Sisters Inside Inc.
ABN 94 859 410 728

P.O. Box 3407
South Brisbane Qld 4101

Ph: (07) 3844 5066
Fax: (07) 3844 2788

Email: admin@sistersinside.com.au
Web: www.sistersinside.com.au

Sisters Inside Inc. is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system

Submission to Queensland Sentencing Advisory Council

Serious violent offences scheme review Terms of Reference and Issues Paper

January 2022

About Sisters Inside

Established in 1992, Sisters Inside is an independent community organisation based in Queensland, which advocates for the collective human rights of women and girls in prison, and their families, and provides services to address their individual needs. Sisters Inside believes that no one is better than anyone else. People are neither "good" nor "bad" but rather, one's environment and life circumstances play a major role in behaviour. Criminalisation is often the outcome of repeated and intergenerational experiences of violence (including state violence), poverty, homelessness, child removal and unemployment. Equally, policing, prisons and courts are not 'neutral' systems; they reflect and reproduce racialised, heteropatriarchal and ableist hierarchies, which we can see most clearly through the mass incarceration of Aboriginal and Torres Strait Islander women and girls.

About this submission

Informed by our values, Sisters Inside advocates for the abolition of prisons, policing and other forms of state-sanctioned violence, control and imprisonment. We recognise that abolition requires us "to imagine a constellation of alternative strategies and institutions" (Davis, 2003, p.107). Sisters Inside maintains a strategic interest in legislative reform processes to the extent that these reviews affect criminalised women and girls. However, we remain ambivalent about the potential for piecemeal legislative reforms to end society's reliance on the prison system.

Sisters Inside is opposed to all forms of mandatory sentencing, including the serious violence offence scheme (the **scheme**) that is currently under review by the Council. **In our submission, the scheme must be abolished, in its entirety.** In this submission, we set out our observations in response to the Terms of Reference and the Issues Paper to explain our position.

At the outset, we want to note the limited ability for a detailed race and gender analysis in relation to the scheme's operation. Our observations are informed by our work and some independent research we have undertaken to supplement this submission. However, our analysis is necessarily limited because, as a small community organisation, we cannot possibly work alongside all women and girls who are currently subject to imprisonment and carceral surveillance in Queensland to represent their individual needs and interests. We are also not resourced to undertake independent research that would allow us to present the type of nuanced analysis that we think is required to understand the depth of the scheme's impact on women and, particularly, Aboriginal and Torres Strait Islander women.

While it is apparent that a lot of work has been put into the Background Papers and Issue Paper, on our reading of these documents there are obvious limitations in the statistical analysis to understand how race functions to produce the disproportionate rates of Aboriginal and Torres Strait Islander people subject to the scheme. Equally, we are disappointed about the limited ability to understand gender in relation to the scheme and, notably, the relationship between gender and the offence of torture (see Background Paper 4, October 2021, p17). Race and gender, together and separately, must be treated as more than statistical markers of 'interest' or 'difference'. In our submission, they are analytical categories and when we pay attention to them closely, we can gain more meaningful insights into the reality that the law produces racialised and gendered hierarchies (see Whittaker, 2020, esp pp22-24, for an example of this approach and discussion of the need to account for race in the structure and impact of one punch laws). This submission seeks to apply this analytical approach to the available material to explain our position.

Response to Terms of Reference

We note the Terms of Reference were not drafted by the Council, but we welcome the opportunity to provide feedback on this document.

The Terms of Reference include a specific requirement for the Council to "advise on the impact of any recommendation on the on over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system" (see Terms of Reference, p2, dot point 11). This framing positions Aboriginal and Torres Strait Islander people as always already perpetrators in relation to the operation of the scheme. By representing the colonial impacts of the scheme as a matter of statistical accounting (over-representation or not), the Terms of Reference erase the voices and expertise of Aboriginal and Torres Strait Islander people as "sovereign knowledge holders" (Sisters Inside and ICRR, 2021, p4), who hold their own expertise in relation to the operation of the scheme. For example, there is no explicit requirement to engage with Aboriginal and Torres Strait Islander people, communities, community justice groups, legal services or organisations.

