and 1989; 3.5 years' imprisonment for an offence of carnal

321 [2020] QCA 136.
322 Ibid [23]–[26], [31] (Jackson J).
323 Ibid [30].
324 Ibid [41].
325 Ibid [42].
326 [2020] QCA 270.

knowledge on a date between 2008 and 2009; and three years' imprisonment for a number of offences committed between 2017 and 2018. [327] The total effective sentence was 12 years' imprisonment. The judge sentenced on the erroneous basis that an automatic SVO declaration had been made[328] and the applicant would be required to serve 9.6 years (80% of 12 years) and therefore did not set a parole eligibility date. In fact, because the offences for which he was sentenced to 5.5 years' imprisonment pre-dated the introduction of the SVO scheme and because there were no discretionary SVO declarations made for the other terms of imprisonment,[329] the '80 per cent rule' did not apply to the sentence and he was eligible for parole after serving one half of the cumulative sentence (6 years).[330]

The Court of Appeal noted that a notional 12-year sentence with parole eligibility after serving 80 per cent was well within the appropriate range of penalties for this offending. The Court granted leave to appeal and adjourned the disposition of the appeal to a date to be fixed. It was adjourned on the expectation that the appeal would be withdrawn because, if withdrawn, the applicant would only have to serve 6 years until becoming eligible for parole. However, if they were to continue with the appeal, he would in fact be re-sentenced by the Court of Appeal to a much more severe non-parole period.[331]

## 5.2 Calculation of the parole eligibility date

**Summary of the law**: The parole eligibility date of 80 per cent (or 15 years, whichever is less) applies only to offences that are declared to be serious violent offences. The usual rules governing parole eligibility apply to other sentences ordered to be served cumulatively. *R v Woods* [2014] QCA 341; *Corrective Services Act 2006* (Qld) s 185.

### 5.2.1 Parole eligibility date where there is an SVO and a non-SVO: *R v Woods* [2014] QCA 341

In 2014, the appellant successfully appealed his convictions for burglary and wounding.[332]

In 2015, the appellant was found guilty at a re-trial. The facts of the offending on which the appellant was ultimately convicted and sentenced, and the consideration of the relevance of the appellant's criminal history to the ultimate sentence and imposition of an SVO declaration, are set out in the discussion of the 2016 Court of Appeal decision of *R v Woods* set out in section 3.2.6 of this paper.[333]

This section considers the 2014 appeal decision because it contains a statement of principle in relation to the applicability of legislation pertaining to cumulative sentences. The appellant was sentenced in 2014 to 14 years' imprisonment[334] for offences of entering a dwelling with intent to commit an indictable offence and wounding with intent to disfigure. This sentence attracted an automatic SVO declaration. He was also sentenced to 3 years' imprisonment for some burglary offences[335] and the 3 years was ordered to be served cumulatively on the 14 years. The sentencing judge, on advice from the Crown prosecutor, did not fix a parole eligibility date on the erroneous understanding that the '80 per cent' would apply to the whole of the aggregate 17-year sentence. However, section 185 of the CSA operates to apply eligibility after serving 80 per cent (or 15 years, whichever is less) to the offence with an SVO declaration only and a parole release date[336] must be imposed on the 3-year sentence in order for it be a lawful sentence. The Court of Appeal, in re-sentencing, maintained the head sentence and imposed a parole release date after serving one-half of the 3-year sentence.

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327 With lesser terms of imprisonment for other offences.
328 *Penalties and Sentences Act 1992* (Qld) s 161C.
329 Ibid ss 161A, 161B.
330 *Corrective Services Act 2006* (Qld) s 184.
331 The Court of Appeal applied the High Court's decision in *Neal v The Queen* (1982) 149 CLR 305, 308.
332 *R v Woods* [2014] QCA 341.
333 *R v Woods* [2016] QCA 310.
334 This was not the sentence that the appellant received after his subsequent conviction on retrial: see *R v Woods* [2016] QCA 310.
335 There were 49 offences, none of which attracted an SVO declaration, for which the appellant received several concurrent sentences, the highest of which was 3 years. This 3-year cumulative sentence was not successfully appealed in 2014, and remained a cumulative sentence imposed after the re-trial: *R v Woods* [2016] QCA 310.
336 It must be a parole release date, as opposed to an eligibility date: *Penalties and Sentences Act 1992* (Qld) s 160B.

The example given in section 185 of the CSA provides an illustration of how this would apply where cumulative sentences of greater than three years[337] are imposed for one offence with an SVO declaration and another offence without an SVO declaration:

> A prisoner is serving a period of 13 years imprisonment, comprising a term of 8 years imprisonment for a serious violent offence and a term of 5 years imprisonment for an offence that is not a serious violent offence which was ordered to be served cumulatively with the term of imprisonment for the serious violent offence. Applying rule 1, the prisoner's notional parole date is the day after the period of 6.4 years the prisoner must serve before reaching the prisoner's parole eligibility date for the serious violent offence under section 182. Rule 2 is then applied. The period the prisoner must serve before reaching the prisoner's parole eligibility date for the second offence is 2.5 years under section 184. Rule 3 requires the periods of 6.4 years and 2.5 years to be added together. In this example, the prisoner's parole eligibility date is the day after the day on which the prisoner has served the period of 8.9 years.

337 The significance of 3 years is that, where a sentence is greater than 3 years and is not a serious violent offence or sexual offence, a parole eligibility date (as opposed to a parole release date) must be imposed: *Penalties and Sentences Act 1992* (Qld) s 160C.

# 6 Practical questions of the application of the scheme

## 6.1 The SVO scheme does not apply retrospectively

**Summary of the law:** An offender who commits an offence pre-1 July 1997 cannot be convicted of a serious violent offence. *R v Inkerman & Attorney-General of Queensland* [1997] QCA 316; *R v Mason and Saunders* [1998] 2 Qd R 186

The Court of Appeal has clarified that the SVO scheme applies only to offences committed post the scheme coming into effect on 1 July 1997.

### 6.1.1 *R v Coghlan* [1998] 2 Qd R 498; [1997] QCA 270; *R v Inkerman & Attorney General of Queensland* [1997] QCA 316

The first Court of Appeal decision to consider the application of section 161A of the Act was *R v Coghlan*.[338] The applicant was sentenced on 10 March 1997 to 14 years' imprisonment for 3 counts of rape and lesser concurrent terms for several other offences. He appealed the sentence which was heard on 20 June 1997 and reasons delivered on 5 September 1997. The Court of Appeal considered whether the Amending Act (which came into operation after his conviction) applied to the parole eligibility date. It was held that the applicant was not convicted of a serious violent offence because he was convicted before the commencement date of 1 July 1997.[339] In reaching this conclusion, the Court determined that the SVO scheme does not apply retrospectively to sentences for offences committed prior to the Amending Act coming into force.[340]

The same position confirming the scheme does not have retrospective application was taken in *R v Inkerman & Attorney-General of Queensland* ('*Inkerman*').[341] Inkerman was convicted of an offence of rape committed on 12 August 1995. He was sentenced to 6 years' imprisonment and an SVO declaration was made. The Court had regard to the statutory presumption against the retrospective operation of laws in section 11(2) of the Criminal Code which says:

> If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender cannot be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law.

The Court of Appeal could find no indication in the Amending Act of an intention for the SVO provisions to apply to offences committed prior to the enactment.[342] Inkerman's application to appeal was allowed and the SVO declaration was removed.

### 6.1.2 *R v Mason and Saunders* [1998] 2 Qd R 186

The decision in *Inkerman* was affirmed in the subsequent decision of *R v Mason and Saunders*.[343] Mason and Saunders were sentenced after 1 July 1997 for offences committed prior to 1 July 1997. The Court of Appeal held that the Amending Act did not apply to offences committed before 1 July 1997, other than in circumstances where the sentence imposed after 1 July 1997 was cumulative on a sentence imposed prior to 1 July 1997 (and the total cumulative period of imprisonment was 10 years or more).[344]

338 [1998] 2 Qd R 498; [1997] QCA 270.
339 Ibid 508–9 (Helman J, Demack and Mackenzie JJ agreeing).
340 The Court of Appeal came to the same view in *R v Sayers & Frost* [1997] QCA 274.
341 [1997] QCA 316 ('*Inkerman*').
342 Ibid 2–3 (Pincus JA, McPherson JA and de Jersey J agreeing).
343 [1998] 2 Qd R 186.
344 *R v Mason and Saunders* [1998] 2 Qd R 186, 188. As to the issue of cumulation, see *Powderham* discussed at 5.1.2.

## 6.2 Where there is a continuing offence that is both pre and post 1 July 1997

**Summary of the law:**

Where there is a continuing offence which commences prior to 1 July 1997 and continues after 1 July 1997, the SVO scheme *may* apply to the offence taken as a whole. *R v Ianculescu* [2000] 2 Qd R 521; *R v H* [2001] QCA 167; *R v P; Ex parte Attorney-General* (Qld) [2001] QCA 188

A continuing offence, as opposed to a discrete offence, is an offence constituted by a course of conduct and/or continuous activity over a period.[345] Examples in Queensland include trafficking in dangerous drugs and maintaining a sexual relationship with a child.

The general principle that applies is that even where some acts committed as part of the course of conduct or continuous activity prior to the scheme come into operation, the SVO provisions can still be applied to the offending as a whole.

### 6.2.1 Trafficking in dangerous drugs: *R v Ianculescu* [2000] 2 Qd R 521; [1999] QCA 439

The Court of Appeal first considered this issue in *R v Ianculescu* (*'Ianculescu'*),[346] which involved an appeal against a sentence of 10 years' imprisonment. The period of drug trafficking with which he was charged started prior to the enactment of the Amending Act and concluded after. Two of the three judges of the Court of Appeal agreed that a continuing offence of unlawfully trafficking in a dangerous drug was to be regarded as one committed throughout the period, and accordingly the SVO scheme must apply to the whole of the offence.[347] The third judge did not decide the issue (but would have reduced the sentence to 8 years' imprisonment and set aside the SVO declaration).[348] The appeal was allowed only to the extent that it set aside the sentences on the related supply counts which were particulars of the trafficking offence. The sentence of 10 years' imprisonment in relation to the trafficking offence was not disturbed.

### 6.2.2 Maintaining a sexual relationship with a child: *R v H* [2001] QCA 167; *R v P* [2001] QCA 188

Two years later, the Court of Appeal had regard to the decision in *Ianculescu* in two judgments with respect to the offence of maintaining a sexual relationship with a child ('maintaining offence') where the offending commenced prior to 1 July 1997 and ended after 1 July 1997.

In *R v H*,[349] Thomas JA (with whom the other four judges agreed) applied the principle from *Ianculescu*.[350]

In *R v P; Ex parte Attorney-General (Qld)*,[351] P appealed against sentence. P was sentenced to several concurrent terms of imprisonment with a head sentence of 17 years' imprisonment for two maintaining offences, each with a circumstance of aggravation. Both maintaining offences commenced prior to 1 July 1997 and ended after 1 July 1997. At that time, maintaining offences required proof of three or more separate sexual offences having been committed. It was argued on behalf of the respondent that this distinguished maintaining offences from the trafficking offence that was considered in *Ianculescu*. In delivering the lead judgment, McMurdo P had regard to *R v H* and noted that it was unclear from that judgment whether at least three sexual offences occurred after 1 July 1997 during that maintaining offence. The Court in *R v P; Ex parte Attorney-General (Qld)* noted that there 'may be some merit'[352] in the respondent's argument and ultimately found that the SVO scheme only applied to one of the maintaining offences where there was some evidence to support proof of three or more sexual offences after 1 July 1997. The Court noted that there was no practical consequence to the scheme not applying to one of the two maintaining offences because the scheme applied to the other.

345 *R v Ianculescu* [2000] 2 Qd R 521 ('*Ianculescu*'), 527 [38], 528 [44] (Cullinane J).
346 Ibid.
347 Ibid in Headnote (Ambrose J and Cullinane J, Pincus JA not deciding).
348 Ibid.
349 [2001] QCA 167.
350 [2000] 2 Qd R 521.
351 [2001] QCA 188.
352 Ibid [33].

In both *R v H* and *R v P; Ex parte Attorney-General (Qld)*, the Court of Appeal noted that in matters involving continuing offences, it 'would not be appropriate for the Court to engage in a discounting exercise in respect of sentencing for acts committed before 1 July 1997'.[353]

## 6.3 Where offences were committed pre and post 1 July 1997

**Summary of the law:**

An offender who is convicted of an offence committed pre-1 July 1997 cannot be declared convicted of a serious violent offence. An offence committed post-1 July 1997 can result in that conviction being declared one for a serious violent offence.

If pre and post 1 July 1997 offending is sentenced at the same time and the terms of imprisonment are cumulative, resulting in a sentence of 10 years or more, an SVO declaration must be made for the post-1 July 1997 offence. Parole will not be granted until the first sentence is served and then 80 per cent of the second sentence (instead of 80 per cent of the total sentence).

*R v Robinson; Ex parte Attorney-General* [1999] 1 Qd R 670; [1998] QCA 107; *R v Gilchrist* [1998] QCA 273

The following cases considered how the scheme applies when there is offending pre- and post-1 July 1997.

As referred to in Background Paper 1, prior to the enactment of the Amending Act, there were various remission systems in place whereby a prisoner could be released earlier than the end date of their sentence on the grounds of good behaviour. From 1997, a prisoner declared convicted of an SVO was not eligible to have their sentence remitted.[354]

The considerations for a decision-maker to exercise their discretion to grant a remission were discussed in *McCasker v Queensland Corrective Services*.[355] It was held:

> (1) That it would be an improper exercise of the discretion under the Regulation to refuse a remission to a prisoner whose conduct and industry had both been good, when there was nothing of substance before the decision-maker indicating that the risk to the community on the prisoner's release would be above an acceptable level.
>
> (2) That if the decision-maker reached the conclusion, on proper grounds based on an overall assessment of the prisoner's conduct in prison viewed **in the light of his past behaviour**, that the risk to the community of his release went beyond what was acceptable, that was a matter relevant to the decision.[356]

There is an added complexity due to the definition of 'cumulative sentences' under the since repealed *Corrective Services Act 1988* (Qld) and *Corrective Services Act 2000* (Qld) as well as the *Corrective Services Act 2006* (Qld) currently in force. Each of those Acts provide that a cumulative term of imprisonment starts at the end of the first term of imprisonment, taking into account any remission granted in relation to the first term.[357]

### 6.3.1 Where this is pre and post 1 July 1997 offending sentenced at the same time: *R v Robinson; Ex parte Attorney-General* [1999] 1 Qd R 670; [1998] QCA 107

In *R v Robinson; Ex parte Attorney-General,*[358] the Court of Appeal considered the application of the SVO scheme to cumulative sentences for pre- and post-1 July 1997 offending. The respondent was sentenced on 17 February 1998 in respect of two groups of offences:

- First group: one count of rape (6 years' imprisonment) and one count of deprivation of liberty (2 years' imprisonment, to be served concurrently) - committed on 10 May 1997, prior to the Amending Act.
- Second group: one count of indecent assault (5 years' imprisonment) and one count of deprivation of liberty (2 years' imprisonment, to be served concurrently) - committed on 13 November 1997, after the Amending Act.

353 *R v H* [2001] QCA 167, 8; *R v P; Ex parte A-G* (Qld) [2001] QCA 188, [34] quoting *R v H* [2001] QCA 167, 8.
354 Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld) cl 161D.
355 [1998] 2 Qd R 261.
356 Ibid in headnote (Macrossan CJ and Helman J. Pincus JA dissenting) (emphasis added).
357 *Corrective Services Act 1988* (Qld) s 122, as repealed by *Corrective Services Act 2000* (Qld) s 81, as repealed by *Corrective Services Act 2000* (Qld) s 109.
358 [1999] 1 Qd R 670; [1998] QCA 107.

The sentence for the second group was cumulative on the first group, resulting in a sentence of 11 years' imprisonment.

The sentencing judge questioned whether the term 'specified years imprisonment' in section 161C of the Act referred to the term of imprisonment ordered on each sentence or to the cumulative number of years of imprisonment. Her Honour concluded it was the term of imprisonment for a single offence and gave the respondent a parole eligibility date after 4 years was served.

The Attorney-General appealed the sentence on the basis that the respondent was sentenced to '10 or more years' imprisonment for 'the offence' within the meaning of sections 161A(a)(ii) and 161C of the Act and therefore a declaration should have been made with respect to the 5 years' imprisonment imposed for the post-1 July 1997 offending.

The Court of Appeal allowed the appeal and held that, on a proper reading of the provisions of the *Corrective Services Act 1988* (Qld)[359] and the transitional provisions of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld):[360]

> Unless the sentences are altered to a cumulative term of less than 10 years' imprisonment, there must be a declaration that the conviction for indecent assault (the offending post-1 July 1997) was a conviction of a serious violent offence.[361]
>
> If the 11-year sentence was not disturbed, and the respondent was not granted parole by the Parole Board, the respondent may have been required to serve the whole of the initial term of six years' imprisonment (or, at best, four years if he was granted a one-third remission) before the five-year sentence commenced.[362]
>
> The order of the sentencing judge of parole eligibility after serving four years was invalid at law and the Court of Appeal must re-sentence.[363]

Upon the re-exercise of its sentencing discretion, the Court of Appeal formed the view that the appropriate cumulative sentence was one of 9 years' imprisonment (6 years' imprisonment for the first set of offending not disturbed; 3 years in lieu of 5 years' imprisonment for the second set of offending). With no recommendation for parole, the practical effect was that the respondent was eligible for parole after serving 4.5 years' imprisonment.[364] Because that cumulative sentence was less than 10 years' imprisonment, there was no automatic SVO declaration. No discretionary SVO declaration was made.

## 6.4 Conclusion

This section has summarised key Court of Appeal decisions that have guided sentencing courts in the making of an SVO declaration under Part 9A of the PSA, sentencing under the scheme and how the SVO provisions are intended to be applied.

Part B of this paper explores how sentencing courts have applied these principles based on sentencing remarks examined by the Council over a two-year period. The outcome of sentencing appeals is also reported where this is known.

