The ‘80 per cent rule’

The serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld)

Submission by Legal Aid Queensland

Legal Aid QUEENSLAND

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Queensland Sentencing Advisory Council (QSAC) in response to its Issues Paper: The ‘80 per cent rule’: Serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld) (the Issues Paper).

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

This submission has been prepared by the Criminal Law Services Division of Legal Aid Queensland and Legal Aid Queensland in-house counsel. Legal Aid Queensland’s Criminal Law Services Division is the largest criminal law legal practice in Queensland providing legal representation across the full range of criminal offences, including offences which are subject to the serious violent offences scheme (“SVO scheme”) in the *Penalties and Sentences Act 1992* (Qld) (PSA).

We have responded to the questions within the Issues Paper most relevant to these practices. LAQ supports retaining judicial discretion in sentencing and therefore supports a shift from the mandatory and arbitrary features of the SVO scheme. We acknowledge, however, the body of case law that has developed since the introduction of the provisions and recognise the operation of a discretion within the integrated sentencing approach being taken to the provisions which has allowed for just outcomes.

Submission

5. Review principles

1. Do the principles adopted by the Council for the purposes of reviewing the operation and efficacy of the serious violent offences scheme ("SVO scheme') provide an appropriate framework for potential reform?

Legal Aid Queensland considers that the principles adopted by the Council for the review of the SVO scheme provide an appropriate framework for reform.

Issues identified

7.1 Discussion questions: Objectives and focus of the SVO scheme

2. Are the purposes of the SVO scheme clear? Is any additional legislative guidance required?

The SVO scheme was introduced in a political climate where there was a perception of serious offenders securing their release from prison earlier than was warranted. This was contributed to by remissions of sentences, which existed at the time. The clear intention was to ensure the protection of the Queensland community when persons were convicted of serious criminal offending. The approach was based on:

> *"a reasonable community expectation that the sentence imposed will reflect the true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it*.[1]"

These purposes have not changed since and can be distilled to the following two objectives:

1. Ensuring condign punishments are imposed with respect to serious offences, and
2. Increasing community safety.

Judicial commentary suggests that the purposes of the scheme are clear in its legislative form. In *R v Eveleigh* [2002] QCA 219, Fryberg J made the following observations in relation to the SVO provisions*:*

> *"It is not difficult to infer that these provisions were included for the purpose of ensuring the protection of the community by their use. The most likely and direct mechanism for such*

[1] "Queensland, Parliamentary Debates, Legislative Assembly, 19 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill — Second Reading', 597 (Denver Beanland, Attorney-General and Minister for Justice).

protection is increasing the total period spent in prison for the offences covered, not restructuring sentences of imprisonment without increasing their burden.[2]

Fryberg J did draw attention to a potential lack of clarity in the naming of the scheme. His Honour observed that the words "serious violent offence" are not used in their ordinary sense in the English language, and that this has the potential to *"raise doubts about what inferences may be drawn from the words themselves".*[3]

LAQ observes that while the name of the scheme reflects the scheme's tenets and goals, the application of the scheme to offences not strictly within this intended ambit is confusing, problematic and worthy of reform. This issue is dealt with later in this response.

3. Is the current scheme meeting its intended objectives?

A direct impact of the application of the declarations under the SVO scheme is a reduced period of parole, or no parole for a serious offender. It is LAQ's view that a reduction of supervision in the community, for offenders who commit the most heinous offences may not provide the best outcome for long term community protection.

As noted in the Queensland Parole System Review Report, deterrence and community protection could better be served by parole order supervision as an offender adjusts after a significant period in custody[4]. The SVO scheme reduces significantly this long-term supervision option. Please refer to our response under question 6 for more detail.

Further, by including offences which are not objectively nor inherently serious and/or violent, on many occasions sentencing under the regime fails to strictly fall within the intended scope of the legislation. This is further discussed in our response to question 21.

Because of the mandatory elements of the provisions and limitations on judicial discretion invested in a sentencing court required to apply the scheme, the resulting sentencing outcomes are not always transparent and can lead to inconsistencies.

The scheme can provide distorted outcomes, examples of which are discussed below, which can undermine public confidence and truth in sentencing.

4. Is the SVO scheme, as it is currently being applied, targeting the right types of offences and offenders?

LAQ does not consider the scheme always operates to target those offenders and offences it may have originally contemplated should be included in order to achieve its objectives. To address this, the scheme should be confined to offences which involve personal violence of a serious nature.

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[2] *R v Eveleigh* [2002] QCA 219 at [39].
[3] Ibid at [38].
[4] Queensland Corrective Services, Queensland Parole System Review: Final Report (2016) [517-19].

Further detail in relation to this aspect of our submission is set out in our responses to questions 19 - 23, and in particular question 21.

LAQ notes with concern, the over-representation of First Nations people throughout the relevant reporting period as detailed in the Issues paper and Background paper 4.[5]

5. How, if at all, should a person's criminal history and other personal circumstances factor into whether an SVO declaration is made?

Historically, the approach taken to the application of Part 9A focused on the nature of the offence and whether there were factors which take the offence outside "the norm" for the type of offence. This approach was criticised in *R v Free; Ex parte Attorney-General (Qld) [2020] QCA 58*, citing the need for courts to adopt an integrated process considering all the relevant circumstances outlined in s 9 of the PSA.

As mentioned above, LAQ supports broad judicial discretion in the approach to sentencing. While currently Part 9A of the PSA is worded more specifically to focus on the offence and not the offender, nothing in Part 9A excludes the application of other sentencing principles including those outlined in section 9 and 11 of the PSA.

If the SVO regime is retained, LAQ supports the maintaining of an approach that allows for an integration of considerations of personal and criminal history within the SVO considerations reflective of the decision in *Free*. Many aspects of this approach are consistent with the intentions of the scheme.

Sections 9 and 11 of the PSA provide guidance to sentencing courts on many factors a sentencing court can take into account regarding an offender's criminal history and personal circumstances in determining a head sentence.

General sentencing guidelines require a Court to have regard to the offender's character in the sentencing process.[6] In determining the character of an offender, a court may consider the number, seriousness, date, relevance and nature of any previous convictions of the offender or any such matter the court considers relevant. [7]

The application of these guidelines is not necessarily inconsistent and on many occasions are consistent with the intentions of the SVO regime.

In addition to the SVO regime, the PSA sentencing guidelines differentiate between a number of offences, including offences of violence against another person and/or that have resulted in physical harm; in particular removing the principle of imprisonment as a last resort and the preference for offenders to remain in the community. For offences of violence or those resulting in physical harm against another the sentencing court must primarily have regard to factors such as

[5] Issues paper 4.1.6 and Background Paper 4, page18
[6] Penalties and Sentences Act Qld, s 9(2)(f)
[7] Penalties and Sentences Act Qld, s11

the past record of the offender, the number of previous offences of any type committed, the antecedents and character of the offender.[8]

If the offence is of a sexual nature committed against a child under 16, the court must have regard primarily to other relevant factors, which also include the offender's antecedents, age and character.[9]

If the offender has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such. The court must have regard to the nature of the previous conviction and its relevance to the current offence, and the time that has elapsed since the conviction.[10] The court cannot impose a sentence which is disproportionate to the gravity of the current offence.[11]

The Court of Appeal in *R v McDougall and Collas* considered a person's personal circumstances or prospects of rehabilitation would be good reasons to bring forward an eligibility date. On the other hand, the considerations which may lead to postponing the eligibility date would usually be concerned with the circumstances which aggravate the offence, which would in turn suggest the public need to be protected from the offender. The discretion as to whether a SVO declaration should be made will usually reflect the offence itself being more than usually serious, or "outside the norm".[12]

The Court in *McDougall and Collas* also identified that *"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."* [13]

As is consistent with the principles outlined in s 9, other aggravating factors, such as prior history of like offending, would increase the appropriate penalty.[14]