The reality is that a disproportionate number of Aboriginal and Torres Strait Islander people are subject to the scheme. In the context of the Queensland Government's apparent concern to consider over-representation, an obvious absence in the Terms of Reference is that there is no requirement for the Council to engage with people who are subject to the scheme or to consider the impact of the scheme from their perspective. This omission reinforces a reading of the Terms of Reference to suggest that the best measures of effectiveness are "court sentencing practices" (Terms of Reference, p1, dot point 2) and "victims' satisfaction with the sentencing process" (Terms of Reference, p1 dot point 4). Even though the Council is considering 'rehabilitation', which is a legislated purpose of sentencing laws (see s9(1)(b), *Penalties and Sentences Act 1992* (Qld)), the omission of this consideration from the Terms of Reference suggests the Queensland Government is not concerned about the impact of the scheme on prisoners.

The erasure of Aboriginal and Torres Strait Islander people and prisoners in the Terms of Reference relies on a legalistic and highly racialised conception of victimhood (see also Sisters Inside and ICRR, 2021, pp3-4). The categories of victim and perpetrator/offender themselves reinforce the idea that violence is experienced as a binary relationship. The reality is that most women in prison are victims and survivors of violence before they are sentenced for offences. However, by ignoring the victimisation of people in prison, the Terms of Reference can ignore these experiences of violence, including the significant violence that is produced and enacted on people through policing and imprisonment.[1] One result of this approach is to narrow the scope of recommendations to matters of 'policy' (how to ensure the "right types of offences and offenders" are captured by the scheme), instead of taking an approach that makes visible the way that race and gender structure the operation of the scheme.

In our submission, the experiences and views of prisoners who are subject to the scheme are relevant considerations in assessing the appropriateness of sentencing laws, especially as they impact on Aboriginal and Torres Strait Islander people.

We note that the Council has identified limitations in record-keeping by courts, which result in much of the Council's analysis being limited to the period after July 2011. This limitation in the data is very disappointing because crucial information about the racialised and gendered operation of the scheme between 1997 and 2011 is likely to have been missed. We note that this approach also does not account for the impact of long sentences and long periods of incarceration on people who were subject to the scheme from the earliest points in time. This is

[1] Here, we are also thinking about the documented failures of police to properly or adequately respond to violence against Aboriginal and Torres Strait Islander women. See, e.g. McQuire, 2021a; Smee, 2021. See also McQuire 2021b, regarding two current coronial inquests examining the adequacy of QPS investigations in relation to the disappearance of two Aboriginal women.

particularly damaging for young people who were sentenced to long periods of imprisonment and highlights the need for the Council to speak directly with people subject to the scheme before 2011.

Response to 5. Review principles

In reviewing the principles outlined by the Council, we were reminded about the reality that all ethical decision-making is a practice. Naming competing considerations is not the same thing as developing and articulating a clear, ethical framework about how to prioritise matters of principle.

As we review the principles, we keep returning to the question: *Which principles take priority?* Without an explicit prioritisation of the interests of Aboriginal and Torres Strait Islander people (principle 6) in relation to this reform process, we are concerned that the racialised impact of maintaining the scheme will get lost in the Council's deliberations. In our submission, the Council must be explicit about how it prioritises different principles in its deliberations.

The principles identified by the Council are not distinct considerations as the realities that sit beneath each principle are interrelated. For example, there is an obvious relationship between principle 3 (concerned with adequate recognition of the "seriousness" of an offence) and principle 7 (judicial discretion to consider "the circumstances of each offender and each offence"). Given the Council's role to inform the community about sentencing, we believe it is imperative for the Council to affirm that judicial discretion remains a fundamental principle, even when the legal system does not meet victims' expectations.

On our understanding, this review was initiated partly in response to the Council's findings in its review of sentencing for child homicide, which identified the real and understandable concerns raised by the families of children who had been killed by caregivers (see further "Sentencing crackdown will be justice for Hemi", 2019; see also Queensland Parliament, 2019, p36, for Attorney-General and Minister for Justice's acknowledgement of families in second reading speech for *Criminal Code and Other Legislation Amendment Bill 2019*). Given the context of this review and the significant changes already made by the Queensland Government to the definition for the offence of murder, the role of this reform process should not be to 'perfect' the scheme, but to minimise the harm produced by and through the legal system for all interested parties.

Response to 7.1. Objectives and nature of the SVO scheme

In our submission, the purpose of the scheme is not clear and it does not seem to be meeting its current objectives (discussed further below in response to 7.4). We believe that all sentencing must be discretionary and the scheme must be abolished.

In relation to **question 4**, we query the Council's choice of language about whether the scheme targets the "right types of offences and offenders". This language suggests that it would be possible to develop an exhaustive list of offences and/or traits or other features of an 'offender' for the purposes of sentencing. In our submission, this approach is unsound and unhelpful because it repeats the mistakes and limitations of the existing scheme. It also undermines judicial discretion by signalling – at a general level – that certain offences are more serious or harmful than others. The purpose of judicial discretion, which the Council recognises as being fundamental important in the sentencing process (principle 7), is to allow for an assessment of each case and each person on their merits.