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359 Since repealed by the *Corrective Services Act 2000* (Qld), repealed by the *Corrective Services Act 2006* (Qld).
360 Section 206 (2). See *R v Robinson; Ex parte A-G* [1999] 1 Qd R 670, 670-1 (headnote).
361 Ibid 679. A differently constituted Court of Appeal in *R v Gilchrist* [1998] QCA 273 considered *R v Robinson; Ex parte A-G* [1999] 1 Qd R 670 and agreed with the Court's decision in *Robinson*.
362 Ibid 680-681 (Pincus JA and White J).
363 Ibid 672.
364 Ibid 681. The applicant would be required to serve one-half before being eligible for parole.

# PART B: Analysis of select District and Supreme Court of Queensland sentencing remarks

# 7 Introduction

## 7.1 Methodology

To better understand how the SVO scheme impacts on court sentencing practices, the Council analysed sentencing remarks for cases sentenced over the period 1 January 2019 to 28 February 2021 published on the Queensland Sentencing Information Service (QSIS) database. The QSIS database contains a collection of linked sentencing-related information, including the full text of revised sentencing remarks from the Supreme and District Courts dating back to 1999.[365]

The methodology adopted and search parameters are set out in Appendix 1.

This analysis examined factors expressly mentioned in the cases reviewed, with a focus on whether an SVO declaration was sought by the Crown, whether the declaration was made and if so, if its making was automatic or discretionary, as well as any relevant explanation as to how the existence of the scheme influenced the court in approaching sentencing. Information about whether judicial officers articulated the purposes of the SVO scheme and what purposes were most frequently mentioned was also captured.

The case overview below refers to the analysis completed by the 'MSO' or 'most serious offence'. This is the offence that received the most serious sentence, as ranked by the classification scheme used by the Australian Bureau of Statistics.[366] In circumstances where multiple charges attracted the same penalty, the MSO was determined by the offence type that ranked as being most serious under the National Offence Index (NOI) (i.e. the charge with the highest ranked Australian and New Zealand Standard Offence Classification code on the NOI).

## 7.2 Limitations

As with its previous work, the Council acknowledges the limitations associated with analysing sentencing remarks. In particular, sentencing remarks do not contain a comprehensive list of matters taken into account by judges in sentencing — just those expressly mentioned — and do not necessarily reflect matters raised in sentencing submissions and discussed during the sentencing hearing.

However, as part of a mixed-methods research design, sentencing remarks supplement purely data-driven analyses, providing a rich source of additional information about the operation of the SVO scheme.

The QSIS database also does not include all sentencing remarks delivered over the relevant period. Its contents are limited to those sentencing remarks that are submitted for inclusion in the database. To this extent, findings based on this analysis may be not be generalisable to the approach taken by all judicial officers to the making of an SVO declaration.

# 8 Overview of case characteristics

## 8.1 Queensland Supreme Court SVO cases

The 76 Supreme Court cases coded involved 88 defendants:

- 66 cases involved a single defendant;
- 8 cases involved 2 defendants;
- 2 cases involved 3 defendants.

The sentences imposed by 18 Supreme Court justices ranged from 3 years to 17.5 years.

The most common MSO in these cases was trafficking in dangerous drugs (n=35), followed by manslaughter (n=22), malicious act with intent (n=13) and attempted murder (n=10) — see Table 1. The majority of declarations made were as a result of the sentence length being 10 years or more, and the automatic application of the scheme.

365 Queensland Sentencing Information Service, *QSIS User Guide* (Queensland Department of Justice and Attorney-General, 2007) 5.

366 See 'Appendix 3 (Sentence Type Classification)' to the explanatory notes for Australian Bureau of Statistics, *Criminal Courts, Australia, 2018-19* (27 February 2020).

**Table 1: Most serious offence by frequency, Queensland Supreme Court, sentencing remarks analysis 1 February 2019 to 28 February 2021**

| Most serious offence (MSO) [defendant count] | No. of defendants | No. SVO declarations made | Automatic | Discretionary |
|---|---|---|---|---|
| Trafficking in dangerous drugs (*Drugs Misuse Act 1986* (Qld) s 5) | 35 | 10 | 10 | N/A |
| Manslaughter (Criminal Code, ss 303, 310) | 22 | 11 | 9 | 2 |
| Acts intended to cause GBH and other malicious acts (Criminal Code, s 317) | 13 | 2 | - | 2 |
| Attempted murder (Criminal Code, s 306) | 10 | 8 | 8 | N/A |
| Armed robbery (Criminal Code, s 411(2) | 2 | 0 | N/A | N/A |
| Grievous bodily harm (Criminal Code, s 320) | 2 | 0 | N/A | N/A |
| Accessory after the fact to manslaughter (Criminal Code ss 10, 545) | 2 | 0 | N/A | N/A |
| Rape (Criminal Code, s 349) | 2 | 2 | 2 | N/A |
| Total | **88** | **33** | **29** | **4** |

## 8.2 Queensland District Court SVO cases

The 135 District Court cases coded involved 141 defendants:

- 129 cases involved a single defendant;
- 3 cases involved 2 defendants;
- 2 cases involved 3 defendants.

The sentences imposed by 34 District Court judges ranged from a 2-year sentence, suspended after 12 months to a 19-year sentence.

The most common MSO in these cases was rape (n=37 defendants), followed by maintaining a sexual relationship with a child (n=35 defendants), malicious act with intent and grievous bodily harm (n=16 defendants each), and armed robbery (n=11 defendants) — see Table 2.

The offences of maintaining a sexual relationship with a child (n=27) and rape (n=16) represented the majority of SVO declarations made among the cases coded (75.3%). All 27 of the SVO declarations made for maintaining a sexual relationship with a child were as a result of the automatic operation of the SVO scheme, while in the case of rape, 11 were applied automatically due to the length of sentence imposed, and five were made as a matter of discretion.

**Table 2: Most serious offence by frequency, Queensland District Court, sentencing remarks analysis 1 February 2019 to 28 February 2021**

| Most serious offence (MSO) [defendant count] | No. of defendants | No. SVO declarations made | Automatic declaration | Discretionary declaration |
|---|---|---|---|---|
| Maintaining a sexual relationship with a child under 16 yrs (Criminal Code, s 229B) | 37 | 27 | 27 | - |
| Rape (Criminal Code, s 349) | 37 | 16 | 11 | 5 |
| Acts intended to cause GBH and other malicious acts (Criminal Code, s 317) | 16 | 5 | 1 | 4 |

| Most serious offence (MSO) [defendant count] | No. of defendants | No. SVO declarations made | Automatic declaration | Discretionary declaration |
|---|---|---|---|---|
| Grievous bodily harm (Criminal Code, s 320) | 16 | 2 | | 2 |
| Armed robbery (Criminal Code, s 411(2) | 11 | 2 | - | 2 |
| Torture (Criminal Code, s 320A) | 7 | 2 | - | 2 |
| Dangerous operation of a motor vehicle causing death (Criminal Code, s 328A(4)) | 4 | 1 | - | 1 |
| Attempted armed robbery (Criminal Code, s 412) | 2 | 1 | - | 1 |
| Kidnapping (Criminal Code, s 354) | 2 | 0 | N/A | N/A |
| Taking child under 12 for immoral purposes (Criminal Code, s 219(3) | 2 | 0 | N/A | N/A |
| Assault occasioning bodily (circumstance of aggravation - while armed) (Criminal Code, s 339(3)) | 1 | 0 | N/A | N/A |
| Attempted carnal knowledge (Criminal Code, ss 215 and 536) | 1 | 1 | - | 1 |
| Burglary (Criminal Code, s 419) | 1 | 0 | N/A | N/A |
| Disabling with intent to commit indictable offence (Criminal Code, s 315) | 1 | 0 | N/A | N/A |
| Extortion (Criminal Code, s 415) | 1 | 0 | N/A | |
| Sexual assault (Criminal Code, s 352) | 1 | 0 | N/A | N/A |
| Unlawful wounding (Criminal Code, s 323) | 1 | 0 | N/A | N/A |
| Total | **141** | **57** | **39** | **18** |

# 9 Impact on sentencing approach

## 9.1 General comments on the impact of the scheme

The impacts of the SVO scheme on the sentencing process were summarised by one sentencing judge in a case involving charges for drug trafficking as threefold, with the comment made that problems with the scheme 'largely disappear' once the sentence falls under 10 years and the making of the declaration therefore is not automatic:

> The major complication is that, if a sentence of more than 10 years is imposed on count 1, a serious violent offence declaration must be made and you would be required to serve 80 per cent of the sentence before being eligible for parole. That has various consequences.
>
> Firstly, it means that the Court cannot reflect the mitigating circumstances by making an early recommendation for release on parole.
>
> Secondly, it is only count 1 on the indictment, which is capable of attracting the serious violent offence declaration. Therefore, if a global sentence is imposed on count 1 to reflect criminality of the other counts, then you are being disadvantaged if a serious violent offence declaration occurs because that declaration will attach to the other offences.
>
> As explained by the Court of Appeal in *R v Carlisle* [2017] QCA 258, the appropriate approach is to reflect all mitigating circumstances in the head sentence. If that results in a sentence of less than 10 years, then many of the problems caused by the legislation largely disappear. Questions arise also in fixing a sentence which is

> just in all the circumstances to either imposing a serious violent offence declaration or making a recommendation for parole.[367]

Similar comments were made by this same judge in an earlier decision — in this instance, with them making further observations that the law recognises that the difference in the impact of a sentence imposed just below the arbitrary mark of 10 years, and a sentence marginally above, is disproportionally great when having regard to time spent under sentence before being eligible for parole — with reference to comments made by the Court of Appeal in *R v Randall*[368] (discussed above in section 2.1.6).

## 9.2 Automatic declarations

### 9.2.1 Reduction in the head sentence/sentencing at the lower end of the range

A number of sentencing judges made direct mention of the head sentence the court might have otherwise imposed being reduced, or the person sentenced at the lower end of the sentencing range, to take into account an offender's plea of guilty and other factors in mitigation, and in some case pre-sentence custody that could not be declared, in circumstances where the SVO scheme would apply automatically.

This was true across cases sentenced in the Supreme Court across a number of offence categories (based on MSO) including:

- Manslaughter:

> The Crown … submitted that after your plea of guilty is taken into account, a head sentence in the range of 12 to 15 years should be imposed. But he emphasised that your sentence should fall towards the higher end of the range. His submission should be understood, however, for what it was and that is a sentence that does not take into account the other mitigating features in your favour and, implicitly, once those other mitigating features are taken into account, the only way to reflect that is to reduce the head sentence.[369]
>
> The Crown has submitted that a sentence of 13 years imprisonment is appropriate. In my view, your involvement would justify a sentence as high as 15 years imprisonment. You should, however, receive the benefit of the plea of guilty.
>
> As has been said by your counsel, the consequence of the sentences is that you will have been convicted of serious violent offences and therefore be required to serve 80 per cent of the sentence. Every year that is imposed is a significant additional burden in respect of that punishment and must be taken into account when trying to balance, to ensure there is a proper reflection of the pleas of guilty. It is in the interests of the administration of justice and, indeed, in the interests of victims that trials be avoided where possible.
>
> Allowing for all of those matters, I am satisfied the appropriate sentence to be imposed is a sentence of 13 years imprisonment.[370]
>
> In arriving at an appropriate sentence for manslaughter, I must take account of the consequences of imposing a sentence of 10 years or more, namely, the automatic making of a serious violent offence declaration and a requirement to serve 80 per cent of that sentence before being eligible for parole. Having done so and reflected on the matter, I consider that in all the circumstances your offending justifies a sentence of more than 10 years. I take account of your early plea of guilty in reducing what otherwise would have been an appropriate sentence for manslaughter.[371]

- Rape (in this case, only automatic as this charge was sentenced alongside a number of other offences for which an SVO declaration was also made in circumstances where some of these sentences were ordered to be served cumulatively):

> I was invited to simply impose a variety of concurrent sentences, singling out the most serious offence for the highest term  Were I to do that, the Crown submits that would be the offence of rape and that the appropriate head sentence would fall between 10 to 12 years. This would have the automatic consequence of a serious violent offence declaration, requiring you to serve a minimum of 80 per cent of your term of imprisonment. … I do not consider a total sentence of 10 or even 11 years would adequately capture your criminality, even after discounting, including to allow for the fact it would be discounting off the top to allow for the effect of a serious violent offence declaration. In my view the sheer gravity of your collective offending deserves, even after such

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367 QSC 2020/20 p. 9, lines 15–32. The offender's application for leave to appeal his sentence in this case was refused on 27 March 2020.
368 [2019] QCA 25, at [31] and [33].
369 QSC 2019/08 p. 8, lines 12–18.
370 QSC 2020/13, p.4, lines 24–37. In this case the offender was sentenced for two counts of manslaughter, and two counts of torture. The declaration was made with respect to the manslaughter counts.
371 QSC 2019/02 p. 13, lines 1–8.

> discounting, a total sentence of 12 years' imprisonment. I have reservations that allowing for discounting, were I to attach it to the rape as a package of concurrent sentencing, that such a total sentence would be in range.
>
> …
>
> This leads inevitably to the proper approach on sentence being that all discounting of the sentence, including your discounting for pleading guilty, ought involve a reduction of the head sentence or sentences.[372]

- Trafficking in dangerous drugs:

> Since the sentence that will be imposed on you is more than 10 years imprisonment there will be an automatic declaration that the traffic offence is a serious violent offence and, therefore, a requirement that you serve 80 per cent of the sentence before being eligible for parole. The Court has no discretion to reduce that period to serve before parole eligibility on account of your guilty plea. Accordingly, it is appropriate to reduce the head sentence from that which would have been warranted had the matter gone to trial. There is no mathematical precision to what that reduction should be.[373]
>
> the seriousness of your offending will require the imposition of a sentence that will automatically attract a serious violent offence declaration. That means that the sentence will carry with it a requirement that you serve 80 per cent of it.
>
> It also means that the only way to reflect the factors in mitigation here, that is, factors personal to you, is by reducing the head sentence, or at least the notional head sentence. There are good reasons to do that here. In the first place there is your plea of guilty to each of these offences. Second, there is the difference in roles between you and [co-offender] which strongly suggests to me that your culpability overall is less than [co-offender's]. Third, you were a drug dependent person at the time of this offending and fourth, you come before the court with a very limited criminal history.[374]
>
> In my approach to sentence, it seems to me that the quantum of sentences likely to be imposed is so significant that the safest approach is to assess what the appropriate head sentence should be after all discounting from the head sentence. That would have the consequence, in the event of a head sentence less than 10 years, that I will make no order about parole eligibility and let the statute do its work [meaning the defendant would be eligible for parole after serving half of the sentence], and it will have the consequence in respect of a sentence of 10 years or greater that a serious violent offence declaration will be made – indeed must be made – with the consequence that 80 per cent at least of that must be served.
>
> Bearing in mind, then, that I am approaching the task by applying all discounting off the top of the appropriate head sentence…In arriving at a just sentence … it is necessary to take all discounting off the top …. [375]

Some remarks directly referenced comments made by the Court of Appeal in *R v Ali*,[376] (discussed at 2.2.3) in reaching the conclusion that a reduction in the head sentence was warranted:

> It seems to me … that this is a serious, violent offence and does call for a sentence higher than the period of 10 years which triggers the automatic imposition of an 80 per cent non-parole period. Having regard to the nature of the offending, combining as it did the elements referred to by Justice Burns in the passages from *R v Ali* to which I have referred, it does seem to me that this is a serious offence which needs to be treated with a sentence in the range submitted. Taking into account the plea of guilty, however, and your remorse otherwise indicated on the evidence, it seems to me that I should sentence you to the lower end of that range of 12 to 14 years, partly taking into account the consequences of your illness on you but to a limited extent, because of the reasons I have identified.[377]
>
> It is also to be kept in mind as … observed in *Ali* at paragraph 28 that any sentence of 10 years or more will carry with it an SVO declaration requiring the offender to serve at least 80 per cent of that sentence. For that reason the sentence will often be reduced to take into account factors in mitigation because that is the only way of reflecting those factors so as to arrive at a sentence that is just in all of the circumstances, and that is what I will do in this case, that is, reduce the head sentence I would otherwise have imposed on count 2 to take into account the various factors personal to you, [D], and take them into account in a way that reduces that head sentence.[378]

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372 QSC 2019/03 p. 12, lines 27–41 and p. 13, lines 16–18. In this case, a sentence of 8 years was imposed for the rape count, and two other sets of offences, the sentences for which were ordered to be served cumulatively, resulted in a sentence of 12 years. SVO declarations attached to the charge of rape, three sexual assault charges, a charge of assault occasioning bodily harm and dangerous operation of a vehicle.

373 QSC 2020/12 p. 11, lines 16–24. An application for leave to appeal in this case against the sentence of 17.5 years was refused. See *R v Phan* [2021] QCA 8.

374 QSC 2021/04 p. 4, lines 3–14.

375 QSC 2020/16 p.10, lines 5–15 and lines 27–28 (subject to appeal).

376 *R v Ali* [2018] QCA 212 – discussed in section 2.3.3.

377 QSC 2019/34 p. 5, lines 10–19.

378 QSC 2019/13 p. 8, lines 7–15.

The same types of considerations were mentioned in sentencing remarks for matters sentenced in the District Court in circumstances where it was clear, due to the level of sentence to be imposed, the declaration would apply automatically:

> the serious aspects of the offending might warrant a sentence in the range of 10 – 14 years imprisonment… …Taking the approach of moderation that are required to take account of the effect of the serious violent offender declaration and also to allow you credit for your pleas, remorse, insight and desire to reform, it seems to me I should sentence you at the lower end of that identified range.[379]

> It would have been, of course, your right to go to trial but it is a matter clearly in your favour that you have pleaded guilty in an early manner. I have had regard to the fact that the overall sentence I intend to impose will inevitably involve an automatic declaration of being convicted of a serious violent offence, for count 4, which means you have to serve 80 per cent of your sentence. And I will give credit for you, in recognition of that fact, by reducing the overall sentence even further. …

> To make it clear how I reached my sentence – as I said, I consider the appropriate starting point, in particular for [count for maintaining a sexual relationship with a child under 16 yrs], and an overall sentence to reflect the global offending, is one of 13 years imprisonment. I have reduced that by two years for your plea of guilty and I will reduce that by a further year to give recognition to the fact that you are going to have to serve 80 per cent of the sentence.[380]

### 9.2.2 Global sentence for most serious charge reflecting totality of offending not imposed, and order for cumulation of sentences made instead

The operation of the SVO scheme led some judges to expressly decline to take the approach of imposing a higher sentence for the most serious charge reflecting the total criminality involved, with all other sentences to be served concurrently as is a well- established sentencing practice adopted by courts when sentencing a person with respect to multiple offences.