The Court of Appeal in *R v Randall [2019] QCA 025* stated there is no rule of law that requires a court to fix the head sentence by mostly having regard to the circumstances surrounding the offence and to fix the actual period of custody by reference to an offender's personal circumstances. The Court considered that approach to be common, but stated in the absence of statute, the way an offender should be punished should be flexible with the ultimate aim being a just sentence in all the circumstances.[15]

The Court of Appeal in *R v Kampf [2021] QCA 47*, upon hearing submissions by the applicant in that matter that an offender's criminal history is "arguably not relevant" to the SVO discretion, Rafter AJ with the Court agreeing, emphasized the integrated approach to sentencing, where all

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[8] Penalties and Sentences Act Qld, ss 9(3)(g) and (h)
[9] Penalties and Sentences Act Qld, s 9(6)(g)
[10] Penalties and Sentences Act Qld, s 9 (10)
[11] Penalties and Sentences Act Qld, s 9 (11)
[12] *R v McDougall and Collas [2007] 2 Qd R 87 at [20]-[21*]
[13] *R v McDougall and Collas at [19]*
[14] *R v Free; Ex parte Attorney-General (Qld) [2020] QCA 58 at [73*]
[15] *R v Randall [2019] QCA 025* at [38]

relevant factors are taken into account to arrive at a single result, with the criminal history being a relevant factor to the SVO discretion.[16]

If an offender has a record of committing violent crime, it could be the decisive consideration in making a SVO declaration, as could a large scale trafficking offence which occurred whilst on parole for trafficking.[17] The rationale for such reasoning is that an offender's criminal history may reveal a need to protect the community. The SVO declaration, however, is currently specific to the 'offence' and not the 'offender'.

LAQ supports the integrated approach to sentencing, consistent with the most recent decisions of the Court of Appeal, that an offender's criminal history is one of many factors that may be taken into account in the exercise of the discretion.

6. How well are prison and post-prison rehabilitation or reintegration measures working for people who have been convicted of an SVO? How can they be improved?

The PSA seeks to provide for a range of possible sentencing options to achieve its purposes of punishment, deterrence, rehabilitation, denunciation and community protection. Absent a life or indefinite sentence, or a DPSOA respondent continuously detained, all prisoners will lawfully be required to be released into the community at some stage.

For the long-term protection of the community, sentencing and corrections should be using the lessons of research to shape practices that reduce offenders' likelihood of committing crimes.[18] Any effective strategy will need to utilise a combination of discretionary sentencing, informed parole decision making, effective parole supervision as well as rehabilitative and post-release support measures.[19]

The Court of Appeal recently in *Free* outlined the competing considerations with respect to the Court's SVO discretion having regard to an offender's rehabilitation:

> *"Community protection is not achieved only by actual incarceration, it is also achieved by the oversight of the Parole Board, before a person may be released on parole; and by supervision of the person, on parole, if they are released, for the remainder of their sentence, whilst they make the adjustment from custody and back into the community.*
>
> *Allowing the possibility of a date for eligibility for parole at an earlier stage (than 80 per cent) 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*

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[16] *R v Kampf [2021] QCA 47 at [29]*
[17] See *R v Parker [2015] QCA 181 at [44*] and *R v Orchard [2005] QCA 141 at [26]*
[18] Burke, P (2011) The Future of Parole as a Key Partner in Assuring Public Safety. Washington: US Department of Justice
[19] Andrew Day, Stuart Ross and Katherine McLachlan, The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation (Summary Report, 2021) ('University of Melbourne Literature Review').

conditional supervision, outside of the custodial environment, which may provide greater community protection in the long term." [20]

Given the nature of the offenders and offences that tend to attract a SVO declaration, there is a risk that offenders may be released into the community having served the entirety of their sentence without any supervision whatsoever. Their release would also not be contingent on a parole board examining their risk to the community.

The QCS data indicates applications for parole for offenders subject to SVOs are most likely to be successful, overwhelmingly so, for offenders convicted of trafficking in dangerous drugs.[21] Those offenders are also the least likely to never apply for parole. It is considered this may be because trafficking offending is traditionally 'non-violent' and is not of a sexual nature.

Offenders granted parole, who were subject to the SVO regime and sentenced for rape, served an average 86% of their sentence before release. Offenders sentenced for trafficking were granted parole on average exactly on the 80% mark.[22] Arguably, the SVO system is creating instances where those who pose the least amount of risk to the community are receiving the most amount of community supervision.[23]

Offenders subject to the SVO regime, who simply never applied for parole, include 14% of offenders convicted of maintaining a relationship with a child, 13% of offenders convicted of rape, 29% of offenders convicted of wounding, 14% of offenders convicted of manslaughter, and 12% of offenders convicted of attempted murder.[24] Absent a DPSOA application for sex offences, those offenders would have been released into the community serving their full time date without any supervision whatsoever.

This rigidity in the sentence options for offenders given an SVO declaration drastically reduces the period of time offenders who commit the most heinous offences are to be supervised in the community.[25] It limits the ability of the Courts and the parole authorities to exercise their discretion to target interventions which take into account the severity of the offence, and the risk posed by the offender.

LAQ does not consider there to be substantive evidence to support an 80% threshold will contribute to improved community safety. It seems likely that longer periods of supervision in the community would be more effective.[26] Offenders released onto parole took longer to commit a new

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[20] *R v Free; Ex parte Attorney-General (Qld) [2020] QCA 58 at [91]*
[21] Background paper 4-30: Analysis of sentencing and parole outcomes
[22] BP 4 -31
[23] BP 4 -30, QCS unpublished data: 76% of parole applications approved for trafficking, only 6% never applied.
[24] BP 4 - 30: Analysis of sentencing and parole outcomes
[25] The exceptions being DPSOA respondents
[26] Andrew Day, Stuart Ross and Katherine McLachlan, The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation (Summary Report, 2021) ('University of Melbourne Literature Review').

offence, were less likely to commit a new indictable offence, and committed fewer offences than those who were released without any supervision.[27]

The rigidity of scheduling release at a minimum of 80% impacts the parole board's ability to participate in the strategic management of individual cases, as they are involved for a significantly reduced period of time.[28] Early considerations of parole in an offender's sentence can also serve as an incentive for offenders to cooperate in preparations that could lead to their release. In Wyoming USA, a study indicated the less time remaining on their sentence the more likely a prisoner was to not apply for parole in favour of completing their sentence.[29] Prisoners who are released earlier on discretionary parole are more likely to have completed programs in prison that improve their release prospects.[30]

Cumulative research among American prison populations show effective correctional interventions that are well designed, implemented, targeted and delivered at an appropriate dosage level can reduce recidivism by up to 30 % or more.[31]

Those sentenced to an SVO, by virtue of the mandatory aspects of the sentence, receive a maximum 20%, but usually less, of their sentence supervised in the community. There is no data to suggest whether the SVO scheme is "working for people". This could be due to the broad range of criteria which could be applied to measure success or failure of any sentencing option open to a Court.

LAQ supports a sentencing approach which is flexible enough to balance the need for appropriate punishment according to community standards, and appropriate rehabilitation in custody and supervised in the community.

7.3: Limited guidance in making discretionary SVO declarations

7. Is the current guidance and the information provided to courts on the making of a discretionary declaration sufficient? If not, what additional guidance or information is required?

The legislative guidance for the making of discretionary SVO declarations pursuant to s161B(3) and s161B(4) of the PSA, is limited to essentially prescribing those factors which must be present before the discretion is enlivened.

However, the factors to be considered in the exercise of the discretion have developed through a body of case law, with reference to the guidance contained in Part 2 of the PSA. Background Paper

[27] Ibid at page 14 citing, Wan, W.-Y., Poynton, S., & Weatherburn, D. (2016). Does parole supervision reduce the risk of reoffending? Australian & New Zealand Journal of Criminology, 49(4), 497-511
[28] Burke, P (2011) The Future of Parole as a Key Partner in Assuring Public Safety. Washington: US Department of Justice discussing mandatory sentencing regimes
[29] Ibid citing Best 2009
[30] Polaschek, Yesberg, and Chauhan (2018)
[31] Burke, P (2011) The Future of Parole as a Key Partner in Assuring Public Safety. Washington: US Department of Justice

3 (Analysis of Key Queensland Court of Appeal decisions and select sentencing remarks) provides a comprehensive review of the case law as it has been developed in response to the SVO scheme.