In our view, maintaining categories based on a certain type of offence and/or 'offender' will likely result in racialised and gendered ideas of violence and/or seriousness continuing to be reinforced through the scheme. For example, the Council's research demonstrates that Aboriginal and Torres Strait Islander people are over-represented in all offence categories that commonly attract an SVO declaration, except for trafficking in dangerous drugs (Issues Paper, p4-23). Aboriginal and Torres Strait Islander people seem to be especially over-represented in discretionary SVOs, comprising 30.3% of all discretionary SVOs reviewed (Issues Paper, p4.23). In contrast, the Council found that the vast majority of people sentenced for drug offences were subject to mandatory declarations under the scheme, i.e. because of the length of their sentence (see Issues Paper, p7-55). Additionally, the Council states that "Drug offences were the most common offence category in the SVO scheme that stakeholder suggested should be removed" (Issues Paper, p7-55). While Sisters Inside understand the rationale behind the suggestion to remove drug trafficking from the list of offences subject to the scheme, it is worth noting that this change would result in a greater over-representation of Aboriginal and Torres Strait Islander people subject to the scheme (statistically speaking, all other things being equal).

It is important to notice how race is visible in the "structure and impact" of the scheme (see Whittaker 2020, p23) because the disparities identified above speak to the underlying racialised dynamics that will continue to inform who is seen as the "right offender" to be punished (or what is the "right offence") under any amended version of the scheme. In our submission, the reality that a greater number of Aboriginal and Torres Strait Islander people are subject to *discretionary* SVOs is indicative of a deeper structural problem – the racialised operation of the legal system through prosecutorial and sentencing discretion. This problem is difficult to articulate because it involves questioning norms about race-neutrality that are widely accepted within the legal system; however, by focusing on race as an analytical category, we can generate insights into the operation of the law (beyond, for example, the exercise of police discretion) and start to think about *why* Aboriginal and Torres Strait Islander people are over-represented (see Whittaker, 2020, pp23-24). One consideration is the existing research which finds that Aboriginal and Torres Strait Islander people are more likely than non-Indigenous people to be identified as threatening or violent (see e.g. Watego, Singh & Kajlich, 2020, pp15-22; Domestic and Family Violence Death Review and Advisory Board, 2017, pp82-83 and ch 7). Being identified as the 'primary perpetrator' of serious violence by police has flow-on consequences for a person's treatment by the legal system, despite whatever mitigating factors may be present (see e.g. Whittaker, 2020, p20, discussing the relationship between race, larrikinism and the difficulty for racialised people to argue self-defence in the context of one-punch offences).

In response to **question 6**, we note the reality that Queensland Corrective Services (QCS) does not provide adequate programs to address violence (including sexual violence) for women in women's prisons. This is apparent from the information that QCS has provided to the Council (Issues Paper, pp3-16 - 3-18) and from the Sofronoff Report (2016, Appendix 12, esp p325).

The scheme was introduced over two decades ago, which means that QCS has had almost as much time to develop and implement programs that specifically address the needs of women and it has not done so. QCS must not be given more time. In our submission, the lack of programs for women in prison represents a compelling reason to abolish the scheme because the scheme is clearly discriminatory towards women in its operation. To be clear, Sisters Inside does not believe that programs in prison are effective in providing 'rehabilitation' for women. The prison is not a safe environment for therapeutic support. Additionally, programs in prisons cannot address the structural factors that result in women's imprisonment (e.g. colonialism, racism, capitalism and exclusion from the economy, housing insecurity etc). In fact, QCS' failure to develop and implement programs for women affected by the scheme may represent the reality that these needs cannot be adequately addressed in the prison environment.

There may be an argument that the development of programs for women has been 'delayed' by the very small numbers subject to the scheme. This is plainly unsatisfactory, especially as the scheme operates (in part) to defer an assessment of future risk to the Parole Board on the assumption that a person will have access to 'rehabilitation' in prison (see discussion in Issues Paper relating to Principle 9). In our submission, it is discriminatory that women who have higher risk profiles and spend longer periods of time in prison are not offered tailored programs.