In one instance[381] the court structured the sentence to:

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

As a consequence of this approach, the parole eligibility date set was set lower than would have been the case had the 80 per cent requirement applied to the total sentence of 14 years and 6 months (at about the 10 years, 11 months mark, instead of at 11 years and 7 months).

The sentencing judge explained the sentence had been structured in this way so as not to fall into the same error found by the Court of Appeal in *R v Derks*[382] (discussed above at 2.4.2).

In a second case,[383] the sentencing judge imposed:

- a 13-year sentence for the most serious charge of drug trafficking (attracting an automatic SVO declaration); and
- 12 months and 9 months respectively for two other non-trafficking charges to be served concurrently, but cumulatively on the 13 years (that the judge noted might otherwise 'have attracted concurrent sentences of nine months and 18 months separately, or a head sentence of two years …on the more serious count'). For these charges, no parole eligibility was set, meaning 6 months of this sentence would need to be served before being eligible for parole.

As a consequence, the offender was sentenced to a total of 14 years' imprisonment, with parole eligibility after serving approximately 10 years and 11 months.

The sentencing judge pointed to it being inappropriate to 'inflate the sentence' for the trafficking charge to take into account other offending given the application of the SVO scheme:

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379 QDC 2019/22 p. 11, lines 40–45.
380 QDC 2019/01 p. 5, lines 38–44 and p. 6, lines 13–18.
381 QSC 2020/34 (subject to appeal – lodged 21/6/21).
382 [2001] QCA 295. In *Derks*, the Court found that the sentencing judge was in error in taking a global approach to the sentence in circumstances where the offences, other than the manslaughter, would not have otherwise attracted an SVO declaration.
383 QSC 2020/25 (subject to appeal – lodged 23/10/20).

> I recognise, in arriving at appropriate sentences for each count, that you are required to serve at least 80 per cent of any sentence for trafficking before being eligible for parole for any sentence of 10 years of more. This means that I should not inflate any sentence for trafficking beyond an appropriate figure for that offending, so as to take account of the other offences, count 10 on the indictment and the single count ex officio indictment. To do so would have the effect of requiring you to serve 80 per cent of part of a sentence which is being imposed for other offences committed after the trafficking period.[384]

The defendant's plea and application of the totality principle in this case resulted in the moderation of sentences ordered to be served cumulatively — although the requirement to serve 80 per cent of these sentences did not apply given their status as non-declared offences:

> The non-trafficking counts might have attracted concurrent sentences of nine months and 18 months separately, or a head sentence of two years by way of a head sentence on the more serious count. That would have entitled you to parole after a third of two years, or eight months. Rather than impose concurrent sentences, I intend to make the second and third counts … concurrent with each other, but require them to be served cumulatively upon your trafficking sentence. In accordance with the totality principle, those sentences will be reduced to a sentence of one year, and you will have parole eligibility in accordance with the provisions of the Act, which will require you to serve six months of actual custody in respect of the accumulated 12 month period.[385]

### 9.2.3 General statements about the consequences of the SVO being taken into account

In several cases involving the making of an automatic declaration, the impact of the SVO scheme on the ultimate sentence imposed was not clearly articulated, although the sentencing judge made clear this had been taken into account. For example:

> I take into account that the consequence of imposing a sentence of 13 years for the offence of manslaughter brings with it the automatic making of a serious violent offence declaration, and a requirement that you serve 80 per cent of that sentence of 13 years before being eligible for parole. I make a serious violent offence declaration.[386]

> I note the consequence of imposing a sentence of 15 years means that it will bring with it an automatic declaration of a serious violence offence, which means you must serve 80 per cent of that sentence, which, on my calculations, is 12 years.[387]

> It is also significant that your sentence will exceed 10 years in prison. That is, you will be required to serve 80 per cent of your term of imprisonment because, by operation of law, you are declared a serious violent offender. I take that into account.[388]

## 9.3 Discretionary declarations

### 9.3.1 Sentences on the cusp of 10 years where SVO declaration not made

In circumstances where the appropriate sentencing range fell both below and above the 10 year mark, there were a number of examples of the sentencing judge determining a sentence in the mid, or lower end of the sentencing range, or a reduction in the head sentence, was appropriate to meet the various purposes of sentencing and to take into account the defendant's plea and other factors in mitigation — thereby narrowly avoiding the mandatory application of the scheme.

In one case of manslaughter perpetrated by a 17-year-old offender, the sentencing judge remarked that while the attack on the victim was 'a very serious example of the offence of manslaughter and viewed objectively, warrants a sentence of imprisonment of at least 10 years', because the defendant had entered an early plea of guilty, this was 'a significant feature of the matter' that the judge had taken into account in reducing the head sentence to a sentence below that of 10 years.[389] This then enabled the sentencing judge to take into account the defendant's youth, other matters in mitigation, and his prospects of rehabilitation in setting a parole eligibility date earlier than the statutory 50 per cent mark at just over 40 per cent.

In another manslaughter case involving an Aboriginal female offender (26 years old at the time of the offence, and 29 at the time of sentence), the judge noted that but for her early guilty plea, the sentence would have been in

384 Ibid p. 11, lines 5–12.
385 Ibid p. 22, lines 10–20.
386 QSC 2019/05 p. 11, lines 25–29.
387 QSC 2019/21 p. 9, lines 35–38. An application for leave to appeal against the conviction and sentence was dismissed on the grounds that the Court's jurisdiction to determine the appeal and application ceased upon the death of the appellant.
388 QDC 2020/16 p. 5, lines 24–27.
389 QSC 2020/04 p. 6, lines 26–29.

excess of 10 years.[390] The offender was sentenced in this case to 9.5 years' imprisonment with no parole eligibility date set (meaning she would be eligible for parole after serving half of her sentence).

In the District Court, similar considerations applied — with the most common outcome being either that the court declined to set a parole eligibility date or set this at the statutory 50 per cent mark or beyond this. For example, in a case of a female offender convicted of multiple sexual offences, the most serious of which was maintaining a sexual relationship with a child,[391] the judge found that but for a range of factors, including the defendant's guilty plea and emotional deprivation suffered as a result of her husband's physical and emotional abuse, they would have imposed a head sentence of 12 years which would have carried an automatic SVO declaration. In circumstances where it was assessed her risk of reoffending was low, some amelioration of the sentence was required, which was reduced to 9 years with parole eligibility set after she had served half. Similarly, in another case where maintaining a sexual relationship with a child was the most serious offence charged,[392] the sentencing judge, in reducing the sentence to 9.5 years with no parole eligibility set, noted that while 'a sentence in the order of nine to 10 years imprisonment would be the appropriate range', a sentence of 10 years imprisonment would result in the automatic declaration for the most serious charge.[393] While this was 'not the determinative issue on sentence', the fact the defendant had entered pleas of guilty was required to be taken into account, which saved the complainant from having to give evidence and be cross-examined.[394] This would not be possible if a sentence of 10 years imprisonment was imposed. The sentence was reduced to 9.5 years with no parole eligibility date set.

In another District Court decision involving two counts of rape, aggravated burglary and assault occasioning bodily harm committed by a young offender, the sentencing judge, in imposing a 9-year sentence, noted the consequences should the sentence have been one of 10 years or more. While declining to make a declaration, they did not set a parole eligibility date for reasons including the 'serious nature' of the offending.[395]

Although not an approach commonly observed in the cases coded, what would have been a sentence triggering the mandatory application of the scheme in one instance was avoided by not declaring pre-sentence custody that might have otherwise been declared to achieve a longer period of community supervision. The sentencing judge, in discussing the merits of not declaring pre-sentence custody that ordinarily would be declared, concluded that the purposes of sentencing were best met in this case by providing for an extended period of supervision:

> The ultimate issue is the most appropriate sentence in this case, so as to meet the needs of punishment, rehabilitation, deterrence, denunciation and community protection. The most appropriate sentence is not arrived at by reference [to] any particular comparable case. … It is arrived at by applying the general principles so as to arrive at a sentence which is just in all the circumstances.
>
> …
>
> I'm conscious that the community's interests are best served by your having a substantial period of supervision after you are released from the structured prison environment. I'm conscious of [psychiatrist's] observation that treatment in the community would usually require two years. A sentence of 10 years imprisonment with an automatic serious violent offence declaration might permit that to occur if you have engaged in treatment and undertaken significant rehabilitation whilst in custody and were released on parole after eight years. The interests of community protection, the security of your victims and the community's interests are best served by giving the parole authorities the opportunity to have you strictly supervised in the community and subject to compulsory, intensive, individual psychological counselling by an experienced forensic psychologist for a period of more than two years if this is considered, at that time, to be in the best interests of your rehabilitation and, therefore, the community's protection.[396]

In considering the best means to achieve this outcome, the judge imposed an effective sentence of 10 years' imprisonment for the attempted murder, but declined to declare the first 6 months spent in pre-sentence custody, instead imposing a sentence of 9.5 years. Parole eligibility was set at 7 years (translating to 70% of what would otherwise have been a 10-year sentence).[397]

The offender in this case, who did not have any prior convictions for offences of violence, was aged 24 years at the time he attempted to kill his former partner. He had been diagnosed with a severe mixed personality disorder and had not been taking his medication at the time of the offending.

390 QSC 2020/08. Transcript issued subject to correction.
391 QDC 2019/10.
392 QDC 2019/57.
393 Ibid p. 3, lines 27–30.
394 Ibid p. 3, lines 31–40.
395 QDC 2019/17 p. 5, line 23.
396 QSC 2021/01 p. 9, lines 42–44, 46–47 and p. 10, lines 13–26.
397 QSC 2021/01.

### 9.3.2 SVO declaration not made –parole eligibility set above one third and offender sentenced at the 'upper end of the range'

As discussed in sections 2.4 and 2.8 (with respect to non-declarable pre-sentence custody), sentencing courts generally must avoid giving offenders a 'double benefit' when reducing a sentence to take into account factors such as the offender's guilty plea or non-declarable time, with the result that the sentence falls under 10 years and the automatic requirement to make a declaration no longer applies. Among the cases coded, parole eligibility was often delayed beyond 'the ordinary one third' to avoid this outcome.

Typical of the approach taken in a number of cases, in one case involving a female offender who pleaded guilty to drug trafficking who had carried on a wholesale trafficking business involving multiple drugs sold in significant quantities, the judge when setting the sentence below 10 years taking into account a 'significant period' she had spent in custody that could not be declared and other factors in mitigation, declined to set a parole eligibility date:

> I am satisfied that if I imposed a sentence of 10 years imprisonment or more, it would not reflect the proper balance between the aggravating features and the mitigating features in your case. It would mean you would be required to serve eight years of that sentence in circumstances where you have already served that significant period in custody.
>
> Instead, I propose to impose an overall head sentence of nine years, six months imprisonment. I will impose lesser periods for the remaining counts. That sentence, in my view, properly reflects the significant cooperation with the administration of justice, whilst also ensuring that the sentence sends a message to others in the community who might engage in this type of activity.
>
> I will not be giving you the benefit of an earlier parole eligibility date. The parole eligibility date will be as set by the legislation, that is, when you have served 50 per cent of that time. In my view, to give you an earlier parole eligibility date would be to overemphasise the mitigating factors and not properly reflect the serious aspects of your offending.[398]

In another drug trafficking case, the offender was sentenced to 9 years, which the sentencing judge noted 'would give [the defendant] the significant benefit of avoiding an automatic serious violent offender declaration and a non-parole period of 80 per cent' — taking into account he had been in custody for 16 months that could not be declared. The judge concluded:

> Because you have gained the benefit of having a sentence that would have otherwise been more than 10 years reduced to below 10 years to take into account of your plea of guilty, you do not get the ordinary one-third starting point for parole eligibility.
>
> The statutory eligibility date is halfway through, which is at four and a-half years. There does not seem to be anything exceptional that should take it below that; however, rather than date the four and a-half years from today … I intend to date it from when you went into custody. That seems to me to reflect the point I have already made and also reflect the steps that you have taken towards your own rehabilitation, and it will give you something to work towards.[399]

In a case involving a charge of malicious act with intent committed by a 17-year-old offender against his then girlfriend, to which he had pleaded guilty following a successful appeal against his original conviction and a retrial being ordered, the Crown called for an 8-year sentence with an SVO declaration, and defence counsel for a 7-year sentence without an SVO.[400] The judge concluded, with reference to the earlier decisions of *Woodman*[401] and *Williams*,[402] that a head sentence in the order of 11 years, to a base of about 9 years was appropriate. In imposing a 9.5 year sentence, and not making the declaration, the judge, made extensive reference to statements made in *Free* and ultimately concluded:

> a further reduction in time to be served before becoming eligible for parole is, in my view, in this case, as it was in the case before the President [in *Free*], not justified given the very serious nature of the offending, and, of course, the need to send a strong message of denunciation and deterrence against offending of this kind.[403]

No parole eligibility date was set. An appeal against sentence by the Attorney-General has since been dismissed.[404]

There were also examples of parole being set beyond the statutory half-way mark where a sentence of 10 years had been avoided due to the seriousness of the offending. For example, in a case involving a man who was convicted after a three-day trial of two counts of rape, once count of attempted rape and two counts of aggravated indecent

398 QSC 2020/07 p. 4, lines 18–34.
399 QSC 2019/09 p. 5, lines 16–26.
400 QDC 2021/01.
401 *R v Woodman* [2009] QCA 197.
402 *R v Williams* [2002] QCA 142.
403 Ibid p. 11, lines 45–49.
404 Dismissed on 2 June 2021. Decision yet to be published.

treatment of a child committed against his 7-year-old daughter, the judge imposed a 9-year sentence, with the parole eligibility date set at 5 years.[405]

An appeal against sentence by the offender was refused, with the Court of Appeal finding: 'When regard is had to the serious and enduring consequences of the crimes committed by the applicant against his daughter, a head sentence of nine years' imprisonment with parole eligibility after five years is not … manifestly excessive', even taking into account that parole eligibility was set six months beyond the statutory halfway point.[406] The Court found the 'serious circumstances of this case justify a period of five years before the applicant was eligible for parole'.[407]

In a drug trafficking case, the sentencing judge explained the reasons for courts taking this approach to the defendant in terms that where sentences were both 10 years and above (attracting a mandatory declaration), and below 10 years for a particular category of offending, this constituted a 'grey zone'. They suggested that the setting of parole dates beyond the statutory halfway mark could be attributed to this avoidance in the application of the scheme:

> I should explain that there is a grey zone that one has to bear in mind in an exercise like this, where one has sentences of 10 years and upwards or sentences below 10 years in this category of offending. The requirement is that you must serve 80 per cent of your head sentence if you receive 10 years or higher. It is not a mandatory requirement for lower, which is why sometimes when we are looking in the nine, nine and a-half mark, in that transition out of that zone one sees parole dates that are above the halfway point.[408]

Where parole eligibility was set below the statutory 50 per cent mark, this was generally due to the unique circumstances involved. For example, a sentencing judge set parole eligibility for a 9-year sentence after serving 3 years and 6 months in one instance due to the offender's particular medical and mental health issues (the nature of which was not specified in the remarks) which meant his time in custody would be more difficult.[409]

In a case of dangerous driving causing death, the judge noted they had imposed a sentence of 11 years in a previous case of someone who 'had a worse history' than the offender, but ultimately sentenced the offender to 8 years' and 8 months' imprisonment, reduced from 9 years taking into account 4 months of pre-sentence custody that could not be declared.[410] His parole eligibility date was set just under half of his head sentence (4 years, 2 months). The offender had been speeding at extremely high speeds (nearly 170 km per hour) through residential areas, running at least four red lights, ultimately crashing into the side of a vehicle killing one of his female passengers, then fleeing the scene. The prosecutor in this case had not sought an SVO declaration. A judge dealing with separate charges two months later involving contravention of a domestic violence order, two counts of choking in a domestic setting and assault occasioning bodily harm, noted that had the charges been sentenced at the same time, there was a 'real prospect' the offender would have received a sentence of 10 years, with the consequence that he would have been declared convicted of an SVO (although the charge of choking, it was noted, was not listed in Schedule 1). The offender received an 18-month sentence in this instance, to be served cumulatively on the earlier imposed sentence, with his parole eligibility extended by a further 9 months. This resulted in a total effective sentence of 10 years and 2 months, with parole eligibility after serving 4 years and 11 months (rather than the over 8 years he would have had to serve if subject to the SVO scheme).

### 9.3.3 SVO declaration made – sentencing at the 'lower end of the range' / reduction in head sentence

Once a determination was made the offence should be declared as a serious violent offence, similar sorts of considerations applied to those mentioned with respect to mandatory declarations. This concerned how to ensure a sentence that was just in the circumstances, given delayed parole eligibility, and that took into account an offender's guilty plea and other factors in mitigation.