LAQ considers that developed body of case law is sufficient to provide guidance to the Courts and legal practitioners as to when a declaration ought to be made.

Markarian v The Queen[32] supports an integrated approach (also referred to as an 'instinctive synthesis' method) to sentencing. In the context of the SVO scheme and discretionary declarations, it means that the determination must be exercised as a part of the process of arriving at a just sentence, and includes having regard to the consequences of either making or not making that declaration (see for example *R v McDougall and Collas*[33]).

The mere commission of an offence that triggers the consideration of Part 9A of the PSA does not mean that one should be made.[34] A Court must have regard to whether there is any special feature of the offence that justifies the making of a declaration.[35]

Justice Fryberg in *R v Eveleigh*[36] provided specific guidance as to the discretion to impose an SVO, including that it is not necessary that the circumstances of the case should take it beyond the 'norm' for cases of its type. Where such circumstances might exist, they need not be categorised as exceptional.[37]

R v McDougall and Collas[38] expanded upon those discretionary considerations, and noted that where the circumstances of the offence suggest that adequate punishment and protection of the public requires a longer period in custody, it is often reflective of a determination that the offence is a more than usually serious, or violent, example of the offence, "so, outside 'the norm' for that type of offence".

In *R v Riseley; ex parte A-G (Qld)*[39] the SVO declaration was removed. Keane JA considered that the sentencing Judge's consideration that the protection of the public was of importance was misplaced. The principal considerations in his view related to general deterrence and the necessity to denounce offences of that nature. The offender's good prospects of rehabilitation meant that the need to protect the public from a likely occurrence of personal violence by him did not loom so large, and it was desirable to afford him the benefit of a lengthy period of supervision on parole.[40]

In *R v Murray*[41] it was noted that it would be difficult to identify what is 'the norm' for an offence of manslaughter, as the offender's criminality often varies from case to case ([26]). The SVO in this case was maintained, with both Wilson AJA and Applegarth J noting that there was an intent to kill following provocation, a number of blows, and blows which continued well after the deceased was

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[32] (2005) 228 CLR 357.
[33] [2007] 2 Qd R 87.
[34] *R v DeSalvo* (2002) 127 A Crim R 229.
[35] *R v Bojovic* [2000] 2 Qd R 183.
[36] [2003] 1 Qd R 399, [111].
[37] *R v DeSalvo* (2002) 127 A Crim R 229.
[38] [2007] 2 Qd R 87, [19], [21].
[39] [2009] QCA 285.
[40] *R v Riseley; ex parte A-G (Qld)* [2009] QCA 285, [46]-[48].
[41] [2012] QCA 68.

unable to offer any resistance. It was a more serious example, and an SVO declaration did not render the sentence excessive.

What the relevant factors are will differ from case to case. As previously noted, an offender's criminal history may be relevant to the exercise of discretion whether or not to make an SVO declaration.[42]

R v Free; Ex Parte Attorney General (Qld)[43] is a re-focussing of the discretion from whether there are factors of the offending that take it 'outside the norm', to whether those factors mean that the community protection must be served by the delay of the offender's eligibility for parole to 80%, or past the statutory 50%.

Free[44], and the subsequent District Court decision of *R v MJB*[45] re-affirm that a sentencing Court is already required to consider all the relevant circumstances. This includes those matters outlined in s9 of the PSA, to determine whether there are circumstances aggravating the offence in a way that suggests the protection of the public, or adequate punishment, requires the offender to serve a longer period in actual custody before eligibility for parole.[46]

For example, in *MJB* when considering whether to impose an SVO declaration, the Court had regard to s9(3) PSA and the circumstances of the victim. In particular, the victim was a seven-week-old child and was extremely vulnerable, MJB had been in a position of trust, the nature and extent of violence was significant and the injuries severe, and it was not a one-off act.[47] And while MJB had not been forthcoming with information and had shown limited insight and remorse,[48] regard was also had to the fact the injuries were caused as a result of the frustration caused by fatigue, that he had pleaded guilty, and had no prior convictions for offences of violence.[49] While declining to impose and SVO declaration, no order for early parole eligibility was made to reflect the serious nature of the offending.[50]

Further, the discretion to fix an eligibility date is unfettered, and should consider factors of punishment, denunciation, deterrence, and community protection in whether a later release date is imposed.[51]

LAQ supports discretion in sentencing to allow courts to impose sentences which are appropriate and take into account the unique facts, aggravating and mitigating features which apply to each case.

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[42] *R v Kampf* [2021] QCA 47, [59].
[43] [2020] 4 QR 80.
[44] Ibid
[45] [2021] QDC 170, [113].
[46] *R v Free; Ex parte Attorney-General (Qld)* [2020] 4 QR 80, [53], [82].
[47] *R v MJB* [2021] QDC 170, [115].
[48] *R v MJB* [2021] QDC 170, [116].
[49] *R v MJB* [2021] QDC 170, [117]-[118].
[50] *R v MJB* [2021[QDC 170, [119]-[120].
[51] See *R v Free; Ex parte Attorney-General (Qld)* [2020] 4 QR 80, [55] referencing *R v Williams; Ex parte Attorney-General (Qld)* (2014) 246 A Crim R 250, 262 [57]-[58], 270 [112].

The discretion to make an SVO declaration is an inherent part of the integrated approach to sentencing, and the provisions contained in s9 PSA (and more broadly Part 2 PSA) provide a comprehensive source of considerations.

8: Should there be a statutory requirement for a court to provide reasons for declining to make a declaration when asked by the prosecution to do so?

No. LAQ does not consider it necessary to impose a statutory requirement to provide reasons when declining to make a discretionary declaration under the scheme, when the same is sought by the prosecution.

Courts are assisted by the submissions made by the parties as to the significant features of the case, which often form the basis for the reasons provided by the sentencing Judge as to why a discretionary SVO declaration was or was not made. Those submissions can also be somewhat reflective of discussions between the parties prior to sentence, though it is accepted that the Courts are not bound by the submissions of either party. While it is unusual for the Court to seek submissions specifically on matters not raised by either party during the course of proceedings to ascertain an appropriate course (and not just in relation to discretionary SVO declarations), it is not unheard of.

There are a number of legislative provisions that require a Judge or Magistrate to provide reasons for making, or not making, certain orders,[52] though these are typically in circumstances where the Court is required to take a certain course by the legislation, and are departing from that course. For example, s147 PSA requires a Court who is dealing with an offender re-offending during the operational period of a suspended sentence, to order that they serve the whole of the suspended imprisonment unless they are of the opinion it would be unjust to do so.[53]

The analysis in Background Paper 3 (Analysis of Key Queensland Court of Appeal decisions and select sentencing remarks)[54] demonstrates that in many matters, reasons have been provided by the sentencing Judge as to why a discretionary SVO declaration was not made. This is more often the case when such submissions are made by the prosecution.

The imposition of a requirement as outlined would be reliant on a sufficiently clear position being taken by the prosecution as to whether they are seeking a declaration be made. For example, the submissions made by the prosecution in QDC 2020/06[55], (and the subsequent appeal published as *R v Knudson* [2021] QCA 267), that the discretion is enlivened, but not 'pressed for', would create difficulties in ascertaining whether the statutory requirement is engaged.

A requirement to provide reasons for declining to make a declaration when sought by the prosecution is unlikely to result in a significant change to the way in which the Courts provide reasons for not

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[52] See for example s159A(3) and (4) *Penalties and Sentences Act 1992*; the exercise of discretion pursuant to s147 *Penalties and Sentences Act 1992*.
[53] S147(1)(b) and (2) *Penalties and Sentences Act 1992*.
[54] Page 72-92, wherein examples of such considerations have been extrapolated.
[55] Seepage 86, and footnote 527 of Background Paper 3 (Analysis of Key Queensland Court of Appeal decisions and select sentencing remarks).

imposing a discretionary SVO. In circumstances where that declaration has been sought, or at the very least raised, most Courts will provide reasons for declining to make a declaration by reference to the circumstances of the offending, various mitigating factors that impact on the need for an offender to serve significant time in custody (including cooperation, mental health issues, criminal history, and prospects of rehabilitation) and the need for supervision following incarceration. Failure to do so may be a matter considered by an appellate Court.