Response to 7.4. Impact on court sentencing practices

In this section, we highlight three cases, which illustrate anomalies and inconsistencies relating to the scheme. We have chosen these cases to explore challenging issues regarding the racialised and gendered operation of the legal system, in relation to the scheme. To be clear, these cases are not exhaustive. Additionally, in critically discussing these cases, Sisters Inside is not seeking to minimise the seriousness of the offences or to question the merits of the outcomes, and we are also not advocating for longer sentences.

The Council has identified the likelihood that the scheme results in head sentences for serious offences being reduced below 10 years, so that the mandatory application of the scheme is not engaged (Issues Paper, pp7-44 – 7-46). In our submission, the scheme also produces unjust outcomes in sentences that involve discretionary SVOs. The Court of Appeal considered the issues of discretionary SVOs in the context of the principle of parity in *R v McGuire* [2017] QCA 250. This case involved SM, a woman, and TH, a man, charged as co-accused with a range of offences against a female complainant. SM appealed against her sentence for the offence of torture.[2] After a trial, SM was given a head sentence of eight years imprisonment for the torture count, with a serious violent offence declaration made in respect of this offence. SM's co-accused TH was also convicted on one count of torture (and other related offences), but the particulars that constituted the offence of torture in his case were slightly different; significantly, SM was found to have committed the offence of rape and two offences of common assault against the complainant,[3] while TH was present but did not participate in this conduct. TH pleaded guilty and was given a head sentence of six years imprisonment with no serious violent offence declaration.

We submit the scheme's relationship with the principle of parity is particularly important for women. Without wishing to diminish women's responsibility, we suggest that gendered ideas about violence often work to render women in these cases "doubly deviant" for their role in acts of serious violence "for violating not only the law but also conventional social norms associated with womanhood" (Lightowlers, 2019, p694). On our reading of SM's appeal case, it is noticeable how gender, although unnamed, seems to have informed the assessment of SM's culpability, particularly in respect of the rape offence. The differing assessments made by Morrison JA (who delivered the majority reasoning) and Boddice J are striking.

In dismissing the appeal, Morrison JA emphasised the fact that SM went to trial and, in relation to the rape, finds that "the rape was violent" (at [44]) and then identifies an aggravating factor specific to this case which he finds "took it out of the ordinary kind for that offence" (at [44]). Morrison JA ultimately finds that: "the different circumstances of the applicant and [TH] and their different degrees of criminality justified the different sentences, which in the circumstances were in due proportion" (at [49]). He also found that the fact that the rape did not form part of the particulars of the torture count for TH was the "determining feature" in the sentencing judge's decision to not impose an SVO declaration in his case (at [36]). In considering this reasoning, we wonder whether it would ever be possible to imagine a non-violent rape. We also reflect on the reality that men, who form the vast majority of people accused of sexual violence against women (and children), frequently plead not guilty and contest their sentences (see e.g. Weston-

[2] SM initially applied to appeal her conviction and her sentence, but abandoned the appeal of her conviction (see [2017] QCA 250, [57] (Boddice J)].
[3] For details of the rape offence, see [2017] QCA 250, [74]-[75] (Boddice J).

Scheuber, 2011, p2). Additionally, white men enjoy a particularly privileged position to challenge sexual assault allegations made against them by women (see, e.g. Baird, 2009).

In contrast to Morrison JA, Boddice J also found the rape to be a "heinous act", but found that SM's higher level of culpability in respect of this offence was reflected by the imposition of the discretionary SVO declaration. On the basis of the principle of parity, Boddice J would have granted the appeal to maintain the SVO declaration but to reduce SM's head sentence from eight years to six years. It is worth quoting his Honour's reasoning at length because it highlights the manner in which the scheme influences sentencing discretion. His Honour's reasoning was as follows (at [101]-[103], [105]-[106]):