In one case, the judge referred to submissions made by both the Crown and defence counsel that if an SVO declaration was made, the sentence should be at 'the lower end of the range to reflect the postponement of parole eligibility' and to take into account the defendant's guilty plea. The Crown had submitted the appropriate range was 7 to 9 years, and defence counsel, 7 to 8 years. The judge imposed an 8-year sentence, distinguishing it as being more serious than another case in which a 7-year sentence had been imposed with an SVO declaration.[411]

In two other cases sentenced in the Supreme Court it was made clear a reduction was made from the top of the sentence, to take into account the defendant's guilty plea and other factors in mitigation — reflecting the approach

405 QDC 2019/11.
406 *R v WBM* [2020] QCA 107, [50]–[51] (Applegarth J, Fraser and Mullins JJA agreeing).
407 Ibid [57].
408 QSC 2019/33 p. 7, lines 21–27.
409 QSC 2020/02.
410 QDC 2019/37.
411 QSC 2019/01.

adopted for mandatory declarations. In the first, this primarily concerned consideration of the offender's timely guilty plea:

> Because the circumstances will result in me making a serious violent offender declaration in respect of count 3 such discounting to which you are entitled, and in the main that boils down to the point about your technically timely plea of guilty to count 3, should be taken from the top of any head sentence to be imposed. Even allowing for that moderation, the head sentence to be imposed will remain, nonetheless in your eyes a heavy sentence, albeit that it will be materially less than what might otherwise have followed.[412]

In the second case, the sentencing judge referenced *Carlisle* (discussed in section 2.8.1) when approaching sentencing in this way, and in imposing a sentence at the lower end of the range:

> In relation to the question of a serious violent offence declaration, I have directed myself to the principles explained by the Court of Appeal in *R v Carlisle* [2017] QCA 258. That is one of the various cases which recognised that where there is a sentence which would fall above 10 years, it is not possible to reflect mitigating circumstances by way of a recommendation for earlier release on parole. It follows then that mitigating circumstances must be reflected by reducing the head sentence.
>
> … In my view, an appropriate sentence is reached in the circumstances of this case by reducing the sentence to reflect all the mitigating circumstances and imposing a sentence at the lower end of the range, but making a declaration.[413]

This approach also was evident in a number of District Court matters. For example, in sentencing an offender for charges of attempted armed robbery with violence, burglary with violence and wounding as a result of a failed attempt to rob a shop owner at his home, the sentencing judge referred to the making of a declaration being 'a step reserved for the most serious cases', and where made, usually resulting in a sentence being imposed 'at the lower end of the otherwise applicable range'.[414]

In another, the sentencing judge, in making an SVO declaration for an offence of torture, accepted the Crown's submission that a sentence of between 5 to 7 years was appropriate, and imposed a 5 year sentence to take into account the decision to make a declaration.[415]

In a case of an offender sentenced for two counts of administering a stupefying drug with intent to commit an indictable offence and two counts of rape, the judge noted that while they considered 'a just sentence for these offences to be in the order of 13 to 14 years imprisonment', this was:

> before reducing the sentences to reflect the following considerations: matters in mitigation including [the defendant's] pleas of guilty; the fact I intend to impose the sentence cumulative upon the earlier sentence; the fact I intend to make a serious violent offence declaration; and the fact that the total sentence must be appropriate in terms of the considerations of totality.[416]

Taking these considerations into account, a sentence of 9 years was imposed on each count – to be served concurrently, but cumulatively on the earlier imposed sentence for fraud of 3.5 years of which he had served 2 years and 2 months at the time of sentence.

# 10 Reasons SVO declaration made/not made where discretionary

## 10.1 Reasons SVO declaration made

### 10.1.1 Supreme Court cases

Of the Supreme Court cases coded, there were four SVO declarations in circumstances where the sentence was for a period of less than 10 years and therefore discretionary.

In two cases, a sentence of 8 years' imprisonment with an SVO declaration was imposed for charges under section 317 of the Code (malicious act with intent). The circumstances involved in the commission of these offences, the defendants' use of a weapon and the significant level of victim harm in both cases appeared to be determinative in the decision it was appropriate to make a declaration.

1. The first offence was described as being committed in 'pre-meditation' against a person the defendant had a 'casual intimate relationship' in circumstances where the victim made it clear she was not interested in the relationship continuing and had started another relationship. The defendant lay in wait at her home,

412 QSC 2020/33 p. 5, lines 26–32.
413 QSC 2019/35 p. 6, lines 10–15 and 41–43,
414 QDC 2019/56.
415 QDC 2021/06 p. 5, lines 29–34.
416 QDC 2020/10 p. 11, lines 7–12.

having turned her power off, and attacked her with a 'large butcher's knife' stabbing her multiple times. The sentencing judge accepted the Crown's description of the attack as involving:

> a persistent, prolonged, brutal, unprovoked attack on an unsuspecting and defenceless victim who was much smaller than you [the defendant] are. It was deliberate. It was pre-planned. You lay in wait, you caused her extensive horrific injuries with devastating consequences. You used a large knife that you found in her kitchen. She experienced physical and emotional horror. The only evidence of remorse is your plea of guilty.[417]

There was no mention in this case of the defendant having a history of prior offending.

2. The second, involved a man who punched and then stabbed an overseas backpacker at a hostel he worked at exchange for free board who had confronted him about sexually assaulting her moments earlier. His assault broke the victim's nose and left her face bruised. He pursued her with a knife stabbing her in the upper arm and upper-chest/lower-neck area. The victim was described as receiving psychological assistance for a range of symptoms consistent with post-traumatic stress. The sentencing judge concluded that the 'circumstances of the offending collectively, compel the conclusion' that an SVO declaration should be made:

> On the back of your sexual assault and the complainant's quite understandable response, you engaged in an unusual, vicious attack upon her, including administering blows when she was defenceless on the ground. Then as she fled, you grabbed a knife and ran after her, a continuation of your extraordinarily violent reaction. Beyond that, of course, you caught up with her, despite her running away from you, and stabbed her in the lower-neck, upper-chest area, with a blow so firm it fractured the winglets of the vertebrae. This was an extraordinary combination of violence by a recidivist violent offender.[418]

The defendant was described as having 'a bad criminal history, generally for violence and including violence against women' but 'no previous convictions for indecent assault'.[419]

The other two cases involving discretionary declarations involved offenders sentenced for the offence of manslaughter. In both cases the head sentence imposed was 8 years' imprisonment.

1. In the first, the defendant was convicted of manslaughter on the basis he had an intention to kill or cause grievous bodily harm, formed as a result of provocation. He was armed with a 'military-style knife' and stabbed the deceased in the course of a fight (two fatal wounds inflicted by the defendant to the deceased person's chest after he had positioned himself above him). The deceased person who was unarmed (although had a vodka bottle and a torch in his possession with which he struck the defendant) had initiated the attack and appeared intoxicated at the time. The victim wrongly believed the defendant was romantically involved with a woman he had been seeing. The defendant had a prior criminal history, but no offences involving any 'actual violence'. The sentencing judge in this case reduced the head sentence to reflect the mitigating circumstances, while at the same time making a declaration, referring to the level of violence used:

> the discretion to make a serious violent offence declaration arises here from the circumstances of the offending. The attack upon the deceased with a knife was extremely violent. It involved two blows to his chest. The weapon was a substantial one. It was carried by you for no apparent specific purpose. It was the production of the knife by you which escalated the fight. You told the deceased that you intended to stab him. The production of the knife made what, up to that point, may have been a fair fight certainly an unfair one.
>
> Even accepting that you acted as a result of provocation and, initially, by way of self-defence, the attack still involved five blows or slashes with the knife, including two to the chest of the deceased. … In my view, an appropriate sentence is reached in the circumstances of this case by reducing the sentence to reflect all the mitigating circumstances and imposing a sentence at the lower end of the range, but making a declaration.[420]

Leave to appeal the sentence was refused, with the Court of Appeal finding no error in the exercise of the judge's sentencing discretion either as to the sentence imposed or the making of an SVO declaration.[421]

2. In the second, the declaration was made in circumstances where the defendant's two co-offenders had received an automatic SVO declaration as a result of being sentenced to 10 years' imprisonment. The three men had been involved in detaining the victim 'in inhumane conditions' subjecting him to 'serious violence' keeping him in an esky over a number of days with the purpose of the victim providing information 'probably

417 QSC 2019/01 p. 7, lines 15–22.
418 QSC 2020/33 p. 5, lines 16–24.
419 Ibid p. 3, lines 10–22.
420 QSC 2019/35 p. 6, lines 27–38 and 41–43.
421 Decision delivered on 13 August 2020.

about drugs that the defendants or others thought he had taken'. He was eventually taken into a state forest and tied to a tree where he died. The defendant (the son of one of the co-offenders) was convicted on the basis of being a party to the offence, being involved in the plan to assault and detain the victim. The Court rejected an argument that his conduct 'could be characterised as reckless indifference or neglect rather than acts of violence directly or indirectly causing death' and in making the SVO declaration, expressed the view 'the circumstances speak for themselves'.[422] The defendant, 21 years at the time of the offence, had no criminal history. The sentencing judge adjusted what would otherwise have been a sentence of 10 years to 8 years taking into account that he had already served in full 2 years' imprisonment for a separate offence of interfering with a corpse.

An appeal against sentence in this case was successful on the basis that the sentencing judge failed to take proper account of non-declarable pre-sentence custody in circumstances where it was declared a conviction for a serious violent offence.[423] In re-sentencing the offender, the Court of Appeal made an SVO declaration with respect to the conviction for manslaughter, for which he received a notional 9 year sentence, with the total period of imprisonment being 9.5 years (taking into account a notional sentence of six months for interference with a corpse) commencing in February 2018 (instead of from February 2020, as had previously been the case).

### 10.1.2 District Court cases

There were 18 cases that involved the making of a discretionary SVO declaration. These were made with respect to the following offences:

- Armed robbery;
- Attempted armed robbery with personal violence;
- Attempted carnal knowledge;
- Attempted rape;
- Burglary with violence while armed;
- Charges associated with offences of maintaining a sexual relationship with a child (carnal knowledge, indecent treatment of a child under 16 years and sexual assault);
- Dangerous operation of a motor vehicle causing death;
- Grievous bodily harm;
- Malicious act with intent;
- Rape;
- Torture.

With some exceptions, these declarations were made for offences committed by offenders who had relevant prior histories of criminal offending.

#### Armed robbery/ attempted armed robbery

Three cases involved SVO declarations being made for charges of armed robbery or attempted armed robbery — in one case, in conjunction with an associated charge of burglary with personal violence while armed.

1. In the first case,[424] the offender had been convicted following a trial of three counts of armed robbery involving three different licensed premises committed over two nights over a 24-hour period. The two counts that attracted the declaration involved robberies in circumstances where he was armed with a rifle, which he pointed at staff. He was 24 years old at the time of the offending, and 27 at the time of sentence. He had had 'significant issues' with drugs during his life and was addicted to ice from about the age of 17. He had previous convictions, including one for armed robbery. He was on parole for that offence and other offences at the time he committed these offences – and while subject to an electronic monitoring condition, had removed his tracking bracelet. In making the SVO declaration, the judge referred to the decision of the Court of Appeal in *R v Gwilliams and Fish*,[425] which the judge noted needed to now be read in the context of *Free*. The factors referred to in making the declaration were that he:

    – committed each of those offences while armed with a rifle, which was used in a threatening manner;

422 QSC 2020/06.
423 Decision delivered on 31 August 2021.
424 QDC 2021/05. Subject to appeal – lodged 12 February 2021.
425 [2010] QCA 286.

- had been on parole 'barely six weeks for an offence of armed robbery' when he committed the new offences;
- was heavily disguised indicating that the offending was premeditated; and
- was being sentenced as the principal offender, although a co-offender was also involved.[426]

The judge concluded:

> I am satisfied in those circumstances that those offences bear those aggravating features such that the protection of the public and adequate punishment require you to serve a longer period in actual custody before eligibility which can be achieved by declaring each of those two counts as serious violent offences. In my view, the circumstances of them well justify reaching that view.[427]

The sentence was reduced to one of 8 years' imprisonment to take into account issues of totality given the sentence had to be ordered to be served cumulatively on his existing sentence.

2. In the second case,[428] the SVO declaration was made with respect to charges of attempted armed robbery with personal violence and burglary. The offender was also convicted of unlawful wounding — although a declaration was not made for this offence. The offender had knowledge, through his brother, that a store owner carried large amounts of cash from his business on a Thursday afternoon. The offender, wearing a disguise, lay in wait at the store owner's home and had disconnected the CCTV security camera by the time the store owner arrived home with his 11-year-old son. Over the course of the incident, the offender grabbed the child by the neck, held a knife to him and threatened to kill him if the complainant did not do what he asked. The offender lunged at the complainant with a knife cutting his hand and in the course of a struggle, stabbed the complainant five times. The offender, who had a history that included some offences of violence, including assault with attempt to rob while in company, was apprehended through the use of DNA evidence. The judge, in making the declaration and attaching it to the conviction for the attempted robbery and burglary counts, found:

> this is a particularly serious instance of attempted robbery and burglary. The degree of planning, the use of the knife towards a child with associated threats to kill him, as well as the actual use of the knife causing wounds to the other complainant, in my view, are factors that warrant the making of serious violent offence declarations in this case.[429]

3. In the final case,[430] the offender had committed a number of armed robberies of second-hand stores and jewellery stores. The two counts of armed robbery that led to an SVO declaration being made both involved an element of personal violence. In the first, the offender robbed a second hand and pawnbroking business with two co-offenders while holding a shotgun. He hit a customer in the face while holding a shotgun, after yelling at him to get down on the floor, and with his co-offenders, threatened the 12 to 15 other customers then in the store. He jumped over the counter and entered a small office and began kicking a female member in the back demanding that she show him where the jewellery was put away or he would shoot. On the other occasion, he robbed a jewellery store with 64-year old store attendant. The offender and co-offender were armed with firearms and smashed the glass cabinets to access the jewellery. The offender's co-offender hit the store attendant in the face with the butt of his gun and glass fell on her. The judge made extensive reference to comments made in both *Eveleigh* and *McDougall and Collas* and also mentioned the more recent decision of *Free*.[431] In declaring the convictions for the two armed robberies to be convictions for an SVO, the judge referred to the 'considerable premeditation, planning, use of firearms, physical violence administered to two separate persons, the threatening of numerous persons with firearms in a sustained and frightening robbery'.[432] A 'significant discount' was given in reducing the sentence, where the appropriate starting point was one of 13 years, taking into account the fact the sentences will have to be served cumulatively with other sentences currently being served, his significant cooperation with police and admissions made, as well as his timely plea of guilty.[433] A 6 year sentence was imposed on each of the armed robbery counts – ordered to be served concurrently, but cumulatively with an existing sentence of approximately 9 years and 8 months, for which the full-time discharge date was approximately 17 months from the date of sentence.

426 QDC 2021/05 p. 8, lines 6–12.
427 QDC 2021/05 p. 8, lines 12–17.
428 QDC 2019/56.
429 Ibid p. 5, lines 36–40.
430 QDC 2021/02
431 Ibid at pp. 11–12.
432 Ibid p. 12, lines 36–40.
433 Ibid p. 10, lines 41–48.

## Grievous bodily harm

Two convictions for offences of grievous bodily harm attracted a discretionary SVO declaration:

1. The first offence[434] occurred in the context of armed robbery committed with two other offenders at a hotel. One of the co-offenders was armed with a replica gun. The complainant – a patron of the hotel – realising a robbery was in progress and that the gun was a replica – attempted to wrestle it from the co-offender. The offender, who was originally acting only as a lookout, involved himself, pulling out a bottle of whiskey, striking the complainant to the head with the bottle three times (the last one when the complainant was already on his knees) causing life-threatening head injuries. The offender had a significant criminal history, including for offences of violence (including serious assault, going armed (firearm) so as to cause fear, and assault occasioning bodily harm while armed. The offender was on parole and bail at the time of the offences. His rehabilitation prospects were described as 'poor'.[435]

   In finding the offence to be 'one of the more serious instances of an offence of this nature',[436] the sentencing judge identified factors warranting the imposition of an SVO as including, 'in particular, the cowardly and viciousness of the attack upon the complainant in the setting',[437] further noting:

   > The attack itself … was upon a vulnerable individual, someone who was not even apprehending that he was to be attacked in the manner in which he was. He was not able to take any defensive action to prevent the nature of the injuries that were inflicted. The strike on the ground was entirely gratuitous and unnecessary, putting aside the gratuitous and unnecessary nature of the earlier blows. Of course, the blows themselves were of such a kind as to give risk to the life of the complainant who was simply acting as a good Samaritan using what could only be best described as minimal force in his intervention and wrestling with [your co-offender] as he effected the robbery.[438]

   An application to the Court of Appeal for leave to appeal the sentence of 7 years' imprisonment with an SVO declaration for the grievous bodily harm charge[439] was dismissed, with the Court finding no error had been made in the exercise of the discretion to make the declaration.[440]

2. The second case[441] involved a 23-year-old offender (25 at the time of sentence) and co-offender who entered the house of the complainant – a 69-year-old Vietnam veteran who lived by himself – via the rear door. On seeing the complainant, the offender punched him to his face, then committing a violent assault on the complainant which resulted in him losing consciousness. The attack was described as 'frenzied',[442] 'vicious and ferocious'[443] involving multiple blows and the use of weapons with evidence the complainant was punched and/or kicked one or more times, struck with a knife one or more times, and struck with a saucepan one or more times. The complainant suffered multiple injuries resulting in a brain injury and moderate ongoing cognitive impairment. The offender at the time was using synthetic ice. The offender had an extensive and significant prior criminal history, with previous convictions for violence. The judge referred to 'the aggregation of circumstances inevitably' justifying the making of the declaration pointing to:
   - 'the nature and the extent of the injuries sustained by the complainant – who was elderly … frail …[and] in a vulnerable position';
   - the offender's conduct 'which involved, effectively, breaking into his house and then immediately setting upon him and assaulting him in a way that resulted him being hospitalised for two months' and suffering ongoing deficits and 'the significant degree of force that must have been used' by the defendant in assaulting him;
   - the use of a weapon to perpetrate some of the injuries;
   - the accompanying significant damage caused to his house; and
   - 'the significant degree of force that must have been used' during the assault on him.[444]

434 QDC 2020/14.
435 Ibid p. 6, lines 41–42.
436 Ibid p. 8, lines 10–11.
437 Ibid p. 7, lines 42–43.
438 Ibid p. 8, lines 1–9.
439 Lesser concurrent sentences were imposed for separate charges of armed robbery in company with personal violence of 4 years and one month for a charge of stealing.
440 Decision delivered 19 March 2021.
441 QDC 2021/04.
442 Ibid p. 4, line 27.
443 Ibid p. 6, line 15.
444 Ibid p. 12, lines 27–40.