7.4 Impact on Court sentencing practices

9. How is the SVO scheme affecting court sentencing practices? For example:

a) What is the impact of the SVO scheme on the length of head sentences?

b) Where the automatic application of the scheme is avoided due to the sentence falling below 10 years, how does this affect the setting of parole eligibility dates?

Reduction of a head sentence to under the mandatory declaration threshold to recognise mitigating factors

LAQ's view is that the scheme has had a clear impact on the length of head sentences. This is particularly where authorities place the sentence for a particular matter around the 10-year threshold. The impact is often noted in a reduction of the sentence to below 10 years, to recognise mitigating factors which would not otherwise be adequately reflected.

In *R v Tran; Ex parte Attorney-General (Qld)*[56], the Court of Appeal recognized the original sentence of 9 and ½ years, (instead of 10 years), to take into account the offender's plea of guilty, as a significant benefit as it avoided the imposition of an SVO declaration.[57] Although the Attorney's appeal was ultimately successful on another point, the approach taken in relation to the head sentence was upheld as sound by the appellate court.

This case was referred to in a similar case of *Delander*.[58] In upholding the original sentence, the Court of Appeal noted the sentencing judge correctly "recognised that the head sentence would be above the 10 year mark but for the mitigating circumstances. He considered the mitigating circumstances including the applicant's cooperation warranted the head sentence being reduced below 10 years."[59]

[56] *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22
[57] Ibid at [40]
[58] [2019] QCA 69
[59] Ibid at [56]

The recent case of *Levi*[60] involved a conviction following a plea of guilty for the rape of the offender's neighbour. In determining a sentence of 8 years, the sentencing judge noted *"I would consider that the appropriate penalty before taking into account the mitigating features, in particular, your plea of guilty would be one of 10 years imprisonment. Such a penalty would probably reflect the serious nature of your offending…Such a penalty would require you to serve eight years in custody before becoming eligible for parole. The most significant mitigating factor present is your early pleas of guilty. And I accept that in the circumstances of this case, where the complainant is a particularly vulnerable woman, that your pleas of guilty are of significance."*

By reducing a sentence just enough to remove it from the mandatory SVO scheme, and thereby granting a significant benefit, the court has another means by which to give recognition to a number of mitigating factors, including the guilty plea, as required by the PSA.

Head sentences where SVO declaration is discretionary

Contrary to the practices above, there is sometimes a tendency for sentencing judges to recognise the availability of an SVO declaration and impose a higher than usual head sentence where the discretion is exercised not to make the SVO declaration.

There are numerous instances where, in declining to make an SVO declaration, the court determines to order a substantial head sentence instead as a means to sufficiently address the aggravating features of an offence. The end result is that although the parole eligibility date is not delayed by the imposition of the declaration, the head sentence is in fact at the higher end of the range of expected sentences for the offence type.

In the recent Attorney-General appeal of *Free*[61]*,* the Court of Appeal declined to declare the offence an SVO but noted that when addressing circumstances of the offence that aggravate the offence such that issues of public protection or just punishment arise *"that objective can be achieved by the imposition of a* ***substantial head sentence****…Protection of the community is relevant to both the fixing of the head sentence and the period before the offender becomes eligible for parole"* (emphasis added).

A recent example where a longer head sentence was explicitly ordered in place of a SVO declaration was the case of *SDM*[62]. The appellant pleaded guilty to three counts of rape of his former partner on a single occasion, the third count being noted as particularly violent and brutal. The appellant had no relevant history and tendered psychological material that was mixed but at least partially favourable. The sentencing judge sentenced the appellant to 7 years with an SVO declaration, but the Court of Appeal found error in the imposition of the declaration. In addressing the competing aspects of the factors in the mitigation against the seriousness of the offence, the Court of Appeal increased the head sentence to 7½ years but removed the SVO.

Similarly, in the case of *Badaa and Kreuzi*[63]*,* the sentencing judge, in ordering imprisonment for 8½ and 8 years respectively, declined to make an SVO declaration but expressly stated the sentences

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[60] [2020] QDCSR 1503
[61] *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58
[62] [2021] QCA 135
[63] [2020] QSCSR 441

ordered were in the case of Mr Badaa "a significant head sentence for this criminal conduct,"[64] and in the case of Mr Kreuzi "a head sentence towards the upper end of the range"[65]. The offences were serious: a malicious act with intent charge with very dangerous conduct in the context of a violent home invasion, however the court took the above steps noting the offenders' relative youth, relatively limited criminal history, and overall circumstances.

Sentencing courts have also taken this approach for offenders with lengthier histories but who still have some favourable indications of future reform. In the case of *Brand*[66] the offender was on parole at the time of committing a violent torture offence. As against this were positive signs of engagement with programs and mental health treatment in custody. Instead of declaring an SVO the court noted *"there is an alternative that is open here, and an alternative that gives the prospect of providing for a longer, rather than shorter, period of supervision in the community under parole,* ***once you are able to satisfy appropriate authorities***[67]*"* (emphasis added).

The court sought to strike a balance between competing sentencing considerations *"to achieve the outcome that there is the prospect of not just the protection of the community by your ongoing imprisonment, but also the prospect of there being a substantial period of supervision for you in the community,* ***once it is determined that it is appropriate to release you***[68]" (emphasis added). Ultimately, the offender was sentenced to 7 years imprisonment with a parole eligibility date after 3 years and 2 months which, with partial declaration of pre-sentence custody, was 50% of the total aggregate period of imprisonment for the old and new terms of imprisonment.

In this approach, substantial head sentences are still ordered. If served in full, will recognise the seriousness of the offending conduct, but also allows for the possibility of early release and a lengthy period of supervision.

Effect on parole eligibility dates

It appears from sentencing remarks and appeal authorities that where the head sentence falls below 10 years, particularly when just below that mark, the sentencing courts will usually consider that as being the 'benefit' for a plea of guilty or other mitigating factors. The result is that due to the avoidance of an automatic SVO, or where the court exercises its discretion not to order an SVO, the usual 'benefit' applied to a plea of guilty, being the customary early parole eligibility date of one third of the head sentence, tends to be dispensed with.

The courts have made repeated statements to this effect in both appellate cases including Attorney-General appeals, and original sentences:

- *Tran*[69]: "…*having determined to reduce the head sentence from 10 years to nine and a half years, which meant that the respondent was no longer subject to an automatic declaration which would have required him to serve 80 per cent of the head sentence, there was no*

[64] Ibid at page 3 line 15
[65] Ibid at page 5 line 45
[66] [2021] QDCSR 318
[67] Ibid at page 7, line 4.
[68] Ibid at page 7, line 19.
[69] *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22 at [40]

legitimate basis upon which to further ameliorate the sentence by fixing a parole eligibility date earlier [than the statutorily set 50%]" (drug trafficking)

- *Smith*[70]: "*Although I would not make a SVO declaration, I consider it is appropriate to set a parole eligibility date somewhat later than the halfway mark which would otherwise apply".* (9 years imprisonment for manslaughter of 17-week-old infant by shaking)

- *McKenna*[71] "*If this had been a trial, in my view a sentence of not less than ten to 11 years would have been imposed on you, with an automatic SVO. The question is how I give weight to all of the matters before me. I think a head sentence of nine years imprisonment is appropriate here. 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.*" (4 violent counts of rape against a sex worker on a single occasion).