> *In the present case, a proper exercise of the sentencing discretion did involve the imposition of a different sentence on the applicant to that of [TH]. The applicant had been additionally convicted of an offence of rape and two offences of common assault. The infliction of these acts of violence was a significant aggravating feature, particularly having regard to the finding that the rape was a vengeful act intended to inflict humiliation and pain. That conclusion was not affected by the distinction between the applicant's personal circumstances and her more limited criminal history.* ***That conduct was properly reflected in the making of the declaration of a serious violent offence in respect of the offence of torture when sentencing the applicant.*** *At that time, [TH] had not been sentenced for the offences.*
>
> ***When [TH] was sentenced subsequently, the sentencing Judge imposed not only a lesser head sentence of six years but declined to make a declaration that the offence of torture was a serious violent offence****.* ***The consequence of this sentence was that [TH]****, who had engaged in much of the conduct the subject of the offence of torture, including having threatened to cut off the complainant's fingers with a machete,* ***received the benefit of both a significantly reduced head sentence on that offence and not having to serve 80 per cent of the sentence imposed upon him for the offence of torture.***
>
> *Such a sentence involved such a marked disparity between the treatment of the applicant and [TH] as to leave the applicant with a justifiable sense of grievance.* ***Whilst the applicant inflicted the more serious aspect of the torture, namely, the rape of the complainant, and the offence of common assault, those features were not of a magnitude to justify both a higher head sentence and the requirement to serve 80 per cent of that higher head sentence.*** *The sentence imposed on the applicant was "a badge of unfairness" sufficient to justify the intervention of this Court.*
>
> *[…] Having regard to [TH's] sentence and the respective conduct of the applicant and [TH], the appropriate sentence to reflect their differing degrees of culpability is a sentence of six years imprisonment for the offence of torture with a declaration that offence is a serious violent offence.*
>
> *The consequence of such a sentence is that the applicant will serve significantly more actual time in custody than [TH]. However, that discrepancy properly reflects the differing culpability and, in particular, the heinous act of rape committed by the applicant on the female complainant.* (citations omitted, emphasis added)

In Boddice J's reasoning, we read a concern that SM should not be 'doubly punished' for her role in the offence, which was substantially committed alongside her male co-accused, despite the additional violence of her conduct. In our submission, the scheme makes it more challenging for judicial decision-makers to make these distinctions in complex cases.

Gendered ideas about culpability and violence are also visible in the sentencing remarks in respect of SM and TH, as summarised in Boddice J's judgement (see [80]-[88]). On our reading of these summaries, it appears that the sentencing judge focused on the distress caused by SM to the complainant through the offence and then the trial process to discount the mitigating features raised on SM's behalf, including her experiences of interpersonal violence as a child and adult, and the relationship between her mental health conditions and drug use (see [78]-[82]). In contrast, the sentencing judge found TH "equally responsible" for most of the offending that constituted the charge of deprivation of liberty (which was a particular of the torture), but that he also "had some redeeming features" in the course of that offending, by showing what was perceived as kindness to the complainant, even though he maintained her deprivation of liberty (see [85]). Additionally, TH's "poor criminal history", and offending while subject to a suspended sentence and probation order, were seen to be mitigated by his "prejudicial upbringing", psychiatric conditions and early plea of guilty (see [86]-[87]). On our reading, these comments represent another example of the ways in which women who engage in violence are rendered 'doubly deviant', while men's actions are framed through a discourse of morality that allows them to be acknowledged for the barest efforts to disengage from violence (see e.g. Baird, 2009, esp discussion at pp384-385).

We have discussed this case at length to illustrate two points. First, that the scheme can and does produce anomalous outcomes between co-accused and, secondly, that these disparities are influenced by gendered ideas about culpability that inform how particular acts of violence are perceived and punished. In our submission, the scheme results in unjust outcomes because it complicates the ability for courts to assess culpability, particularly in circumstances where gender (and race) are highly relevant, but unnamed, in the exercise of the sentencing discretion.

Cases involving serious violence towards children also illustrate the illogical relationship between the scheme and the seriousness of violence. To illustrate this point, we consider the cases of NX and MI. NX is an Aboriginal woman who was convicted of the offence of torture against four of her daughters after a trial. She was given a head sentence of nine years' imprisonment and the court imposed a discretionary SVO (see *R v NX* [2018] QCA 325). MI pleaded guilty to the manslaughter of an 18-month-old child, and later assault occasioning bodily harm against that child's three-year old sibling (see *R v Ireland; ex parte Attorney-General* [2019] QCA 58). The children were temporarily in MI's care, while their parents were away seeking necessary medical treatment (Sutton, 2019). He was sentenced to eight years, six months imprisonment for the manslaughter offence, with a parole eligibility date set for a period of about two years after the sentence, after significant pre-sentence custody. No SVO declaration was made. Later, he was sentenced to six months imprisonment for the assault offence, to be served concurrently, with an effective delay of two months to his parole eligibility date. The Crown appealed the sentence for assault (but not manslaughter), but the appeal was dismissed (*R v Ireland; ex parte Attorney-General* [2019] QCA 58).