### Maintaining a sexual relationship with a child — associated charges

In some cases involving charges of maintaining a sexual relationship with a child that attracted an automatic declaration, other charges sentenced at the same time were declared to be SVOs. For example, in a case[445] involving three counts of rape committed against a complainant aged between 9 and 10 years were declared to be SVOs — although these attracted sentences of 9 years that were ordered to be served concurrently with a 10-year sentence imposed for the maintaining charge. The offender in this case had a prior criminal history – but none relating to sexual offending.

In a second maintaining case,[446] the two offenders, who were both convicted of maintaining a sexual relationship with a child committed against three complainants (aged between 5 and 7 years) had all charges of which they were convicted at trial (a total of 26 sexual offences in the case of the first offender, and six in the second) declared as convictions of an SVO. This included charges that attracted a sentence of less than 10 years ordered to be served concurrently. Both had minor criminal histories, unrelated to the current charges.

### Malicious act with intent

Four cases involving charges of malicious act with intent resulted in an SVO declaration being made:

1. The first case[447] involved an attack by the offender on a woman at her home with a machete causing injuries to her wrist and upper arm over a failed drug transaction. The woman's 8-year-old daughter was present. In imposing an 8-year sentence with an SVO declaration, the judge pointed to factors including the presence of the child, and violent attack of her mother in full view and the extent of her injuries – leaving the child after the attack to seek assistance – as 'a significant aggravating feature, which together with the extent of the pre-meditation involved' warranted an SVO declaration.[448]
2. The second case[449] involved a road rage incident apparently motivated by the complainant thinking the offender had spat at the car he was in as it drove past. They met up in front of a liquor store and, in response to a comment the offender made to a woman walking past, the complainant asked him what his problem was and walked towards him. As the complainant turned around to look at his friend who was getting out of his car, the offender punched him to the right side of his jaw causing the complainant to stumble backwards and fall to the ground. The punch was described as 'cowardly and unprovoked'.[450] While on the ground, the offender began to stab him on a number of occasions to the face and chest. The complainant's friend came to his aid and pushed him off the complainant after which the offender ran away. The reasons for making the declaration were fourfold:
   - 'first, by having regard to the seriousness of the offending itself involving a weapon capable of taking a person's life';
   - 'second, that this was in reality an unprovoked stabbing in a public place in circumstances where' on the defendant's own admission, he recognised he 'could have walked away, but decided not to';
   - third, having regard to his 'criminal history and particularly the propensity to resort to the use of weapons capable of taking a person's life'; and
   - 'finally, having regard to the absence of any genuine evidence going to the prospects of rehabilitation'.[451]
3. The third case[452] involved an episode of domestic violence directed by the offender towards his former partner. He was then living with her at her residence along with her three children, her mother and her grandmother. After an argument, the complainant decided to end her relationship with the offender. He stayed the night in the house in a separate room to the complainant and the next morning, the complainant was in her car in the garage when attacked by the offender. He punched her approximately five times in the face, dragged her from the car and kicked her repeatedly in the ribs, continued to punch her while holding on to her hair and eventually stomped on the back of her head, forcing her head into the floor. She suffered bruising of the face and, significantly, a fracture of the right eye socket. The offender then poured hot water from a recently boiled kettle on the complainant with intent to do grievous bodily harm. She suffered significant third degree burns to her arm, wrist and ear and felt extreme pain (although her injuries did not

445 QDC 2020/21.
446 QDC 2019/25.
447 QDC 2019/47.
448 Ibid p. 3, lines 43–45.
449 QDC 2020/33.
450 Ibid p. 4, line 21.
451 Ibid p. 11, lines 18–25.
452 QDC 2020/42.

amount to grievous bodily harm). She required significant treatment including surgery in respect of her injuries. In concluding an SVO declaration was warranted, the judge pointed to:

- 'the level of seriousness of the violence involved in this conduct';
- the offender's 'history of resorting to violence' and that he 'presently presents a substantial risk of reoffending by using violence'; and
- that 'there is also a strong need for the sentence imposed .., to serve the purpose of protection of the community as well as providing adequate punishment for that very serious conduct'.[453]

The offender was sentenced to 6 years' imprisonment, with an SVO declaration for the malicious act with intent count. The sentence was reduced from one that 'might have extended as high as eight years imprisonment'[454] taking into account his pleas of guilty, remorse, his 'apparent insight and change of attitude', his 'relatively young age' (32 years), and background, as well as the 'onerous aspects' of his incarceration 'resulting from the current [COVID-19] health crisis', the fact they would be making an SVO declaration, and the 'need to avoid [what] otherwise would be a crushing sentence'.[455]

4. The final case[456] involved three offenders — only one of whom was charged with malicious act with intent. This offender had been drinking with one of the two co-offenders with whom he drove to a fast food chain where they parked in the carpark and continued drinking. The group came into contact with the complainant's group of friends (three men in their mid-20s and one of their girlfriends). Initially the two groups were friendly. Something was said to the offender that he took umbrage at. The two got involved in an altercation. One of his co-offenders gave the offender an axe (from the car – which the co-offender had brought with them) and the offender ran at the group with it. The offender struck the first complainant (a 29-year-old woman) to the right side of her head as he was running past. The offender, with one of his co-offenders, pursued the group. The offender caught up to a second complainant (who was putting his hands out in submission) and struck him in the head with the axe causing him to fall to the ground unconscious and causing a deep laceration to right side of his head. He then ran at the first complainant with the axe and then gestured at her with a raised arm as if to push her. The three then fled the scene. They attempted to destroy the axe later that night.

   In making the declaration the sentencing judge referred to comments by the former Chief Justice, Justice De Jersey, in *R v Bryan; ex parte Attorney-General*[457] that the introduction of Part 9A of the PSA 'signalled a hardened intolerance of serious violent offending which sentencing Courts must be astute to acknowledge and respect' and in cases such as this, 'deterrence, punishment and community denunciation . . . will ordinarily assume much greater significance than the personal circumstances of an offender'.[458]

   The judge then made specific reference to the nature of the attack on the complainant with the axe, which was deliberate, the fact he had had the axe for some time, that he had threatened other persons present with the axe, and that the complainant was not threatening the offender or 'offering any real threat … at all', having his hands up in surrender at the time he was struck in the head with the axe 'causing the horrific injuries' and causing the complainant to lose consciousness.[459]

   He was sentenced to 7 years' imprisonment (reduced from 8.5 years taking into account his plea of guilty) with an SVO declaration for the charge of doing grievous bodily harm with intent, and 2 years' imprisonment for a separate charge of assault occasioning bodily harm in company with the sentenced ordered to be served concurrently.

### Dangerous operation of a motor vehicle causing death

A declaration was made on a discretionary basis in one case involving a charge of dangerous operation of a vehicle causing death.[460]

The offender was driving a motor vehicle on a highway with her husband and son, aged five years. The car left the road and impacted at high speed with a culvert and subsequently a tree. Both the offender's husband and son lost their lives. An investigation of the collision established that the motor vehicle had failed to negotiate a sweeping curve and left the road at a minimum speed of 171 kilometres per hour. Immediately prior to leaving the road, the

453 Ibid p. 14, lines 42–46.
454 Ibid p. 14, lines 46–47.
455 Ibid p. 15, lines 1–6.
456 QDC 2020/51 (subject to appeal – lodged 4 December 2020).
457 [2003] QCA 18.
458 Ibid [6] cited at p. 10, lines 19–33.
459 QDC 2020/51 p. 10, lines 38–43.
460 QDC 2019/14.

offender was observed to engage in a protracted course of dangerous driving (including travelling at an excessive speed on the wrong side of the road and crossing double white lines when vehicles were approaching from the opposite direction). Other road users had been required to take evasive actions to avoid a collision. She was found to be under the influence of both amphetamines and methylamphetamine at levels likely to impair her ability to drive safely. She had no criminal history and a limited traffic history and had pleaded guilty in a timely way.

The sentencing judge, with reference to the principles set out in *McDougall v Collas*,[461] identified factors that made this a more serious example of the offence and as warranting the declaration were:

- 'the extended distance over which [the defendant] drove dangerously;
- 'the inherently dangerous nature of the manoeuvres [the defendant] made on a number of occasions';
- 'the number of innocent members of the community [the defendant] exposed to the real risk of serious injury or death by [their] deliberate and reckless conduct';
- 'that [the defendant] allowed [their] son to travel unrestrained in the vehicle when [they] determined to drive the way you [they] whilst adversely affected by methylamphetamine'; and
- their 'deliberate and reckless conduct' that had 'taken the lives of two people'.[462]

While appealed on the grounds the sentence imposed was manifestly excessive, the Court of Appeal dismissed the appeal on the basis that the imposition of a 9-year sentence of imprisonment with an SVO declaration could be 'properly characterised as a sentence at the lower end of the sentences applicable to this serious offending' and that it 'was neither unreasonable nor plainly unjust'.[463] The making of the declaration was also found to fall 'within a sound exercise of the sentencing decision'.[464]

### Rape

There were five cases of rape where a discretionary SVO declaration was made.

1. In the first case,[465] the offender, aged 27 years at the time of his offending and 31 years at sentence, was sentenced to 9 years' imprisonment with an SVO declaration for one count of rape, and 10 counts of indecent treatment of a child under 16, and lesser concurrent counts for a number of other offences, including making and possessing child exploitation material offences, and burglary by breaking. The judge in sentencing noted they had taken into account his early plea of guilty in reducing the sentence that they would have otherwise imposed. Some offences involved the offender entering the homes of two families at night or early in the morning and committing the offences while the children were sleeping and filming the offending on his phone. Of the charges declared (including a digital rape), some related to a single incident of offending against a two-year-old child. Other counts of indecent treatment were committed on six different occasions to 9 and 10-year old siblings. His conduct was described by the sentencing judge as 'absolutely despicable, depraved and brazen'.[466] They noted that: 'It extended to private homes where families especially young, vulnerable children are entitled to feel safe; are entitled to be protected; are entitled to be secure; are entitled to be nurtured'.[467] The judge referred to the behaviour involving multiple households and that, in total, he had 'preyed upon not only one child but five children, one of whom was only two' when he considered himself 'entitled to commit serious offences against them'.[468] The Crown had submitted a sentence of not less than 10 years was appropriate (which would carry an automatic SVO declaration) while defence counsel submitted it was one of 7 years.
2. In the second case,[469] the 26-year-old offender and complainant were engaging in consensual sexual acts when the offender committed a violent act that she did not consent to, causing her considerable pain. Notwithstanding her screaming and asking him to stop, he continued. She suffered internal injuries, lost a significant amount of blood and required surgery as a result. He was convicted after two trials (the first, of which he was convicted of GBH, and the second at which he was found guilty of the rape). The offender was sentenced to 7 years on the rape, and 6 years on the grievous bodily harm to be served concurrently. The decision was appealed, including on grounds that the sentence was manifestly excessive due to the making of the SVO declaration. The sentencing judge explained the reasons for reaching his conclusion that an SVO declaration was justified with reference to:

461 *McDougall and Collas* (n 19) at [18] and [19] cited in ibid at p. 4, lines 9–10.
462 QDC 2019/14 p. 4, lines 16–23.
463 Decision delivered 17 March 2020.
464 Ibid.
465 QDC 2019/61.
466 Ibid p. 4, lines 13–14.
467 Ibid p. 4, lines 14–16.
468 Ibid p. 4, lines 17–19.
469 QDC 2019/42.

- the nature of the conduct which 'must be seen only as a brutal and degrading act designed to humiliate and degrade the complainant';
- the fact the complainant suffered grievous bodily harm and 'the high probability of such an injury occurring due to the nature of [the offender's] forceful actions' and level of force used; and
- his 'grotesque actions' in continuing with his actions when she cried out in pain 'clearly indicating her lack of consent'.[470]

While noting the offender's lack of criminal history, age and rehabilitation prospects given his good work history, he concluded:

> In my view, however, the violence of your offending, your associated contempt of the complainant, your lack of remorse as evidenced by the fact that these matters proceeded to trial rather than a plea are all relevant to the assessment of appropriate penalty in this. In my view, the brutality of that second act, in particular, is something that places this case in a special category, a special feature which demands, in my view, the making of an SVO.[471]

But for the making of the SVO declaration, the sentencing judge noted the sentence imposed in respect of the offences 'would have been higher and perhaps even beyond the eight years sought by the Crown'.[472]

The offender appealed both against his conviction for rape and the sentence — including on the basis of the making of the SVO declaration. The appeal against conviction and sentence was dismissed.[473]

3. The third case[474] involved an offender who invited a young couple in their early 20s, one of whom (the first complainant) the offender worked with, back to his house after having dinner with colleagues at a restaurant. He handed each a glass of wine which he had laced with a sedative. Both became drowsy and intoxicated. The young woman, the second complainant, passed out on his bed. The offender suggested to the first complainant they go for a drive and drove him to a park where he left him on his own. He awoke some hours later and was assisted to different police stations on two occasions. His phone had been handed in (his keys and wallet were missing) and he called the offender to pick him up unaware of what had happened. After leaving her boyfriend at the park, the offender returned and raped the second complainant twice. She had little recollection of what happened. She did not wake up until late that afternoon. After collecting her boyfriend, the offender took the couple out for dinner and dropped them both home. The second complainant told the first complainant she thought she had been raped. When confronted, the offender offered to pay her $100,000. The complainants then reported the incident to police. In deciding to make the declaration, referring to statements made by the Count of Appeal in *Free,* the sentencing judge commented:

> The current offences were particularly abhorrent having regard to the factors including the callous and premeditated nature of the offences, the stupefying of the male to prevent him aiding the female complainant, abandoning the male complainant in a drugged and delirious state at night in a park, and subjecting the complainant to serious invasive sexual assault while she was unable to resist, call for help or escape over an 18-hour period. The emotional and psychological impact upon both complainants is severe. In addition, the offending occurred whilst on parole and in breach of a suspended sentence, and you also have a relevant criminal history. These circumstances aggravate the present offences in such a way which suggests protection of the public and adequate punishment warrant the making of a serious violent offence declaration.[475]

A sentence of 9 years was imposed for the two counts of rape and two counts of administering a stupefying drug with intent to commit an indictable offence, reduced from one in the range of 13 to 14 years taking into account his pleas of guilty, that the sentences would be cumulative on an earlier imposed sentence, the making of the declaration, and totality considerations.

4. The fourth case[476] related to an SVO declaration made with respect to a 7-year sentence for one of three counts of rape that was set aside on appeal.[477] The complainant and 44-year-old offender had been in a previous relationship, but the complainant ended the relationship after they had been living together for about 10 months. The complainant allowed him to stay in a spare bedroom while he looked for somewhere else to live. A few days after she told him the relationship was over, the applicant entered the complainant's bedroom and told her they were going to have sex. She told him that she didn't think that was a good idea and said no. The offender then grabbed her and held her arm down raping her twice in a rough way, calling her abusive, derogatory and denigrating names. He then committed a sexually violent act causing her great

470 Ibid p. 3, lines 47–48 and p. 4, lines 1–5.
471 Ibid p. 4, lines 22–31.
472 Ibid p. 4, lines 40–41.
473 Decision delivered on 15 September 2020.
474 QDC 2020/10.
475 Ibid p. 10, lines 43–48, p. 11, lines 1–5.
476 QDC 2020/40.
477 *R v SDM* [2021] QCA 135.

pain. She did not immediately seek medical assistance although she had physical injuries and found it difficult to walk or sit down for a week and half following the incident. She did not disclose it until some 6 months later. The offender had no prior relevant convictions for sexual offending, but some violent offences. His risk of reoffending was assessed by a psychiatrist as 'below average'.[478] He claimed to have no memory of the events and minimised the offending. He had a history of post-traumatic stress disorder (although not viewed as relevant to the offending), benzodiazepine misuse, alcohol use and narcissistic personality disorder. At sentence, the judge made reference to *Free* and determined it appropriate to exercise their discretion to make the declaration with respect to count 3. The judge commented:

> While any rape is serious, this was a more than usually serious combination of this offence. It involved the commission of three separate rapes on a woman who had been in a domestic relationship with you, and who had only two days before, made the decision to end the relationship. The woman made it clear that she did not consent to any sexual activity with you and she articulated her lack of consent.[479]

The judge noted the two previous rapes culminated in count 3 (the third rape) which was 'a particularly brutal and degrading act, designed to humiliate and degrade the complainant'.[480] In making the declaration, they referred to the force used, as well as that 'it caused excruciating pain to her, that it was repeated for a period of time and was not brief'.[481] The offender's lack of cooperation with police and failure, initially, to make any admissions and his minimisation and denial of the offending was further found to 'suggest a lack of insight' relevant to the assessment of his risk of reoffending and protection of the community.[482] The judge concluded:

> Those aggravating features of the offending warrant greater condign punishment and lead me to conclude that there is good reason to postpone the date of eligibility for parole, because they suggest that the protection of the public and adequate punishment require a longer period in actual custody before eligibility for parole [than] would otherwise be required by the Act.[483]

The Court of Appeal, in allowing the appeal, distinguished the second case, discussed above, in finding the sentence was manifestly excessive on the basis that the rape did not have the feature of resulting in the commission of grievous bodily harm – although: 'Apart from that feature, the applicant's offending can otherwise be characterised as more serious … particularly because it was a domestic violence offence'.[484] A sentence of 7.5 years with no parole eligibility date set was substituted – resulting in a higher head sentence, but an earlier parole eligibility date (meaning the offender would be eligible to apply for release on parole after serving 3 years and 9 months, instead of approximately 5 years and 7 months).[485]

5. In the final case,[486] the sentencing judge, in imposing an 8.5-year sentence with an SVO declaration made with respect to two counts of rape, pointed to:

> the seriousness of the offending conduct, the degree of violence used, the driving to a remote location, the failure to reconsider after the resistance, and the verbal lack of consent, and [the offender's] behaviour subsequently aggravate the offence in a way which suggests that the protection of the public, or adequate punishment, requires a longer period in actual custody before parole than would otherwise be required.[487]

The two rapes and other offences charged (including assault occasioning bodily harm and a third count of rape) were committed against a friend of the offender's sister whom he had offered to drive home late at night. Instead of driving her home, he veered off the highway and drove to a remote location. She made clear her lack of consent, opened the door of the vehicle and ran. The offender pushed her from behind causing her to fall and he then held her down while grabbing her hands and forced her back to the car where he forced her to perform oral sex and then to get into the car and take her pants off, where he then had non-consensual sex with her twice. He drove her to a friend's house where he walked beside her holding her upper arm with force (perceived as a threat to stay silent). Realising something was wrong, the friends prevented him from entering the house. The offender had a 'serious and relevant criminal history', including contravening domestic violence orders and for offences of violence. The sentencing judge remarked that the offender had 'demonstrated [himself] to be someone who is a danger to … females in the community'

478 QDC 2020/40 p. 5, lines 24–25.
479 Ibid p. 8, lines 9–14.
480 Ibid p. 8, lines 17–18.
481 Ibid p. 8, lines 16–21.
482 Ibid p. 8, lines 24–29.
483 Ibid p. 8, lines 31–35,
484 Decision delivered on 25 June 2021.
485 In accordance with *Neal v The Queen* (1982) 149 CLR 305, 308, the applicant was given the opportunity to consider whether he wished to abandon the appeal and leave the sentence for count 3 as that imposed by the sentencing judge. He chose not to.
486 QDC 2020/28.
487 Ibid p. 5, lines 21–27.

and that the current offending conduct was 'demonstrative of a significant leap in seriousness in criminality' and his prior conduct as evidence by his criminal histories both in Queensland the Northern Territory.[488]

### Torture

There were two cases involving charges of torture that resulted in an SVO declaration being made in circumstances where this was discretionary.