This also tends to apply where upon ordering a sentence of between 5 and 10 years imprisonment, the court exercises the discretion not to declare an offence an SVO but still recognises the serious nature of the offending and the possibility that the offence could well have justifiably been subject to a declaration:

- *MJB*[72]: *"It is very much a borderline case, however taking into account the mitigating factors in the end I am persuaded in the exercise of my discretion not to impose an SVO declaration but I do not intend to fix an early parole eligibility date."* (7 years imprisonment for a grievous bodily harm on a 7-week-old infant with likely catastrophic lifelong disabilities)

- *Wall*[73]: "*I have considered that a declaration should not be made, despite the seriousness of your behaviour…but the serious aspects of the matter that I have referred to, and the fact that your history does reveal you as someone from whom the community needs some protection, as well as considerations of adequate punishment, mean that the parole eligibility date should be halfway through the sentence rather than the conventional starting point of one-third."* (6 years imprisonment for malicious act with intent in the form of repeated stabbing)

- *Bell*[74]: "*Having regard to adequate punishment or the need to protect the community from the prospect of future offending by you… to the extent there is a need to recognise your precipitation of the offending or the longer period over which you dealt with the complainant in comparison [to the co-offender], that will be dealt with on the basis that I will not make*

[70] [2019] QCA 33 at [32].
[71] [2020] QDCSR 1043 at page 6 line 14
[72] [2021] QDC 170 at [119].
[73] [2020] QDCSR 1435 at page 6, line 6.
[74] [2021] QDCSR 296 at page 4, line 16.

any particular parole eligibility declaration for you, so you will have your statutory entitlement at the halfway point of the sentence. (7 years imprisonment for torture).

This practice was supported in a recent Attorney-General appeal where the Court of Appeal determined that adopting the one third release date as a matter of course with insufficient specific consideration to the case is in fact a judicial error. The court stated in *Free*[75] "…*the sentencing discretion was affected by a second error, which arose because the learned sentencing judge moved directly from the conclusion about the serious violent offender declaration, to a conclusion that parole eligibility after the "conventional" one-third was appropriate, without considering the overall effect of that conclusion, and whether there were factors (including punishment, denunciation, deterrence and community protection) favouring a later release date*." The result of that appeal was to decline to order an SVO but also remove the order for the earlier parole eligibility date.

On occasion, the courts have extended special leniency with a parole eligibility date for a Schedule 1 offence that is earlier than 50%. However, the authorities show judicial practice is to carefully outline the reasons why it is under 50%, and the date may still be above the one third mark but under the halfway point. This was seen in the recent case of *Ware*[76], where on a sentence of manslaughter of an infant the court declined to order an SVO due to the desirability of a longer period of supervision upon release, and the parole eligibility was set at 40% of the total sentence.[77]

This also occurred in the case of *BZG*,[78] however there were extraordinary circumstances in that the offender had a terminal illness which led the sentencing judge to reduce the head sentence from 11 to 9 years for 3 counts of rape, and decline to declare the conviction a SVO. The Court did refuse to order parole eligibility at one third however and ordered it closer to 50%. The Court did specifically note that although the offender was unlikely to survive until his eligibility date, the wider circumstances of the case did not call for the level of leniency sought by the defence, particularly as the matter was a sentence after trial.

Courts have ordered the usual one third parole eligibility even in cases where an SVO declaration was sought by the prosecution, as was seen in the recent case of *Foley.*[79] The Court in that case imposed a sentence of 7 years for dangerous operation causing grievous bodily harm whilst adversely affected, declined to declare an SVO and ordered parole eligibility after one third. The case involved a drug affected driver hitting a group of cyclists. The Court noted "*I do not think that either public protection or adequate punishment require that step to be taken in this particular case. There was nothing deliberate about this activity. It was a recklessness for other humans' safety*."[80]

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[75] *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58

[76] [2021] QSCSR 418
[77] Ibid at page 5, line 38 and page 6, line 6.
[78] [2021] QDCSR 647.
[79] [2021] QSCSR 328
[80] Ibid at page 4, line 41

In summary, the current regime has seen the development of guidance through caselaw that continues to allow for elements of sentencing discretion that can be exercised in such a way as to ensure a sentence that is just in all the circumstances[81].

10. Does the current application of the scheme and anomalies in its structure and operation create inconsistencies or other problems? How might these be overcome?

The structure and operation of the provisions within Part 9A coexisting with long standing overarching principles of sentencing have led to, at times, differences in sentencing approaches when compared with sentencing proceedings that do not require consideration of the SVO regime. These differences in our view are more a reflection of the tension between the courts applying general principles in the context of Part 9A. This may present as artificial or inconsistent and impact on public confidence in sentencing. However, in our view it is an approach that can allow for just sentencing outcomes to be achieved, while incorporating ideals of protection of the community and attempting to honour the intentions of the scheme.

This has been reflected in a number of different circumstances, as outlined below.

Integrated approach to sentencing under the discretionary provisions

The discretion invested in a sentencing court under s.161B(3) and (4) of the PSA, can, at a surface level, result in perceived inconsistencies that come with the differences in sentencing approaches. The Court of Appeal has recognised that the discretion to make an SVO declaration is but one component of the broader sentencing process.[82] The Court of Appeal more recently affirmed this principle in *Free*."[83]

By extension, this means that varying competing factors in sentencing are synthesised into the decision to declare an SVO, as it is also in the decision as to the appropriate head sentence. This creates some tensions where the court must recognise some factual circumstances, particularly where the sentence is one that will or could potentially enliven the mandatory declaration provisions.

Difficulties with recognising pleas of guilty

Section 13 PSA directs a sentencing court to take into account pleas of guilty when passing sentence, and the utilitarian value of such a plea is well recognized.[84] Courts have responded to this by taking a wide approach under s.13, including commonly granting early parole release or eligibility at one third of the head sentence, or in some cases reducing the head sentence.

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[81] See for further examples the differing conclusions reached by Jerrard JA in the matters of *R v BAW* [2005] CA 334]; *R v BAX* [2005] QCA 365; and *R v McDougall and Collas* [2007] 2 Qd R 87.

[82] [2007] 2 Qd R 87 at [17]
[83] *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58 at [23].
[84] *R v Amato* [2013] QCA 158 at [21]

However, the discretion conferred by s.160C of the PSA to fix the parole eligibility date is relevantly unfettered.[85]

Complications arise where the offence, even with a plea of guilty, potentially calls for a sentence of 10 years or higher but where other mitigating factors are present that would tend to bode against delaying the parole eligibility to the 80% mark.

LAQ considers the threat of potentially having an SVO declaration made, can be a powerful motivator to enter a plea of guilty. As previously noted, an example of where the court attached significant benefit to such a plea of guilty was the matter of *Levi.*[86]

The court noted that the appropriate penalty on the face of the matter before taking into account mitigating features including the plea of guilty was that of 10 years imprisonment. The court noted that this would reflect the serious nature of the offending and its escalating nature and persistence. Ultimately though the court ordered imprisonment for 8 years with no recommendation for parole on the basis that *"in the circumstances of this case, where the complainant is a particularly vulnerable woman, that your pleas of guilty are of significance."*[87]

The declaration of pre-sentence custody

Sentencing judges have on occasion, acceded to submissions not to declare pre-sentence custody and thereby produce a sentence that on its face is less than 10 years, but in actuality is higher. The result is that the automatic declaration provisions of the SVO scheme are avoided and the sentencing court is returned its discretion to order relief for mitigating factors in the form of an earlier parole eligibility date.

An example of the court adopting this approach is in *Hile*,[88] a sentence for attempted murder. In deciding to not declare some 800 days of pre-sentence custody, the sentencing judge remarked *"I initially thought that a structure of not declaring presentence custody where, ordinarily, it should be declared might be or be seen to be an attempt to subvert the intention of part 9A of the Act…[o]n reflection, I concluded…after hearing further submissions that that was not the case. In many cases in which a sentence may be between nine and 11 years, the Court can have regard to the effect of an automatic declaration and arrive at an integrated sentence which has regard to the needs of punishment, rehabilitation, deterrence, denunciation and community protection."*[89]

Pre-sentence custody unable to be declared

An issue also arises where the court is faced with pre-sentence custody that cannot be declared, but where the authorities are clear the head sentence must be in excess of 10 years imprisonment. Ordinarily courts are able to take into account such time and moderate the head sentence and, if it is appropriate, the parole eligibility date. Within the SVO scheme, these issues are sometimes difficult to reconcile.