We did not have the benefit of reviewing the sentencing remarks for any of these cases, as they are not publicly available. Therefore, we have been left to draw our insights from appeal decisions and media coverage. Despite the legal differences between the offence of manslaughter and torture, we still consider it useful to compare these cases to critically interrogate how race and gender operate in the discourses surrounding the cases as, we argue, these produce relevant insights to understanding how the scheme produces unjust outcomes.

In relation to the sentence in NX's case, we note that she had a minor criminal history, that was not relevant and, therefore, she was treated by the trial judge as a person without previous convictions (see [2018] QCA 325, [25] (Mullins J)). Information about NX's mitigating circumstances was not offered at her sentence, on her instruction. A news article about the case recounts the following exchange in relation to the sentence (Clarke, 2016a):

> Defence council [CG] told the court her client instructed her not to place on record the details of her upbringing as it would have been "culturally insensitive".
>
> "Suffice to say her upbringing was not a pleasant one," she said.
>
> Ms [CG] said the charges before the court resulted in child protection services removing the defendant's two youngest of her eight children, who were not complainants.
>
> "She essentially lost those two children (which) caused a significant traumatic effect on her," she said.
>
> Judge […] said it was "a shame" cultural issues limited the defence council from from [sic] disclosing details of the defendant's childhood to the court.
>
> "I wonder if you were subject to abuse as a child," he said.

On appeal, NX asserted that she was "just another indigenous [sic] person that does not matter" (quoted in [2018] QCA 325, [16] (Mullins J)). The Court of Appeal also noted that NX, who was unrepresented on appeal, "alleges" that she was assaulted in prison, after her sentence ([2018] QCA 325, [13] (Mullins J)).

By asserting her Indigeneity *on her terms* in the court process, we understand NX to be gesturing to the inability of the legal system to understand her life or the offences. This is not a new or surprising claim for an Aboriginal and/or Torres Strait Islander woman to make. As we read these texts, we are reminded about the longstanding denigration of Aboriginal and Torres Strait Islander women, in their role as mothers and caregivers, which we continue to see reflected in high rates of child removal and child protection interventions in Aboriginal families (see, e.g. McGlade, 2019, p340). We are also reminded about the inherent limitations of the colonial legal system, as a practice of "white witnessing" (see McQuire, 2019), to integrate the harm produced by colonisation in the lives of Aboriginal and Torres Strait Islander people and families. The sentencing judge's 'wonder' is indicative of the

These realities are not diminished even though NX also appears to be refusing to take responsibility for her actions towards her daughters (see Baird, 2009, pp379-380).

In the absence of information about NX's life, generalised discourses about motherhood become dominant on the record. During the trial, the Crown Prosecutor characterised NX's offences against her daughters as "abuse by a mother by trust reposed in her by nature, (to) care for them and love them" (quoted in Clarke, 2016b). These discourses render NX 'doubly deviant' (as described above), making it inevitable that she would be subject to harsh forms of punishment, including violence within the prison system.

In NX's case, her appeal was dismissed because it was out of time. However, the Court also found that her sentence, including the SVO, was consistent with the comparable authorities ([2018] QCA 325, [26] (Mullins J)).

In relation to MI's case, we note the following:

- Police initially charged MI with torture and grievous bodily harm (as the 18-month-old infant was initially in hospital). When the infant died, he was charged with murder. He later pleaded guilty to manslaughter and was sentenced on this basis (Sutton, 2019);
- he reportedly lied to investigators initially, saying that the 18-month-old child had suffered a seizure and tried to blame the significant physical injuries he caused to the infant on his three-year-old sibling (AAP, 2017);
- he has a "lengthy past criminal history" in Queensland and New South Wales, including convictions for armed robbery and drug offences ([2019] QCA 58, [7] (Boddice J));
- he was "abusing alcohol" at the time of the offences against the children, when he had primary responsibility for their care ([2019] QCA 58, [8] (Boddice J); see also Sutton, 2019); and
- his prison conditions were taken into account by the sentencing judge (for the later assault offence), including that he had been "the subject of assault whilst in prison", that he was incarcerated in "very high security, for his own protection" and that he "had made good use of his time in custody" (at [2019] QCA 58, [12] (Boddice J)).

As we consider these details about MI's case, we notice the uneven operation of the legal system and its inability to adequately name and categorise harm. We are also reminded about the benefit of the doubt afforded to most white men as they move through different points in the criminal legal and prison systems. For example, MI was initially charged with torture, presumably to reflect the sustained and violent nature of his actions, despite the short timeframe he was responsible for the children. However, based on the information available to us, the ability to recognise the nature of these actions through the charge of torture appears to have been erased as the charges changed.