1. In the first case,[489] the judge determined an SVO declaration was warranted 'because of the peculiar cruelty, the keeping of the complainant in the room, which was pre-planned and the various assaults and indignities meted out upon [the complainant], the psychological torture of her and the degrading conduct'.[490] A sentence that would otherwise have been one of 8 years was reduced to 7 years, taking into account the offender's plea and other mitigating factors, and by a further year to take into account the impact of the SVO declaration resulting in a sentence of 6 years' imprisonment.

   The incident occurred during a dispute over a rental car which it is alleged the complainant had borrowed without permission. The offender kept the complainant in a room of her house and told her she was not going to get out alive. She kicked the complainant in the head and body multiple times and threatened her with a claw hammer. She bound the complainant's wrists and ankles and used a dog chain to tie her to a hook on the wall. The complainant was held over three days where she was violently assaulted by the offender on a number of occasions who also made threats about killing her. She also had boiling water poured over her. The offender questioned her about whether she'd had any prior association with or slept with the offender's boyfriend before. There were children in the house. The police were called by one of the co-offenders after a man who had been contacted by the complainant's friend concerned for her safety had made contact with him and been taken to the house where the complainant was being held. The offender had initially asked for $1,000 to secure her release. She had a 'significant criminal history'.[491] An assessment report by a psychologist referred to her having a psychoactive substance dependence disorder,[492] as well as meeting the criteria for antisocial personality disorder, and exhibiting signs of post-traumatic stress disorder – which could have been the result of her being in a domestically violent relationship with her boyfriend (a co-offender) or being shot by police.[493] Her risk of reoffending was assessed by a psychologist as being 'in the high range'.[494] In making the declaration, the court referred to statements made in *McDougall and Collas* and the case of *R v Galleghan*,[495] in which an appeal against an 8-year sentence with an SVO declaration on the grounds of manifest excess had been dismissed.

2. In the second case,[496] the judge took into account the offender's lack of remorse, that the offending involved 'a protracted incident over a long period of time' which 'only finished because of the complainant's ability to escape' and that it involved 'an intentional infliction of severe pain and suffering' on the complainant in making the declaration. In this case, the complainant, a 19-year-old male, described as a 'vulnerable person' was detained at a bush camp over a three-day period by the offender, his 16-year-old daughter and another young person during which time he was tied up and assaulted with various implements, including a saw and a shovel. The offender wrongly believed the complainant had stolen property from him. He was sentenced to 5 years' imprisonment (which the judge noted was 'at the lower end of the range' taking into account the making of the SVO declaration).[497]

## 10.2 Reasons why an SVO declaration was not made

The reasons sentencing judges gave for not making an SVO declaration were varied.

### 10.2.1 Prosecution did not ask for one, or make strong submissions in support

A common reason given for not making a declaration was that the prosecution did not ask for one. For example, in the case of an offender sentenced for charges including grievous bodily harm and sexual assault, the judge remarked that while some features might justify the making of an order, they 'were not asked to make a declaration' and:

488 Ibid p. 4, lines 20, 22–26.
489 QDC 2019/49.
490 Ibid p. 15, lines 36–41.
491 Ibid p. 2, lines 8–10.
492 Ibid p. 12, lines 31–33.
493 Ibid p. 12 lines 39–41, 43–45
494 Ibid p. 13, lines 9–10.
495 [2017] QCA 186.
496 QDC 2021/06 p. 2, lines 42–46 and p. 3, lines 1–4. Subject to appeal.
497 Ibid p. 3, lines 4–5.

> Whilst I am of the view that some features of the grievous bodily harm offence might justify making such an order, the circumstances of the sexual assault do not justify that course. In the end, given that the prosecution are not seeking such an order and taking account of the circumstances of the grievous bodily harm offence and all of the other circumstances, including your personal circumstances, I have decided that it is not necessary to delay your eligibility for release in that way.[498]

The offences in this instance involved an assault perpetrated on a female complainant with whom the offender had at one time been friendly, while visiting her at her unit, including punching her a number of times (giving rise to the grievous bodily harm charge) and sexually assaulting her by removing her shorts and underwear while unconscious, as well as stealing a number of items. The offender was a New Zealand citizen who would be deported on his release.

Mental health issues factored into the decision not to make an SVO declaration in a Supreme Court case, supported by submissions from the Crown — in this case to ensure the offender would be subject to an extended period of supervision. The offender had been on remand for about 4 years and 10 months for a charge of malicious act with intent (cutting an acquaintance's neck with a pocket knife, while he was driving, over a religious disagreement) – some of this delay because of Mental Health Court processes. While the Crown initially submitted this was a case in which the court might make an SVO declaration, it was submitted by the prosecution that the interests of the community would be better served by making an order that would allow the offender to be supervised at an earlier date than after he had served 80 per cent of his sentence. This submission was accepted.[499]

Other examples where comment was made by the sentencing judge that the prosecution was not actively seeking or pressing for an SVO declaration to be made included:

- An offender convicted of dangerous operation of a vehicle with a circumstance of aggravation, grievous bodily harm, serious assault and other offences committed during what was described as a 'crime spree'. The grievous bodily harm related to a police officer's injuries when they were trying to apprehend the offender and a police car drove into the passenger side of the offender's pushing it into another vehicle causing a door that he had the tips of his index and middle fingers in, to slam. In a separate road-rage incident, he punched a male complainant to the head and torso, and then reversed his car into the complainant's vehicle. The offender was sentenced to 7 years' imprisonment, with parole eligibility set at one-third.[500]
- A 21-year-old offender convicted on his own pleas of one count of torture, eight counts of choking in a domestic setting, one count of assault occasioning bodily harm, one count of deprivation of liberty and one count of contravention of a domestic violence order with a circumstance of aggravation.[501] The offender had confronted his girlfriend about alleged infidelity in a church car park and perpetrated acts of violence against her over a period of about 30 minutes, including knocking her to the ground, choking her and punching her with a closed fist. The Crown made submissions for a head sentence of between 6 and 7 years but did 'not press for a serious violent offence declaration'.[502] The offender had a limited criminal history. He was sentenced to 5.5 years with eligibility at one-third.
- A 26-year-old offender who pleaded guilty to offences of burglary and rape committed against a woman he had met online.[503] He followed her to her residence and later returned, which is when the rape occurred. He initially denied committing the offences. The Prosecution submitted a sentence in the range of 7 and up to 10 years was available in the circumstances, and although submitting it was open in the circumstances to declare it an SVO, no submissions were made to request a declaration. He had no prior criminal history. He was sentenced to 8 years' imprisonment. The judge commented that they were 'not satisfied that this is an offence which is out of the norm or sufficiently serious to warrant a declaration that it is a serious violent offence', pointing to 'the lack of gratuitous violence beyond that necessary to commit the offence, the lack of a use of weapon or other treat, or other evidence of sophistication in the carrying out of the offending'.[504] The sentencing judge referred to factors including the offender's lack of prior history, the fact the offence appeared to be 'completely out of character', and that he entered early pleas of guilty in setting parole eligibility at one third of the head sentence.[505]
- A 40-year-old offender who pleaded guilty to offences including dangerous operation of a motor vehicle causing grievous bodily harm and leaving the scene, robbery with personal violence, armed robbery and

498 QDC 2019/65 p. 10, lines 6–12.
499 QSC 2019/04. Note: transcript issued subject to correction.
500 QDC 2020/05.
501 QDC 2020/54.
502 Ibid p. 5, lines 16–17.
503 QDC 2020/01.
504 Ibid p. 6, lines 13–17.
505 Ibid p. 6, lines 9–12.

unlawfully using a motor vehicle.[506] The dangerous operation charge related to him deliberately driving at the complainant, the offender's wife, and/or the group of people they were with, in the context of an argument he and his wife were having. The offender was using methylamphetamine at the time. The armed robbery in company involved the theft of a campervan being driven by tourists, during which he threatened the complainants with a screwdriver. The Crown did not seek an SVO declaration. He was sentenced to 4 years imprisonment for the dangerous driving charge, with the sentences imposed for his other charges ordered to be concurrent with each other, but cumulative on this sentence — the highest being 4.5 years imposed for armed robbery. Parole eligibility was set at one-third.

- An offender who pleaded guilty to one count of armed robbery with personal violence and two counts of armed robbery.[507] The offences occurred during a period of about 30 minutes involving three different bottle shops, during which time his co-offender waited for him on a motorbike. He presented a shortened rifle at each of the premises and demanded money. He had a prior criminal history for offences including drugs and property offences and some motor vehicle offences. He had been diagnosed with a heroin and methylamphetamine use disorder and as being a 'very high' risk of reoffending.[508] The prosecutor made submissions for a global head sentence in the range of 8 to 9 years, conceding it was 'not really the case for a serious violent offence order'.[509] In agreeing with this conclusion, the judge referred to the nature of the particular offences and that the offending 'did not involve any gratuitous violence', while noting it would have been 'a pretty terrifying experience' for the victims.[510] He was sentenced to 8 years' imprisonment, with parole eligibility after serving 3 years.

### 10.2.2 Did not meet the 'requirements' of an SVO declaration / not 'outside the norm'

Other judges referred to the circumstances involved not meeting the 'requirements' of making an SVO declaration with reference to the nature of the offending.

For example, a Supreme Court judge in one case involving two separate charges involving a malicious act with intent and wounding[511] declined to make a declaration with respect to either offence. The offender, who was drug affected at the time, shot the first complainant – a friend he had been smoking drugs with – in the pelvis causing internal injuries. This occurred when the friend asked him to return his phone the offender had taken which had a picture of the offender's girlfriend on it. The second charge of wounding arose from an incident in which the offender shot the complainant – a person known to him — from a car while the victim was sitting outside a shopping centre with the pellets striking him in the lower back – again causing internal injuries.

The judge, while acknowledging that the first charge involved the use of a firearm and was very concerning, did not consider it met the requirements of an SVO declaration. In drawing this conclusion, the judge noted the offence had occurred against a background of drug use among friends, and while the shotgun was fired with intent to cause grievous bodily harm, it appeared to be on one occasion only with no protracted conduct against the complainant involved. The judge distinguished the cases of *R v Selvey*[512] and *R v Gadd*[513] (two 'home invasion' cases relied upon by the Crown) on this basis.

The judge also declined to make an SVO declaration with respect to the second charge of wounding, finding that there was no intent to injure the complainant with some evidence there was a ricochet of the bullet involved.

In a second case,[514] an offender who was also affected by methylamphetamine and said to have been suffering 'a chronic methylamphetamine induced psychosis',[515] forcibly entered a police complex and threatened three police officers while armed with a knife in an effort to get the officers to shoot and kill him, wrongly believing his wife and son had been killed. The judge, in imposing a 7-year sentence for the most serious charge of committing a malicious act with intent to cause grievous bodily harm (with parole eligibility set at one-third) found:

> While the offending involving an attempt to cause grievous bodily harm to a police officer whilst wielding a knife is a serious offence, and, fortunately in our community not a common offence, it is not so serious and out of the

506 QDC 2020/36.
507 QDC 2020/37.
508 Ibid p. 3, lines 43–45.
509 Ibid p. 4, lines 27–29.
510 Ibid p. 4, lines 31–34.
511 QSC 2019/17. Transcript issued subject to correction.
512 Ibid (citation omitted).
513 *R v Gadd* [2013] QCA 242. In this case, the Court of Appeal dismissed an appeal against a sentence of 8 years' imprisonment with an SVO declaration.
514 QSC 2020/30.
515 Ibid p. 5, lines 1–3.

> norm, I think in the particular circumstances, to warrant a declaration, and in particular in this case I repeat what I've said about the defendant's early plea, his cooperation and his evident remorse.[516]

For matters sentenced in the District Court, the absence of aggravating features that would suggest the case was one that would support an SVO declaration being made was also noted in a number of cases.

There was reference in some cases to the circumstances of the offending not being beyond or outside 'the norm' for this type of offence — referencing the language adopted in *MacDougall and Colla*s (discussed above at 2.1.2). For example, in one case involving multiple complainants and charges including multiple counts of rape and aggravated burglary, the sentencing judge concluded that:

> although the circumstances were unusual, consistent and persistent, affecting multiple complainants, those offences in themselves are not beyond the norm so as to warrant the making of a declaration. Nor, taken together in the whole series of the events so as to elevate their seriousness in the circumstances, and I decline to make the declaration.[517]

The sentencing judge, when explaining the consequences of the declaration to the offender should it apply, noted that the process would involve considering whether or not the offender's criminal conduct, for the purposes of a declaration, was 'beyond the norm of offending of this type, which is a very unfortunate way to put it'.[518]

In a third case, the sentencing judge concluded:

> Your case, while serious, does not justify in my mind a serious violent offence. Had you had previous violence, had there been something more specific, had it been more planned, and had it been more deliberate, I might well have been more inclined to make the order the Crown sought.[519]

The offender had pleaded guilty to two charges of armed robbery with personal violence against two separate complainants. The second incident involved the offender walking up to the driver's side door of the complainants car and demanding he give him whatever he had. He sprayed the complainant with clear liquid and told him it was methane – holding out a lighter – and that he would light him on fire if he didn't give him what he needed. The complainant got out of the car with his keys, with the offender then threatening him and punching him six times, and kicking him in the ribs when the complainant then fell to the ground and lost consciousness. A number of items were missing from the car when he regained consciousness.

In considering the level of violence involved, the judge commented:

> The gratuitous violence, unfortunately, on the ground relating to the armed robbery, in itself, sadly, is not particularly unusual, or out of the norm … related to armed robberies generally. Gratuitous violence is part and parcel, sadly, of most armed robberies with personal violence. And the fact that no one was physically hurt – although the incidents were frightening for both complainants – ultimately I consider that, in the circumstances, a serious violent offence declaration is not warranted here.
>
> All robberies are serious. All, by definition, involve violence, or threats of violence. Unfortunately, it is regrettable that that is exactly what armed robberies with personal violence entail.[520]

As to the issue of the case being 'outside the norm', the sentencing judge clarified, citing comments made by Justice Henry in *R v FAI*:[521]

> out of the norm does not necessarily mean anything other than – particularly, it is not a reference to the norm for factual similar circumstances of an offence, because as he says, rapes by burglars upon women in their homes might, necessarily in themselves – can be something not unknown to the criminal law, but the circumstances involving them might be so serious to justify making a declaration regardless.
>
> And as he said also, it does not mandate, necessarily, the exercise of a discretion to make a declaration upon any finding being made that the offence, in itself, was taken out of the norm.[522]

All but one of these cases pre-dated the Court of Appeal's decision in *Free* which clarified it was erroneous to focus:

> on a perceived need to find factors which take the case outside the norm for the type of offence; rather than considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required.[523]

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516 Ibid p. 6, lines 23–28.
517 QDC 2019/13 p. 9, lines 27–31.
518 Ibid p. 7, lines 26–29.
519 QDC 2019/12 p. 8, lines 31–34.
520 Ibid p. 8, lines 4–14.
521 [2016] QCA 150.
522 QDC 2019/12 p. 8, lines 19–27.
523 *Free* (n 23) [49].

In a decision handed down post-*Free*, the lack of sufficient aggravating features was pointed to as a basis on which to decline to declare a rape charge to be a serious violent offence.[524] This case involved a 74-year-old offender sentenced for 39 historical sexual offences committed over three decades commencing in the mid-1970s against six complainants aged between 12 and 15 years. He pleaded guilty to these charges, although at a late stage (on the morning of his trial). The sentencing judge was 'not satisfied that the aggravating features are such that I ought to declare the offence of rape a serious violent offence' but declined to set a parole eligibility date (meaning he would be eligible after serving half of his sentence).[525] The judge noted that no psychiatric report had been placed before them 'where a proper consideration of [the offender's] risk of reoffending has been assessed', and, in the absence of this, they 'could not be satisfied 'that he had rehabilitated or was not a danger of reoffending.[526] The offender was sentenced to a total of 16 years' imprisonment — which included 8 years' imprisonment for the offence of rape.