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[85] *R v Kitson* [2008] QCA 86 at [16]
[86] [2020] QDCSR 1503
[87] Ibid at 43.
[88] [2021] QSCSR 1
[89] Ibid at page 9, line 23

This issue arose in the appeal matter of *Armitage, Armitage and Dean*.[90] The offenders each had a period of pre-sentence custody time that was not able to be expressly declared as time served on the sentences. As a matter of natural justice, it needed to be taken into account when setting parole eligibility as the time was spent in custody following convictions for the offence of murder which was ultimately quashed on a conviction appeal and substituted with convictions for manslaughter.[91] When the matter was set for re-sentencing on the lesser charges, the sentencing judge had to proceed on the basis that the sentence was to start on the new sentencing date and could not be backdated to the original sentencing date, resulting in lengthy periods of non-declarable time.[92]

This issue could have been rectified with adjustments to the parole eligibility date with explanatory comments in the sentence remarks, but given that an automatic SVO declaration had to be made, all discretion to bring forward a parole eligibility date was removed. The end result of the sentencing order was that the offenders' parole eligibility dates were in fact more than 80% of the *effective sentence* or the actual time spent in custody overall including the non-declarable pre-sentence custody.

With reference to the previous case of *Carlisle*[93], the Court of Appeal stated *"[w]hen accounting for non-declarable pre-sentence custody where a serious violent offence declaration is made, it is necessary to reduce the head sentence to reflect the fact that, if the non-declarable pre-sentence custody formed part of the sentence, the defendant would be eligible for parole after serving 80 per cent of it*."[94] This means sentencing courts are left in a position where they are forced to artificially reduce a head sentence, and then declare a serious violent offender declaration to achieve a just sentence.

Ultimately in *Armitage* the Court of Appeal was able to reconcile the issue by reasoning that that court, unlike the single sentencing judge, was in fact able to backdate the sentence to the original sentence date and thereby declare the pre-sentence custody.[95] It is respectfully submitted however that the considerable cost of this appeal, and the uncertainty that came with the difficulties of the case, could have been avoided had the SVO scheme had a more discretionary framework to anticipate such complex circumstances.

Difficulties where sentencing trends are to impose cumulative sentences or global sentences for multiple episodes of offending

Sentencing courts are often faced with offenders who are pleading guilty to a multitude of offences across a number of different indictments, sometimes involving vastly different offending types. This requires a sentencing judge to balance the need to order sentences that justly address each series

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[90] [2021] QCA 185
[91] Ibid at [16].
[92] Ibid at [20]. This was because the sentencing judge proceeded under s.668F(2) of the Code, which states a substituted sentence following a substituted verdict on appeal can only be passed by the Court of Appeal with reference to s.668 of the Code. Due to this, the judge considered the exercise as being a fresh sentence that could not be backdated.
[93] [2017] QCA 258
[94] [2021] QCA 185 at [27]
[95] Ibid at 42. Refer also to footnote 33.

of offending by considering both the issues particular to each, as well as determining a global sentence outcome that addresses the offender's crimes in totality.

Approaches adopted by sentencing courts to this problem have been to order a head sentence for the most serious offence before the court that would be higher than what would have been ordered had that offence been dealt with in isolation. This takes into account the additional punishment needed to address the other lesser offences, which in a practical sense are lesser concurrent sentences. Another approach is to cumulate terms of imprisonment from the different indictments to clearly delineate the punishment for each episode of offending and in combination determine a head sentence.

However, these approaches have become difficult where one of the offences calls for an SVO declaration to be made, particularly where the established range of head sentence for an offence is 10 years or over.

In the recent appeal of *Baker*[96] the Court of Appeal was split as to the approach to be taken for multiple episodes of offending where the consequence is a mandatory SVO declaration. The offender entered a guilty plea to a malicious act with intent, the particulars were that he shot another male at point blank range to the leg. The other charges, which were spread across a total of six indictments and included some not dissimilar firearm related offending, were assessed by both the original sentencing judge and all appellate judges as on its own potentially attracting sentences of 6 to 7 years imprisonment.[97] The original sentence was 11 years imprisonment for the malicious act offence with lesser concurrent sentences for the other matters.

The majority, in quoting the principle in the earlier case of *Nagy*,[98] stated "*that approach should not be adopted…where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole…*" As none of the other offences were declared SVOs, the practical effect of ordering a global sentence with a mandatory SVO was that it had the practical effect of essentially rendering all offences as SVOs, in that 80% was required to be served before being eligible for parole. This resulted in a lengthier non-parole period than had the sentences for the different sets of offending been separate yet cumulated terms of imprisonment. The majority ordered the sentence be moderated down to 9 ½ years with an SVO, taking into account that the offender was still relatively young with real prospects of rehabilitation and the support of a partner.[99]

Justice Henry dissented and found that the approach of a global head sentence with an SVO declaration was potentially appropriate where that head sentence's increase was only moderate and in line with the totality of offending, which His Honour found was the case with Mr Baker's offending: *"[a]n uplift of the head sentence from nine years to 11 years, to take account of the totality of the appalling criminal conduct, was moderate…[b]earing in mind the additional multitude*

[96] [2021] QCA 150
[97] Ibid at [17], [19] and [35].
[98] [2004] 1 Qd R 63
[99] [2021] QCA 150 At [23]

of offending could readily justify a head sentence in its own right upwards of seven years, and even allowing for a totality discount to avoid too crushing an overall sentence…"[100]

The passage from *Nagy* quoted in *Baker* notably gave other examples of where a global sentence may not be the proper approach: *"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 co-offenders. That list is not necessarily exhaustive*."[101] This is an example of how difficulties with SVOs are sometimes addressed with the application of established general sentencing principles.

Issues with other mandatory sentencing regimes

The above difficulty was addressed in combination with another mandatory sentencing regime in the case of *Cook*.[102] The sentencing process in this matter had to strike a balance between the principles from the case of *Baker* referred to above, whilst also considering the effect of an SVO declaration and the effect it would have where the sentence ordered is by operation of law cumulative on an earlier sentence.

In that case the court was sentencing the offender for a very serious malicious act charge that involved firing a weapon during a violent arrest by police, as well as other robbery and assault offences, with the additional complication of an unexpired portion of imprisonment for a previous sentence and with it the operation of s.156A of the PSA, requiring the new sentence be cumulative on that old sentence.

The court was required to consider the effect that any order which triggered an automatic SVO declaration would result in an 80% non-parole period being not only imposed on the SVO offence's term of imprisonment, but also the lesser offences' terms (as in *Baker*), and yet again it would in essence see the offender serving the entire remaining portion of his current sentence on top of the 80%. Similarly to *Hile* and *Armitage*, the court resorted to not declaring a portion of pre-sentence custody in order to justify bringing the head sentence under the mandatory declaration level to balance these considerations.

The court ordered a head sentence of 9 ½ years which resulted in an effective period of imprisonment covering all orders was a head sentence starting from 18/01/19 until 27/03/30, being 11 years, 2 months and 9 days. The parole eligibility date was set at 25/01/24, being after serving 5 years and one week. Yet another complicating factor in that sentence, was the 20 months of pre-sentence custody spent before the earlier sentence, which was not declared, in order to allow an order for the offender to be immediately released at that time on parole.

[100] Ibid at [35]
[101] [2004] 1 Qd R 63 at [39]
[102] [2021] QDCSR 841

Difficulties with recognising differences in culpability for parties to offences

Sentencing regimes such as the SVO scheme cause difficulties for sentencing judges to balance established ranges of sentences against the need to recognise differences in culpability for parties compared to principal offenders.