Despite his criminal history, he received a head sentence that did not engage the scheme. Based on the Council's previous findings, we assume this was understood by the legal actors involved at the time. (It is not clear whether the sentencing judge considered a discretionary SVO declaration for the manslaughter offence.) Unlike NX, who was sentenced as someone without a criminal history, MI seems to have been treated with leniency *despite* his criminal history. Unlike the representation of NX by the prosecution as having offended 'nature' by harming her children, the discourse in MI's case does not appear to have position him as a 'natural' caregiver. For example, the Court of Appeal described him as being "entrusted with the care of two very young children", but also described his role in that respect as a "task" ([2019] QCA 58, [23] (Boddice J)). Therefore, he remains someone capable of redemption and rehabilitation, and the Court recognises his efforts through the "good use" of his imprisonment. It is understandable that the parents of the children in MI's case and their supporters would be highly distressed by the outcome in this case.

In this section, we have discussed three cases to illustrate some issues relating to the scheme and the gendered and racialised operation of the legal system. In our submission, the scheme contributes to anomalies in sentencing, by creating distinctions between certain offences (and, as a consequence, certain 'typologies' of violence). It would be beneficial to abolish the scheme to require judicial decision-makers to make clearer links between the nature of the conduct specific to an offence, the length of the sentence and parole eligibility.

Response to 7.5. Automatic operation of the scheme and parole eligibility

In relation to question 12, Sisters Inside's position is that sentencing judges must have full discretion to determine the appropriate sentence, including parole eligibility. Therefore, mandatory sentencing schemes are never appropriate.

Parole delays with parole decision-making have resulted in a substantial increase in applications to Queensland courts by prisoners for judicial review or for re-consideration of their sentence to mitigate the impact of parole delays (see Dibben, 2021; Murray, 2021; Keim, 2021). Judicial officers are also citing parole delays as the reason for reduced sentences at first instance (see Hardwick, 2021). Parole delays are a relevant consideration for the Council's review, especially because the scheme results in greater numbers of people spending longer periods in prison. Parole delays *now* are relevant for people subjected to longer sentences because the significant time that people spend on remand often serves to make it appear that they serve little time in prison after their sentence (consider e.g. the case of MI above). In our submission, judges must have the broadest discretion to determine an appropriate sentence that is not constrained by minimum non-parole periods, such as the scheme.

In relation to question 15, we do not support a legislated percentage or range to replace the 80/20 split under the scheme because this would constrain judicial discretion. If any range was to be legislated, it must be discretionary and allow for departures from the range in the interests of justice.

Response to 7.6. Offences included in the scheme

Sisters Inside's position is that the scheme must be abolished in its entirety. Therefore, we do not support efforts to develop a list of offences that would be subject to a reformed scheme. We acknowledge the list in schedule 1 will likely be retained for the operation of other aspects of sentencing law, that are not currently under consideration by the Council.

As explained in response to question 4 above (see pp4-5 of this submission), we are concerned that the development of a list will necessarily reproduce the same problems that exist with the current scheme. We remain concerned that whatever offences are included on the list, Aboriginal and Torres Strait Islander women and men will end up being over-represented in the scheme because of the racialised and gendered operation of the legal system.

In relation to question 22, we confirm that our position is that the ability to make a declaration should not be retained in respect of any offence.

Response to 7.8. Human rights issues

The scheme clearly engages human rights issues and, for women, concerns that the scheme operates in a discriminatory way. As an organisation, it is not our area of expertise to advise on human rights law. Based on the nature of our work, we are concerned about the scheme's impact on the conditions of women's imprisonment, including in relation to programs, access to low-security prisons and/or other 'progressions' in the prison system such as participation in work camps, and disruptions to family connection. These impacts have flow on consequences for women's ability to effectively apply for parole when they finally reach their eligibility dates. In our view, these concerns raise questions about the scheme in relation to rights protected under the following sections of the *Human Rights Act 2019* (Qld):

- section 15 (Recognition and equality before the law);
- section 17 (Protection from torture, cruel, inhuman or degrading treatment);
- section 26 (Protection of families and children);
- for Aboriginal and Torres Strait Islander women – section 28 (Cultural rights); and
- section 30 (Humane treatment when deprived of liberty).

Response to 8.2. Reform options

Our position is that the SVO scheme must be abolished in its entirety. It should not be replaced by any adjustments to sentencing laws that seek to address some aspects of the scheme, as these piecemeal adjustments would undermine judicial discretion.