In another post-*Free* decision, the sentencing judge made reference to the fact the prosecution had referred to this decision, noting that they had also 'been assisted by, the decision of *R v Free; ex parte Attorney-General* [2020] QCA 58, which has somewhat clarified the exercise of the discretion to make a declaration of a serious violent offence'.[527]

The judge declined to make a declaration in this case which involved an offender convicted on his own pleas of assault occasioning bodily harm, disabling with intent to commit an offence, attempted deprivation of liberty and stealing, as well as two Commonwealth offences and a number of summary charges.[528] The state offences were committed against an escort with whom the offender had booked an appointment. The offender punched her in the face while they were walking towards the entrance of a hotel, placed an arm around her neck and applied pressure lifting her body off the ground and causing her to lose consciousness, attempted to tie her wrist with a cable tie, and tried to grab and punch her as she regained consciousness and ran away. The offences were caught on the hotel's CCTV. The offender was said to have been on methylamphetamine at the time of his offending, and to 'suffer from a significant problem with substance abuse'.[529] The sentencing judge commented that 'the circumstances, particularly viewed in the context of [the offender's] serious criminal history and … serious criminal history of violence against females' were 'extremely disturbing'.[530]

The prosecution submitted that the discretion to make an SVO declaration was 'enlivened' although the sentencing judged noted 'they do not strongly advocate for it'.[531] It submitted for a head sentence in the range of 6 to 7 years taking into account his plea of guilty, prejudicial upbringing, involving a childhood involving violence and abuse, and health problems (including back injuries), but also his 'continued offending, including violence against women' and submitted if an SVO declaration was not made, there should be no early eligibility for parole.[532] He was sentenced to 7 years for the most serious charge of disabling with intent, with other sentences imposed to be served concurrently, and set parole eligibility after he had served 3.5 years.

### 10.2.3 Totality considerations: it would be disproportionate to the offender's overall criminality/to avoid a 'crushing' sentence

Another reason given for not making an SVO declaration was to avoid imposing a sentence that was disproportionate to the overall offending — as was explained by the sentencing judge in one case involving an offender being sentenced for three separate charges of trafficking in dangerous drugs, armed robbery and wounding.

> I have been referred again to other cases of a similar nature which have been decided by a higher Court than me and they have been helpful, in particular the case of *R v Thompson* [2016] QCA 196. It is well-settled that for that offence alone you could get a sentence of somewhere between three to five years. And I hope you were listening to the exchange that I had with the Crown Prosecutor because I suspect you are aware of the concept of SVOs, serious violent offence orders, which mean that you have to serve 80 per cent of your term and there is no earlier parole than that. You are so close to getting one because, if you got five for the robbery, which you should, and got five for the trafficking, which you easily could, then you get 10 and they are both offences which would mean an automatic 80 per cent and there would be nothing I could do about it.
>
> As it is, the trafficking and the armed robbery with wounding are completely different types of offending and I take the view in this sort of situation that it is appropriate for sentences to be cumulative upon each other. For that matter, the six months imprisonment that you received in the District Court could have been made

524 QDC 2020/32.
525 QDC 2020/32 p. 8, lines 26–31. Subject to appeal.
526 Ibid p. 8, lines 12–17.
527 QDC 2020/06 p. 4, lines 15–17. Subject to appeal.
528 Ibid.
529 Ibid p. 4, lines 36–38.
530 Ibid p. 5, lines 21–23.
531 Ibid p. 4, lines 1–2.
532 Ibid p. 4, lines 9–14. The transcript indicates the submission as to there being no early eligibility for parole should be considered if an SVO declaration was made. The authors have assumed this is an error resulting from the transcription process.

> cumulative as well. And even if we did not get to 10, we would be very close to it if I just gave you what each offence deserved, and accumulated it. However, I am again bound by a sentencing principle which has been formulated by a Court higher than this. And I have to be careful to ensure that the sentence ultimately imposed is not disproportionate to your overall criminality.[533]

In another instance, the offender had spent time in custody for offences committed in South Australia that could not be declared. The sentencing judge reduced the head sentence taking this and his efforts at rehabilitation into account, and set his parole eligibility date by reference to when he first went into custody in South Australia — resulting in a total period of 4 years — being slightly less than 2 years from the date of sentence:

> it would have been open to me to impose a sentence in the range of 10 to 12 years imprisonment, you being a mature offender who had pleaded guilty to trafficking in schedule 1 drugs on a scale like this one here. … bearing in mind the period you have already spent in custody and the steps you have taken while in custody to attempt to reform yourself, it would seem to me that it would have been crushing to impose a sentence of more than 10 years with the consequent 80 per cent non-parole period in circumstances where you have already spent time in custody in South Australia recently for similar offending and where you have taken what appear to me to be active steps to reform yourself. For that reason, it does seem to me to be appropriate to fix a nine-year sentence for the trafficking offence.[534]

An appeal against sentence was allowed, but on the limited basis that 16 days of pre-sentence custody should have been declared.[535]

Totality considerations were also referred to in another case in circumstances where the offender had committed the offences while on parole, with the judge declining to exercise their discretion to make an SVO declaration:

> It seems to me that the sentence contended for by the learned Crown Prosecutor of seven years with a serious violent offence declaration, whilst open to me as a matter of discretion, carries the risk that you will spend a very long time, 5.6 years, before being eligible for parole. I think it is better that I do not exercise my discretion to impose a serious violent offence declaration but impose a sentence that reflects your criminality and your criminal history, the matters in aggravation, including that you committed this offence whilst on parole, but also recognises the totality principle. [536]

In this case the judge determined it appropriate for the defendant to serve more than one third, but less than the statutory 50 per cent before being eligible for parole, setting parole eligibility at approximately 40 per cent of the sentence. In doing so, the sentencing judge observed that: 'Commonly, early or timely pleas of guilty attract eligibility after a third. That is not automatic'.[537]

### 10.2.4 Mitigating factors

A range of mitigating factors were referred to in justifying the decision either to sentence the offender below the 10 year threshold, thereby avoiding the need to make an automatic SVO declaration, or in declining to make an SVO declaration.

#### Admissions and cooperation with investigation

In a drug trafficking case, the level of cooperation with law enforcement authorities and admissions made by the offender as to the extent of their offending was referred to as justifying a sentence below 10 years.[538] A sentence that would otherwise have been one of 11 years was reduced, partly on the basis of admissions made by the defendant — albeit in circumstances where there was 'very strong circumstantial evidence' of his involvement in the trafficking business.

The sentencing judge referred to the need to give a discount 'off the top of the sentence' taking into account mitigating circumstances due to 'the inevitable 80 per cent that would follow from [an SVO] declaration being automatic from 10 years and upwards' making it 'inevitable that the discounting should be from the top'.[539]

#### Mental health issues

The presence of mental health issues was also relevant in some cases to the judge's decision it would be inappropriate to make an SVO declaration. For example, in a case of attempted murder involving a woman who had

533 QSC 2020/18 p. 3, lines 46–48, p. 4, lines 1–18.
534 QSC 2019/25 p. 4, lines 34–45.
535 Decision delivered on 21 April 2020.
536 QSC 2019/27 p. 8, lines 40–46.
537 Ibid p. 9, lines 24–25.
538 QSC 2019/31.
539 QSC 2019/31 p. 6, lines 27–29.

attempted to kill herself and her 9-year-old daughter by gassing them, the court found that while the discretion to make a declaration might have been enlivened, her case was not one in which it should be exercised.[540] The offender in this case was noted as having developed insight into her mental health condition, had expressed considerable remorse, and had no criminal history prior to this offending.

In this case, the daughter had woken up and turned the gas bottles off after her mother told her how to do so and later disclosed the incident to her father who took her to police to report the incident. The offender made full admissions to police and cooperated with the investigation. Two expert reports prepared by separate psychiatrists expressed the view that her mental health affected her at the time of the offending impairing her capacity to know she ought not do what she did. She had been diagnosed as having borderline personality disorder, and also as having features of PTSD and a major depressive order.[541]

In a District Court case involving charges of malicious acts with intent and three counts of serious assault (assault of a police officer), the judge found that while the offender had a 'long history' of criminal offending, including for violence, and his 'offending on this occasion was really exceptionally violent, even taking into account the kinds of violence the court hears about with this charge [of malicious act with intent]', 'it would be better not for [the offender] to be subject to a serious violent offence declaration'.[542] In reaching this conclusion, the judge intended to 'make plain' that their purpose was that 'with such assistance and support' as the offender can be given, he 'be released and supervised in the community for a significant period of time'.[543] The offence involved a vicious assault committed against a person who lived in a unit next door to the woman the offender was in a de facto relationship with, and with whom the offender had, from time to time, stayed.

The offender was said to have demonstrated 'classic expansive paranoia of a methamphetamine psychosis' which had 'occurred on a baseline of chronic and untreated psychosis likely extended back to early 2000' – when he was diagnosed with a schizophrenic disorder.[544] While initially referred to the Mental Health Court, the Court found that 'although there might have been an underlying schizophrenic type of illness, because [the offender was] as the time affected by drugs' the defence of unsoundness of mind was not available to him.[545]

The sentence ultimately imposed was one of 8 years, with parole eligibility after serving 4.5 years (with about 3.5 years of pre-sentence custody declared as time served under the sentence, and a further 12-month period to serve before he would be eligible for parole). As the offence was committed while the offender was on parole, he also had to serve out the balance of an earlier imposed 12-month sentence prior to sentence which could not be declared as time served under the sentence.

### Combination of factors

Most commonly, it was a combination of factors that led the judge to the conclusion an SVO declaration should not be made.

In one case, an offender's relative youth and absence of prior offending were factors pointed to by the sentencing judge as the 'overwhelming feature' in deciding a declaration should not be made[546] — with the offender in this case also having significant mental health issues which were found to have reduced his degree of moral culpability. This determination was made despite the prosecutor making submissions that it was open for the court to make a declaration given the level of planning and premeditation involved.[547]

The 29-year-old offender had pleaded guilty to unlawfully doing grievous bodily harm to a fellow church parishioner — whom he stabbed in the back inside the church four times resulting in a struggle and the complainant's hand being badly lacerated. The offender had walked from his home to the church bringing knives and a tomahawk with him.

The offender was sentenced to a period of 4.5 years' imprisonment, suspended after serving 3 months for an operational period of 5 years. He had no prior criminal history and was a Singaporean national (meaning he would soon be deported). He suffered from a depressive illness that it was accepted substantially impaired his capacity at the time to know he ought not to do the act and, thereby, reducing his degree of moral culpability.

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540 QSC 2019/29. Transcript issued subject to correction. Subject to appeal.
541 Different views were expressed by the two psychiatrists as to these diagnoses and the impact on her offending, although both agreeing as to this resulting in her impaired capacity.
542 QDC 2020/02 p. 5, lines 45–47, p. 6, lines 1–3.
543 Ibid p. 6, lines 12–14.
544 Ibid p. 5, lines 6–10. This view was provided in a report tendered.
545 Ibid p. 4, lines 27–30.
546 QSC 2019/26.
547 QSC 2019/26.

The sentence was reduced from one that would otherwise have been about 6 years by the judge not declaring time already served under the sentence (about 16.5 months).

In another case, the young age of two co-offenders (20 years and 25 years respectively), the fact that both had 'limited criminal histories' with no history of violence, and the level of violence involved were identified as supporting the sentencing judge's conclusion that a declaration should not be made – as was the requirement, if they were declared convicted of an SVO, to sentence them towards the lower end of the range. In these circumstances, it was considered their release was best left as a matter for the Parole Board:

> Kidnapping is of itself a disturbing offence of violence, but if the discretion were to be exercised here, the Court would still need to consider the overall sentence of imprisonment and would be obliged to look to a sentence towards the lower end of the range.
>
> The prisoners are still young without a history of violence and the level of violence, although serious, was contained. In those circumstances, it is, in my view, preferable to leave the discretion for release to the parole authorities after the halfway mark is reached.[548]

This case involved four separate charges of kidnapping, grievous bodily harm, deprivation of liberty and common assault perpetrated against a male person from whom the offenders were trying to recover money. The victim, who was physically much smaller than the two offenders, was punched, had his legs slashed to stop him escaping, and held prisoner for 13 hours without medical treatment or food. The younger offender, who had used the knife against the complainant, was sentenced to 7 years' imprisonment and the older offender to 5 years and 2 months' imprisonment, with parole periods for both fixed at the halfway mark.

In another case of an offender sentenced for four counts of rape committed against a sex worker,[549] the judge assessed it as a 'borderline case' as to whether a declaration should be made, but ultimately declined to do so referring to factors including the defendant's plea and lack of previous sexual offending, and the impact on his family:

> The question is, do I impose an SVO. It is a borderline case. There are some concerning aspects of violence here. On the other hand, there is the plea. There is a lack of previous sexual offending. There is the significant impact on your family and as I said earlier, pleas of guilty need to be encouraged by these Courts. I think this is a case where, in the exercise of my discretion, I will not impose an SVO, but on the other hand, I do not propose to order an earlier parole eligibility date.[550]

The offender's pleas to charges including rape, attempted rape, and three counts of choking, in a domestic setting committed against his 29-year-old niece was also an important factor in the decision not to make a declaration in another District Court case.[551] The judge referred to the decision not to make the declaration as being 'primarily' a result of the offender's pleas in combination with the lack of previous sexual offending and rehabilitative prospects as well as the nature of the conduct involved and lack of serious physical injuries:

> I've decided in the exercise of my discretion not to impose such a declaration. The reasons for that primarily are the pleas. The reality is I think the courts need to encourage pleas of guilty, otherwise we'll have trials for all of these cases. But over and beyond that, you don't have any previous sexual offending. If you did it would be a different story. Luckily, there was no penile rape, there were no serious physical injuries, and there is a good chance of rehabilitation.[552]

Given this conduct involved 'very serious offending', the sentencing judge did not set a parole eligibility date (meaning he would be eligible after serving half of his sentence).[553] The sentence imposed for the most serious charge of rape was 9.5 years, with other sentences imposed ordered to be concurrent.[554]

Both the offender and complainant in this case, who were Aboriginal and Torres Strait Islanders, were under the influence of methylamphetamine at the time the offending occurred. The offences occurred in the context of an apparent argument concerning accusations by the offender that the complainant's mother and sister were running a brothel, and the complainant confronting him over her belief he had broken into her home and stolen items. The offending was interrupted when police entered the house and arrested him. Psychological and psychiatric follow up for the offender was recommended in an expert report, and the judge noted that the offender had expressed a

548 QDC 2019/52 p. 3, lines 37–45.
549 QDC 2020/22.
550 Ibid p. 6, lines 17–23.
551 QDC 2020/34. Subject to appeal – lodged 27 October 2020.
552 Ibid p. 5, lines 44–49, p. 6, line 1.
553 Ibid p. 6, lines 1–2.
554 This sentence is subject to appeal.

desire to abstain from drugs and alcohol.[555] The offender in this case was a victim of sexual abuse and had lodged a claim for compensation through the redress scheme. He was described as being 'very remorseful'.[556]

In a case involving a charge of maintaining a sexual relationship with a child,[557] which concerned offences committed by the child victim's grandfather, the judge referred to the offender's plea, sense of remorse, the extent to which he had recognised his offending and sought to address it and his prospects of rehabilitation as of relevance both in deciding to reduce what otherwise would have been a higher head sentence, and deciding not to make an SVO declaration.[558] Having regard to these circumstances, the sentencing judge found:

> this is not a case which necessarily demands a response from the Court which would have the effect if, for instance, 10 years or more would be imposed, by way of a need to protect the community from the prospect of further offending by you ....[559]

### 10.2.5 Need for an extended period of supervision and to promote rehabilitation

Concerns about ensuring the sentence was structured in such a way as to provide for a sufficient period of supervision of the offender on their release from custody was raised as a reason for not making a declaration in a case involving an offender aged 20–21 years at the time of the offending, who was convicted of grievous bodily harm in a domestic violence context against a 17-year-old partner, as well as four earlier assaults against her (one while armed):

> I certainly am mindful of the fact that if, as would be the case, I would need to look at a lower end of any sentencing in relation to a declaration of a serious violent offence, it would be that there would be only a very small period of time - a window, if you like - for supervision to be provided.
>
> If, however, I were to impose a sentence of a longer duration and to then declare a parole eligibility date, it would be the case that there would be a more significant period of supervision available in relation to your release from jail. And that would, in the long term, have benefits not only for you, but one would hope for the community, and therefore be of a longer term - betterment for you and better opportunities for the protection of our society.[560]

In this instance, the sentencing judge, while noting the offending 'was of the very – most serious of nature', took into account the defendant's guilty plea, youth, and fact he was gaining some insight into his behaviour and its consequences, concluded: 'there are some prospects that would benefit from a considerable period of supervision following any release from prison'.[561] The sentence imposed was one for 8 years' and 4 months' imprisonment with parole eligibility set 3 years from the date of sentence — with 130 days of pre-sentence custody declared as time served under the sentence.[562]

Concerns about the need to ensure a significant period of supervision — which would not be possible should the offender be subject to an SVO declaration — were also mentioned in another case involving a charge of rape committed against the offender's former partner while on parole — although it was noted the offender had been subject to a declaration with respect to two previous rapes:

> The Prosecutor submits that I should consider a serious violent offender order – you have had that previously. With respect to his submissions, my view is that the previous two rapes for which you were sentenced very clearly did require a serious violent offender order. Despite that having been imposed in the past, in my view, there is nothing about the context of the current offending that would require a serious violent offender order. Although I may not completely agree with your barrister's submissions, I certainly agree that a substantial period of time on parole will be a very important part of your rehabilitation; that cannot be achieved with a serious violent offender order, and, as I say, I do not think there is anything about the circumstances – as despicable as rape is – about the current offence for which I am sentencing you that would persuade me, in an overall context, that a serious violent offender order is appropriate.[563]

The offender in this case had reported the offence immediately on committing it having called the police when he left his former partner's house and had made full admissions. He was reported as having multiple mental health issues including diagnoses of post-traumatic stress disorder and complex trauma as a result of a traumatic childhood, a provisional diagnosis of borderline personality disorder, and to have a substance use disorder, currently

555 Ibid p. 4, lines 39–41.
556 Ibid p. 5, lines 20–21.
557 QDC 2021/08.
558 Ibid p. 4, lines 45–49.
559 Ibid p. 5, lines 2–4.
560 QDC 2019/20 p. 12, lines 34–44.
561 Ibid p. 12, lines 46–47 and p. 13, lines 1–5.
562 The sentencing judge also referred to the fact the offender had been in custody 'for significantly more time than that' due to previous offending and the consequences of breaches of previous parole and suspended sentence orders, meaning he was 'unable to have any benefit from the additional time' he had spent in custody: ibid p. 12, lines 38–42.
563 QDC 2020/35 p. 3, lines 37–46, p. 4, lines 1–3.

in remission. He was sentenced to 6.5 years' imprisonment, with parole eligibility at one third of the head sentence, calculated from the date he came into custody.