This was demonstrated in the manslaughter sentence appeal matter of *Wales*.[103] In that matter the appellant was a party to a homicide offence where the principal offender ran a sword through a door during a home invasion which ultimately struck and killed the deceased. The appellant was sentenced on a plea of guilty to manslaughter to 9 years imprisonment with an SVO declaration. The appellant's complaint was that the sentencing judge *"did not adopt the required integrated approach to sentencing but instead reduced a notional ten year term to nine years (to give credit for the plea of guilty and a four month period of custody which could not be declared) and fixed upon the resulting nine year term without having regard to the making of the serious violent offence declaration."*[104] In removing the SVO declaration the Court of Appeal made reference to a previous similar case of *Hicks and Taylor,*[105] and found *"[i]n these circumstances I would not exercise the discretion to make a serious violent offence declaration in relation to the applicant's offence, for which he (like Hicks) was liable under s 8 of the Code rather than as a principal offender*."

The guidance this case provides would be difficult to apply, where authorities call for a head sentence of 10 years or more and thereby require an automatic declaration.

In Summary

The above examples demonstrate the multitude of different complicating factors that sentencing judges can be faced with when sentencing is subject to the SVO regime. Sentencing courts can be required to perform a difficult balancing act with different considerations, that sometimes compound on each other, in order to determine a just sentence.

These measures can result in a distortion of the true circumstances of a case, leading to community perceptions of unjust outcomes. Such sentences may draw unjustified criticism of excessive lenience.

It is LAQ's position that if the scheme is to be retained, that introducing further judicial discretion into it, would be an appropriate remedy to these issues. This could be extending the discretionary nature of the orders to sentences above 10 years, or introducing exceptions to allow issues such as taking non-declarable time into account. It could be adopting a split model (Option D-2 in the Issues paper) to make a declaration presumptive only, in the case of sentences above a specified limit. This option is addressed further in our response to question 32.

Given the large body of authority dealing with SVO sentences developed over time, it is LAQ's view that the principles upheld in these decisions should be respected when considering any reforms or amendments. Ultimately in our view they continue to maintain, albeit in at times a creative way, the intentions of the SVO provisions.

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[103] [2019] QCA 64
[104] Ibid at [9]
[105] [2011] QCA 207

11. Are there any other issues with the operation of the scheme as it impacts court sentencing practices not identified that should be considered as part of the review?

Nothing additional to that raised in Question 10.

7.5 Automatic operation of the scheme and parole eligibility

12. Are mandatory sentencing schemes appropriate in certain cases – such as for serious violent offences?

LAQ does not support mandatory sentencing schemes. Mandatory sentencing unnecessarily fetters the exercise of the sentencing discretion of the court, risks unintended consequences and can lead to miscarriages of justice, for example, where mitigating factors cannot appropriately be taken into account by the sentencing court. Sentencing in this fashion inevitably leads to unjust outcomes, taking a 'one size fits all' approach where, in reality, the circumstances surrounding offences and the individuals who are being sentenced, differ greatly.

Mandatory sentencing reduces the incentive to offenders to plead guilty, leading to matters progressing to trial and victims being subject to cross- examination and the court process, where this may have otherwise been avoided.

All of the risks in mandatory sentencing are relevant to the application of the SVO Scheme. The SVO scheme reduces/fetters the exercise of the sentencing discretion to an extent that can lead to a miscarriage of justice. The current SVO scheme poses difficulties for a court in appropriately taking into account (and reflecting in the sentence outcome) factors in mitigation and, specifically, a plea of guilty.

As outlined in our response to questions 9 and 10, Courts have interpreted and applied the legislation in a way that at times allows for the recognition of sentencing principles in an attempt to avoid unjust outcomes. However, the approach dilutes truth in sentencing and can appear artificial. It would be preferable to provide the courts with broad sentencing discretion and the ability to sentence on a case by case basis, applying all of the relevant sentencing principles.

13. Should the distinction under the SVO scheme between sentences at or above 10 years and below 10 years be retained?

No. The relevance of the 10-year mark is that it automatically reduces the discretion of the sentencing court simply because a particular head sentence is imposed. LAQ does not support a requirement that an SVO is automatic simply by function of the head sentence. This distinction at the 10-year mark is one that appears to have been arbitrarily selected at the time of the creation of the legislative scheme. The efficacy of the 10-year threshold is not established by evidence (see Issues Paper, page 51). If the SVO scheme is to be retained, LAQ's position is that the best approach is to have a scheme that allows for maximum discretion to the sentencing court which cannot occur if arbitrary thresholds enliven an automatic outcome.

The requirement that an SVO should be automatically imposed in sentences over 10 years can lead to artificial sentencing outcomes, which do not reflect the criminality of the offence.

14. If retained, should the discretion for the SVO scheme to be applied to a listed offence for sentences of imprisonment of 5 to 10 years be retained, or should this apply to a sentence of any length where a listed offence is dealt with on indictment?

LAQ does not support the SVO scheme being applied to a sentence of any length where a listed offence is dealt with on indictment. With reference to the response provided in question 12, the imposition of the SVO declaration can reduce the court's ability to properly exercise its discretion and take into account all relevant matters when imposing sentence.

Additionally, there are already mechanisms in place that provide a safety net for many offences in this category and ensure that the most serious of these offences receive adequate punishment, such as the DPSOA legislation, the threshold of exceptional circumstances for sexual offences and the requirement that an offender's parole application be considered by the parole board in any sentence over 3 years.

Further, allowing a sentencing court to make an SVO declaration in relation to any length of sentence would increase the numbers of offenders exposed to such orders and place further pressure on an already stretched system. It would increase the period of time more offenders are in custody and increase the numbers of offenders subject to parole orders.

Requiring an offender to complete a significant portion of their head sentence in custody presents the following issues: -

a) An increased pressure on corrective services and the jail system, which is already overcrowded; and

b) Significant reduction in the amount of time that an offender is subject to the supervision of probation and parole, thereby affording less opportunity for treatment and interventions to take place upon an offender's release from custody. The purpose of these interventions is to address offending behaviour and reintegrate an offender into the community, and ultimately this is in the public interest.

It is LAQ's view that, should this scheme be retained, the low mark of 5 years should remain, and not be reduced. It is our view that 5 years is suitable given that it is at the 5-year mark that an offender is no longer able to be released on a suspended sentence, and parole eligibility automatically applies.

15. Is the 80 per cent/20 per cent split between the minimum period in custody and maximum period on parole appropriate for offenders declared convicted of an SVO or should this be changed? If changed, what approach do you support:

The 80/20 percent split should be changed. In accordance with the discussion in the Issues Paper, the 80/20 split is an arbitrary one with no evidentiary basis or justification. It is accepted that parole holds a crucial role in the path to rehabilitation of an offender. Putting to one side offenders sentenced to non-violent offences in the scheme, offenders who are sentenced pursuant to the SVO scheme generally commit offences of such a nature and level of seriousness, that make it wholly in their interests and the interests of the community that their rehabilitation is of significant focus. Such

rehabilitation is occasioned by strong levels of support of an offender for an extended period of time upon return to the community.

The current SVO scheme proportionately allows for a very limited amount of time to provide that support and achieve steps towards rehabilitation – a position or outcome that is not in the community's interests in terms of the long-term goals of reduction of offending and rehabilitation of offenders. Any decision to restrict time on parole so significantly should not be mandatory, automatic, or arbitrary but should be occasioned by case-by-case decision-making based on the evidence before the court and the full exercise of the sentencing discretion. That is, the imposition of a non-parole period in SVO matters should be an active decision of the sentencing court rather than an automatic and mandatory side effect of the sentence imposed with no evidentiary basis.

However, if the scheme is to be retained, then we would support any position that increases the discretion afforded to the sentencing Judges. A set range of 50% - 80% would allow for greater judicial discretion when setting the non-parole period and allow for greater parole supervision.

(a) A fixed standard percentage non-parole period scheme (e.g. parole eligibility at two-thirds, 70%, 75% or other defined percentage of the head sentence); or

No. it is submitted, by reference to the above response, that setting one arbitrary figure as the threshold risks causing a restriction of the sentencing discretion.