In our view, a benefit of abolishing the scheme would be to require judges to explain and justify sentences in greater detail, by making the relationship between sentence length, parole eligibility and assessments of 'seriousness' clearer. Additionally, as described above, the scheme operates in a discriminatory way towards Aboriginal and Torres Strait Islander people who are disproportionately over-represented in the scheme. This is a compelling reason to abolish it.

Response to 9. Alternative approaches

We support an approach that allows the court to have full discretion to set parole eligibility, applying the already extensive legal principles in section 9 of the *Penalties and Sentences Act 1992* (Qld). In the last decade, there have been significant changes to sentencing laws in Queensland, including repeated changes to the sentencing principles in section 9, as well as more recent changes to the definition of murder in the Criminal Code. We submit there is no immediate need for further changes to section 9 of the *Penalties and Sentences Act 1992* (Qld) to 'replace' the scheme. In our submission, it would not serve the interests of justice to pretend that the Council can look into a crystal ball and predict future anomalies, given the inconsistencies and difficulties that the scheme has created since its introduction in 1997. If the scheme is abolished, a further review could be undertaken by the Council within 5 years to consider any anomalies that have arisen in that period.

We note the law in Queensland was previously more favourable towards young people, under 25 years old. Before it was amended by the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld), section 9(4) of the *Penalties and Sentences Act 1992* (Qld) stated:

> *A court may impose a sentence of imprisonment on an offender who is under the age of 25 years and has not previously been convicted only if the court, having—*
>
> *(a) considered all other available sentences; and*
>
> *(b) taken into account the desirability of not imprisoning a first offender;*
>
> *is satisfied that no other sentence is appropriate in all circumstances of the case.*

This provision was removed at the same time as the scheme was introduced. In our view, it is not accidental that the scheme targeted young people, although we have not had sufficient opportunity to research this point. We were struck by the comments of Denver Beanland, an Opposition MP at that time, quoted at length in the Council's Background Paper 1 (see BP1-7 – BP1-8). As the Background Paper points out, Denver Beanland MP was the Attorney-General in the Coalition Government who oversaw introduction of the scheme (see BP1-7). Criticising the then Labor Government's proposed criminal law reforms in 1994, Mr Beanland MP raised the specific case of the rape of an 85-year-old woman in Roma, in which the accused was sentenced with a parole eligibility date after only two years (see Queensland Parliament, 1994, p9614). Later in the same speech, Mr Beanland MP specifically identified former section 9(4) for criticism, stating:

> Again, this is one of the sections of legislation that make it very difficult for the judiciary, particularly where violent offenders are concerned. We know that this legislation applies to offenders under 25, but it is those under 30 who commit the majority of violent offences within the community. So, of course, the court's hands are tied time and time again by these governing principles set out in this legislation. (Queensland Parliament, 1994, p9614)

We were curious about the specific case Mr Beanland MP highlighted and wanted to read 'behind the headlines' to understand this sentence. Through a search of the public case law database maintained by the Supreme Court of Queensland Library, we found the Court of Appeal decision of *The Queen v Rosenberger* [1994] QCA 488. We assume this is the same case. What is striking about the case is that the accused was an 18-year-old young person. He had prior convictions (which would have taken him outside the operation of section 9(4) anyway). The matter was before the Court of Appeal because the Crown appealed the sentence at first instance, which was six years (not eight years as Mr Beanland MP stated), with a recommendation for parole after two years. On appeal, the Court set aside the head sentence and substituted it for a sentence of nine years' imprisonment, with a recommendation for parole after three years and six months, in view of the defendant's youth and guilty plea. It is striking that in this example the legal system functioned to increase the sentence, even for a very youthful defendant. Therefore, it is a useful reminder that the political function that cases serve in Parliament is not always aligned with the actual operation of the legal system.

In our view, the Council should give serious consideration to reinstating an expanded provision that is similar in nature to former section 9(4) in Queensland law. Through our work, we see the particularly damaging nature of imprisonment for young people, especially Aboriginal and Torres Strait Islander women. We are concerned that the impact of childhood violence and institutionalisation is not adequately reflected in sentencing practices once children become adults. Requiring judicial consideration of alternatives to prison for *all* adults under 25 years old would also be consistent with emerging research about adolescent and young adult brain development (see Johnson, Blum & Giedd, 2009 for an interesting discussion of the public policy implications of this research). Even apart from the neuroscience research, Sisters Inside believes that specific legal protections for people under 25 years old would be a reasonable decarceration measure, at a time when the prison and parole systems are in obvious crisis.

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