In the case of a violent home invasion while in company, during which the offender repeatedly used a machete on the victim's knee wounding him while others struck him with a sword, the court noted that: '[t]he level of violence squarely raises consideration of a declaration of a serious violent offence' and that if made, 'the sentence would need to be towards the lower level of the range'.[564] While the 'need for deterrence and just punishment required a substantial prison sentence to be imposed, because of the offender's young age (23 years at the time of sentence), it was 'preferable to structure a sentence that offers positive encouragement for [the offender's] rehabilitation and opportunities, if released on parole, 'to return to the community under an extended period of supervision on parole'.[565] The offender was sentenced in this case to 8 years' imprisonment, with parole eligibility 3.5 years from the date of sentence, taking into account 5 months of time spent in custody that the sentencing judge chose not to declare, and that it would be partially cumulative on a pre-existing sentence of 2 years and the offender's plea of guilty.

An appeal against sentence was allowed on the basis that the pre-sentence custody put forward at sentence (117 days, or about 4 months – referred to by the sentencing judge as 'nearly five months') was incorrect.[566] The real period was 201 days (just over 6.5 months). The Court, in re-exercising its sentencing discretion, did not change the original sentences imposed, but set parole eligibility at one third (rather than after the offender had served 4 years of his 8 year term) taking into account his pre-sentence custody, and in accordance with the principle discussed in *Carlisle* (discussed above at 4.2.1 of this paper).[567] In varying the sentence in this way, Sofronoff P, with whom the other members of the Court agreed, supported the sentencing judge's observations about the offender's mitigating factors and concluded:

> For those reasons, the applicant should be afforded a real opportunity to demonstrate his ability to build a life if he can, that has been so severely damaged by a drug to which he became addicted at an age at which he lacked the experience to know the seriousness of the danger posed to him by methylamphetamine. He has been the subject of an almost crushing series of sentences while still a very young man. Full effect should be given to the actual pre-sentence custody that he has served and he should also be given the full benefit of his acknowledgement of his responsibility which he has shown by his pleas of guilty.[568]

# 11 Purposes of an SVO declaration

Four Supreme Court cases expressly mentioned the purposes of the SVO scheme — all in the context of justifying why the sentencing judge had determined that an SVO declaration should not be made:

- One mentioned that: 'such a declaration may not be just in all the circumstances in order to fulfil the purpose of sentencing', with reference to *R v McDougall and Collas* [2007] 2 Qd R 87 at [18].[569]
- Two cited the Court of Appeal in *McDougall and Collas*, with reference to the Court of Appeal's statements that 'the considerations which may be taken into account in the exercise of the discretion to make a serious violent offence declaration are the same as those which may be taken into account in relation to other aspects of sentencing' and:

  > The considerations which may lead to the postponement of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way the exercise of the discretion will usually reflect an appreciation by the sentencing Judge that the offence is a more than usually serious or violent example of the offence in question and so outside the norm for that type of offence.[570]

  The sentencing judge in one of these cases referred to the Court of Appeal's more recent statements in *Free* that 'the real question is whether the offence suggests the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than otherwise would be required by the Act'.[571]

564 QDC 2020/18 p. 3, lines 13–15.
565 Ibid p. 3, lines 17–22.
566 Decision delivered on 8 June 2021.
567 Ibid [15].
568 Ibid [14].
569 QSC 2021/01, p. 9, line 49, p. 10, lines 1–2.
570 QSC 2019/18 and QSC 2020/10.
571 QSC 2020/10 p. 5, lines 41–45.

- In the final case, the same statements made by the Court of Appeal in *McDougall and Collas* were referenced in determining that an SVO declaration should not be made[572] — a conclusion reached 'not without hesitation'.[573] This case involved an offender convicted of a charge of malicious act with intent arising from the offender throwing petrol at the complainant and setting fire to it resulting in burns to the complainant, and the complainant's duplex being set alight. There was an apparent vigilante motivation concerning beliefs the offender had about the complainant's actions towards the complainant's daughter. The sentencing judge concluded that while the offender's criminal history was 'relevant and concerning because it reflects prior violent actions', it did not lead to a conclusion that he was 'to be regarded as being a high risk to the community' of committing further acts of violence, and serious acts of violence, in the future.[574] The offender in this case was sentenced to 8.5 years, with parole eligibility after 4 years.

Of the 76 District Court cases coded, the purposes of the scheme were referred in an explicit or implied way in over one-third of cases (28 cases). This included 25 cases sentenced after the Court of Appeal's decision in *Free* (delivered on 31 March 2020).

Of those sentences handed down post–*Free*, 12 expressly referred to statements made by the Court of Appeal[575] when considering if there were 'circumstances … which aggravate the offence in a way which suggests the protection of the public or adequate punishment requires a longer period of actual custody, namely 80 per cent'.[576] All 12 involved an exercise of the court's discretion as to whether a declaration should be made — with an SVO declaration being made in four of these cases, and declined to be made in the remaining eight.

Others referred in a more general way to this decision, but without expressly articulating how it had influenced the sentencing judge's exercise of their discretion whether to make a declaration.[577]

A number of District Court cases also referred to statements made by the Court of Appeal in *McDougall and Collas* as to the relevant purposes to be considered. For example, in one case, the sentencing judge in deciding to make an SVO declaration in circumstances where this was discretionary, concluded:

> I am of the view that the offending is of such a serious nature, and that the circumstances of relevance in this matter, that is the seriousness of the offending conduct, the degree of violence used, the driving to a remote location, the failure to reconsider after the resistance, and the verbal lack of consent, and your behaviour subsequently aggravate the offence in a way which suggests that the protection of the public, or adequate punishment, requires a longer period in actual custody before parole than would otherwise be required.[578]

One case[579] referenced statements made by the former Chief Justice, Justice De Jersey, in *R v Bryan, ex parte Attorney-General*,[580] where his Honour, at paragraph 6, observed that:

> By [introducing] part 9A … into the *Penalties and Sentences Act* in 1997, the legislature clearly signalled a hardened intolerance of serious violent offending which sentencing courts must be astute to acknowledge and respect. In cases like this one [and the present case], deterrence, punishment and community denunciation … will ordinarily assume much greater significance than the personal circumstances of an offender.[581]

# 12 Problems with the SVO scheme

Problems identified by sentencing judges with the operation of the SVO scheme typically related to the automatic nature of the scheme — meaning that the only way to reflect factors in mitigation, including the defendant's guilty plea, was through a reduction in the head sentence.

For example, in one case sentenced in the District Court, the judge noted that while 'a sentence in the order of nine to 10 years imprisonment would be the appropriate range', this would not permit them to recognise the offender's guilty pleas — contrary to the requirement at law to take this into account:

> It does seem to me that, a sentence in the order of nine to 10 years imprisonment would be the appropriate range. I note, of course, that a sentence of 10 years imprisonment would result in the automatic declaration of count 1 being a serious violent offence. But that's not the determinative issue on sentence.

572 QSC 2020/05 p. 7, lines 24–47.
573 QSC 2020/05 p. 8, lines 3–4.
574 Ibid p. 2, lines 25–31.
575 QDC 2020/10; QDC 2021/01; QDC 2020/40; QDC 2020/09; QDC 2020/08; QDC 2020/44; QDC 2020/23; QDC 2021/05; QDC 2021/04; QDC 2020/55; QDC 2020/24; QDC 2020/15.
576 *Free* (n 23) [90].
577 For example, QDC 2020/06 discussed above in section 10.2.2.
578 QDC 2020/28 p. 5, lines 21–27.
579 QDC 2020/51.
580 [2003] QCA 18.
581 Ibid [6].

> However, I do need, in accordance with the legislation, to take into account the fact that you have entered the pleas of guilty, and that it has, at the very least, had the impact of saving the complainant from having to endure the giving of evidence and cross-examination, and that that is a matter which needs to be recognised on sentence. I'm unable to recognise that on sentence if I imposed a sentence of 10 years imprisonment for the reasons that I've just mentioned.[582]

This resulted in a sentence of 9.5 years being imposed for the most serious charge of maintaining a sexual relationship with a child, with no parole eligibility set (meaning parole eligibility at the statutory 50% mark would apply).

Similar concerns were raised in other cases where the SVO declaration applied either automatically,[583] or as a result of the discretion to do so being exercised at sentence.[584]

In a drug trafficking case, the sentencing judge noted while the general discount given for an early guilty plea was to set parole eligibility at one third of the head sentence, the SVO scheme, in effect, meant that a 10-year sentence (requiring the offender to serve a minimum of 8 years before being eligible for parole) was the equivalent of a 24-year sentence should the scheme not apply. This was identified as the reason there were so many cases in the 9-to-10-year range because if the benefit of a plea could not be taken into account for a sentence of imprisonment set at 10 years, as opposed to a sentence just below this, this was of significant concern.[585]

Another judge, in deciding not to impose a life sentence on an offender who pleaded guilty to one count of rape and one count of torture of a 3-year-old child, noted that this effectively would result in the offender being subject to a shorter period of supervision due to the offender having to serve 80 per cent of the sentence under the SVO scheme — although it would be wrong to impose a sentence of life just to ensure the offender was supervised for longer at the end of their period of incarceration.[586]

In this case, the offender was sentenced to a total effective sentence of 17 years, with parole eligibility after 80 per cent (or about 13 years, 7 months) equating to a maximum period of 3 years and 5 months that could be spent under supervision if released on parole at his parole eligibility date. If sentenced to a life sentence, he would have been subject to a mandatory minimum term of 15 years (with the option for the court to set a later parole eligibility date) but once released, would be subject to lifetime supervision.

The impact of the scheme in reducing the period an offender is under supervision on parole has been the subject of more recent judicial comment in a case that fell outside the coding timeframe for this exercise. The judge, when sentencing a 30-year-old offender who had previously been subject to an SVO declaration and who had committed offences when released on parole, commented at some length about the limitations of this offender's original sentence in offering a proper opportunity for supervision:

> Your offending behaviour for which you were sentenced on that occasion ten years ago was linked unequivocally to post-traumatic stress and was triggered also by drug abuse, which is something that was occurring, no doubt, because of the demons that were haunting you. All of that was received and incorporated as part of the proceedings in which you were sentenced for some truly dreadful crimes and that can never be forgotten. Having said that, those proceedings are as good an illustration as any of the limitations and inadequacies embedded in Queensland's sentencing laws.
>
> The judge who sentenced you, regarded as very, very important the fact that the psychologist who examined you had said that when you were discharged back into the community, it would be highly desirable to ensure that you continued to receive the regular treatment and support that you so obviously needed. But regular treatment and support of the kind contemplated was never going to be ensured when the effective sentence was one of nine years with a serious violent offence declaration. You, as an offender who was most in need of supervision for a lengthy period, were given a sentence which guaranteed that could not happen, and in that context, the prediction that you would relapse and re-offend was a self-fulfilling prophecy.[587]

The original offending, for which the offender had been sentenced some 10 years prior, involved two summary offences and 20 indictable charges, of which the most serious was doing grievous bodily harm with intent and wounding committed against two 15-year-old school students. The students were subject to a random attack at their school by the offender, who was aged 17 years at the time, and in the company of other boys at the time – five of whom were charged as co-offenders for the relevant offending. The offending appeared to have been prompted

582 QDC 2019/57 p. 3, lines 27–38.
583 For example, QDC 2020/28.
584 For example, QDC 2020/51.
585 QSC 2019/32 p. 11, lines 33–44.
586 QDC 2019/71 p. 5, lines 23–28.
587 20210408/BSD/SC/10, p. 2, lines 12–31. This case fell outside the coding timeframe. A unique case code was not allocated on this basis.

by one of the offender's co-offenders being told by one of the group that his sister had been raped by a year 10 student of a Brisbane Secondary College — a claim that was untrue, but caused the offender and others to seek revenge. The offender brought a meat cleaver with him into the school and swung it at the first complainant, striking him in the jaw — causing significant injuries, requiring 60 stitches and ongoing plastic surgery. He chased down the second complainant and hit him on the back — the resulting injury being a 'very small distance from his spinal cord' and could have resulted in catastrophic injuries. The offender and his co-offenders ran away when a teacher intervened. He was assessed as having 'been severely psychologically damaged by his dysfunctional upbringing as a result of the Bosnian war'. He had also been subjected to violence by his step-father on moving to Australia at the age of 9 years and had left school after completing grade 9. He started using illegal drugs to which he was introduced by friends on leaving school. An appeal against sentence on the basis the 9-year sentence with an SVO declaration was manifestly excessive was dismissed.[588]

In other cases, the exclusion of some offences from Schedule 1 of the PSA also attracted comment in circumstances where the sentencing judge noted the offence of choking was not listed 'for some reason' in schedule 1.[589]

[588] Decision delivered on 7 December 2020.

[589] These particular comments were made in a subsequent case that was not coded, but was sentenced after the offender was sentenced for charges including dangerous operation of a motor vehicle causing death: QDC 2019/37.

# 13 Conclusion

In this background paper, we have explored key Court of Appeal decisions that guide the making of an SVO declaration under Part 9A of the PSA, sentencing under the scheme and how the SVO provisions are intended to be applied.

We have also considered sentencing remarks as a way to understand how the SVO scheme is understood and applied by courts, including its intended purposes, how the scheme is taken into account when imposing sentence, and anomalies and other problems identified by individual sentencing judges arising from the scheme.

This analysis 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 issues 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: Methodology for sentencing remarks analysis

## 13.1 Methodology

To better understand how the SVO scheme impacts on court sentencing practices, the Council analysed sentencing remarks for cases sentenced over the period 1 January 2019 to 29 February 2020 published on the Queensland Sentencing Information Service (QSIS) database. The QSIS database contains a collection of linked sentencing-related information, including the full text of revised sentencing remarks from the Supreme and District Courts dating back to 1999.[590]

The QSIS interface provides a text searching mechanism that allows simple or advanced searches to be performed across the different components. The searches can be constructed using "Boolean" operators.

For the purposes of this analysis, cases were initially identified using the following search terms and parameters:

| Search terms | Supreme Court cases | District Court cases |
|---|---|---|
| 'serious violent offence' AND 'declare' AND where date is 'between 1/1/2019 and 28/02/2021' | 58 hits (base search) | 127 hits (base search) |
| 'serious violent offender' AND 'declare' AND where date is 'between 1/1/2019 and 28/02/2021' | 10 hits, 3 unique hits (not identified in base search) | 33 hits, 18 unique hits (not identified in base search) |
| '80 per cent' AND where date is 'between 1/1/2019 and 28/02/2021' | 64 hits, 31 unique (not identified in two previous searches) | 112 hits, 37 unique (not identified in two previous searches) and 1 duplicate |
| 'serious violent offence' AND 'declaration' where date is 'between 1/1/2019 and 28/02/2021' | 46 hits, 1 unique (not identified in previous three searches). | 119 hits, 10 unique (not identified in previous three searches) |
| **Total cases** | **93 cases** | **192 cases** |

The database is not a public database and is only accessible to people working in the criminal justice system.[591]

The Council established a coding framework to structure the analysis and reporting of sentencing remarks. A pre-test of the framework was conducted across a number of cases, resulting in minor adjustments.

Through the searches undertaken, the Council identified 93 sentencing remarks for cases sentenced in the Supreme Court, and 192 sentencing remarks for cases sentenced in the District Court that included mention of relevant search terms used. Sentencing remarks were excluded if in reading the remarks it was clear that the making of an SVO declaration was not relevant in the circumstances of the case or was not under active consideration. Once these exclusions were made, it left 76 Supreme Court cases and 136 District Court cases to be coded and analysed.

This analysis examined factors discussed as part of the cases, with a focus on whether an SVO declaration was sought by the Crown, whether the declaration was made and if so, if its making was automatic or discretionary, as well as any relevant explanation as to how the existence of the scheme influenced the court in approaching sentencing. Information about whether judicial officers articulated the purposes of the SVO scheme and what purposes were most frequently mentioned was also captured.

All cases that were coded were assigned a unique code. These were assigned randomly in date order, and do not correspond with indictment numbers.

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590 Queensland Sentencing Information Service, *QSIS User Guide* (Queensland Department of Justice and Attorney-General, 2007) 5.

591 Section 19 of the *Supreme Court Library Act 1968* (Qld) governs access to restricted information held in QSIS and who may be granted access.

The Council thanks the Department of Justice and Attorney-General for permission granted to quote directly from sentencing remarks[592] – without which the Council's task of explaining how the SVO scheme is understood and applied by judges at first instance would have been made much more difficult.

## 13.2 Limitations

The Council acknowledges the limitations associated with analysing sentencing remarks — most notably, that sentencing remarks do not contain a comprehensive list of matters taken into account by judges in sentencing — just those expressly mentioned — and do not necessarily reflect matters raised and considered by the Court in sentencing submissions.

Further, any findings are not generalisable as they do not relate to a comprehensive, nor necessarily representative, sample of all sentencing remarks over the relevant period. For example, not all cases are published on QSIS, and the search parameters may have resulted in some SVO cases being missed — particularly where the scheme applied automatically. As one case example, in a sentencing remarks which included the imposition of a 10-year sentence for two counts of rape, the sentencing judge simply stated: 'the length of the sentence that I have required you to serve … will see you serving at least eight years imprisonment before becoming eligible for parole'.[593] Because there was no mention of the search terms of '80 per cent', 'serious violent offence' or 'serious violent offender', this case was not captured.

However, as part of a mixed-methods research design, sentencing remarks supplement purely data-driven analyses, providing a rich source of additional information about the operation of the SVO scheme.

592 Letter from Director – Recording and Transcription, Reform and Support Services, Department of Justice and Attorney-General to Chair, Queensland Sentencing Advisory Council, 16 June 2021.

593 20201211/BSD/DC/31 – p. 11, lines 2–4 (unpublished).

Queensland Sentencing
Advisory Council