(b) A minimum standard percentage non-parole period scheme (e.g. a minimum of two-thirds, 70%, 75% or other defined percentage of the head sentence); or

No. See above. It is submitted that this suggested approach risks causing the same issue mentioned above but with no cap or upper threshold. This could lead to even more severe and/or unintended consequences. Further, it increases the risk of the outcome that an offender ultimately spends no time on parole and is released to the community totally unsupported and unsupervised.

(c) A fixed set range (e.g. between 50–80% of the head sentence)?

Yes. If the scheme is retained, then a range of 50% - 80% would be appropriate. This would allow for the appropriate exercise of sentencing discretion depending on the individual facts of the case. It would allow a sentencing court to, on an individualised basis, balance the seriousness of the offending and the need to protect the community with the need for an offender to be rehabilitated.

16. If the SVO scheme is retained in some form, should a court have the ability to depart by setting either:

(a) a lower non-parole period; and/or

Yes, the court should have the discretion to set a non-parole period that is appropriate for the individual matter. This would allow the court to maximise its sentencing discretion.

(b) a higher non-parole period?

LAQ would not support the imposition of a higher non-parole period for the reasons discussed in questions 13 and 15. A higher non-parole period would provide less time that an offender would be supervised in the community following release, reduce incentives to plead guilty and lead to artificial sentencing outcomes. This would not be in accordance with the general sentencing principles as set out in section 9 of the PSA and would effectively remove the principle of rehabilitation.

There is the risk that this would affect the most vulnerable members of our society, who are already over-represented in the criminal justice systems, such as Aboriginal and Torres Straight Islanders, those with mental health diagnoses that fall short of mental health defences, and those with childhood trauma and disadvantaged backgrounds. This could risk seeing these vulnerable members of our society spending further time incarcerated.

17. If a court has the ability to depart from the scheme's mandatory application, is any legislative guidance required to a court in the setting of a:

(a) a lower non-parole period; and/or

(b) a higher non-parole period; and

what form should this take (e.g. where there are 'exceptional circumstances' or 'special circumstances' or where this is 'in the interests of justice')?

LAQ does not support the imposition of threshold tests such as "exceptional circumstances" or "special circumstances" or "in the interests of justice" as this would limit the Court's discretion. Any test would require the Court to justify the exercise of their discretion or to meet a certain threshold test before they could impose a certain penalty.

However, if a threshold test is imposed, then LAQ would support the test "in the interests of justice".[106] This would allow the Court to make an assessment of all relevant factors, including the offender's personal circumstances, the nature of the offending and prospects of rehabilitation. This would be particularly relevant where there are cultural or mental health aspects pertinent to the sentencing of an offender.

[106] *R v Prisk and Harris* [2009] QSC 315 at [22]-[29]

18. What factors should be considered in the setting of either a higher or a lower non-parole period, and should these be legislated?

The applicable sentencing principles contained in section 9 of the PSA, factors in mitigation, and aspects relevant to each individual case. In accordance with the above, there is no need to legislate, but simply allow for the broadest discretion of the court.

7.6 Offences included in the scheme

19. If the SVO scheme is retained, should a schedule of offences to which the SVO scheme applies form the basis for its application?

Yes. To ensure that the application of this legislative scheme remains within the scope and intent of the legislation it is necessary for specific offences to be encompassed by the scheme. Limiting the scheme to a set list of offences solely connected to the intent of the legislative scheme ensures that the focus remains on the outcomes intended and limits the risk of unintended consequences. To ensure these purposes, any list of offences utilised in the SVO area should be focused on the purpose of the legislation only (that is, be a list for the sole purposes of the SVO scheme); should be limited to those involving serious violence (not drug offending, dishonesty or property offending) and should be revised regularly to reflect community standards including considerations as to the prevalence of the offending.

20. If a separate schedule is retained, should the schedule be separate to that which applies for the purposes of section 156A(1)(a) of the *Penalties and Sentences Act 1992* (Qld) ('PSA')?

Yes. Currently the dual purposes of "Schedule 1" are the SVO scheme and to identify offences where mandatory cumulative offences would apply in particular circumstances. These dual purposes of the schedule are not aligned and are not naturally or intrinsically connected so that the same factors do not affect or impact the two purposes. An unintended consequence of this joint schedule is that offences that are not obviously part of the SVO scheme are being included so that offenders may be subject to an additional liability that they may not otherwise have been exposed to. This inexplicable crossover between the two purposes leads to confusion in the understanding of the purpose of the schedule and the underlying legislative schemes. The schedule relating to SVOs should be for the sole purpose of identifying SVOs to preserve and clarify the purpose of the legislation.

21. Is the current list of offences to which the scheme can, or must, be applied (depending on the sentence length) as listed in Schedule 1 of the PSA appropriate?

LAQ's position is that the current schedule includes offences that do not address the purpose of the legislation and therefore are not appropriate.

(a) Are there any offences not included in Schedule 1 that should be?

LAQ does not support adding further offences to the scheme.

Table 7: Suggested offences to add to the SVO scheme

Offence	Maximum Penalty
Choking, suffocation and strangulation in a domestic setting (Criminal Code, s 315A)	7 years
Arson (Criminal Code, s 461)	14 years
Deprivation of liberty (Criminal Code, s 355)	3 years
Involving child in making child exploitation material (Criminal Code, s 228A)	20 or 25 years
Making child exploitation material (Criminal Code, s 228B)	20 or 25 years
Distributing child exploitation material (Criminal Code, s 228C)	14 or 20 years
Possessing child exploitation material (Criminal Code, s 228D)	14 years
Fraud (Criminal Code, s408C)	5 years or 14 years or 20 years
Aiding suicide (Criminal Code, s 311)	Life imprisonment

In relation to the specific offences noted above, the current sentencing legislation allows for the appropriate penalties to be imposed without requiring mandatory sentencing.

In relation to offences under sections 228A, 228B, 228C and 228D the principles in PSA 2(a) do not apply and, thus, imprisonment is not a last resort. Further the offender must serve a period of actual custody unless there are exceptional circumstances (PSA s 9(4)). Therefore, these offences already fall into a more serious category and are treated in this manner by the courts.

Many of these offences are committed in conjunction with offences under the Commonwealth Criminal Code. *The Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020*, amended the *Crimes Act* to create minimum penalties for certain offences under section 16AAA. Therefore, there is already significant mandatory sentencing within this area.

With respect to the offences of arson and deprivation of liberty, these are not inherently serious violent offences. It is submitted that if the factual matrix involving such charges were "serious" and "violent" that criminality could be appropriately addressed in additional charges with an offence already on the SVO scheme, e.g., arson and murder or deprivation of liberty and rape.

Consistent with the above comments, LAQ also does not support adding the charge of fraud to the SVO scheme as it is not objectively **"**violent".

Whilst LAQ accepts that there is a community shift in attitude to offences of choking, suffocation, and strangulation in a domestic setting our concern in relation to adding this offence to the SVO scheme would be the unintended consequences. The offence can be established in the absence of medical evidence and based on self–reporting alone. The offence would be better suited to a penalty which allows for greater supervision and rehabilitation. It is notable that s. 234(7) of the *Corrective Services Act 2006* already allows for an additional consideration by the Parole Board for matters such as these.

(b)Should any offences be removed?

Yes. If the offending is not inherently "serious" and "violent" it is LAQ's position the offences should not be included in the schedule of offences relating to the SVO scheme.

It is noted in the Issues Paper that the SVO scheme has never been applied to over half of the offences listed. It is applied overwhelmingly to only 9 offences in Schedule 1. These offences are:

maintaining a sexual relationship with a child (20.8%), rape (16.2%), trafficking in dangerous drugs (14.8%); malicious acts (11.8%); manslaughter (10.9%); attempted murder (10.7%); torture (4.8%); robbery (3.7%); and grievous bodily harm (3.4%). Apart from the offence of trafficking, LAQ would support the retention of these most frequently applied offences in the schedule.

Offences that are not objectively, inherently serious and violent, and/or already have other mechanisms of punishment within the current legislation should be removed. On our review of the Schedule 1 list contemplation should be given to removing the following offences:

- Riot – not so inherently serious – if serious violence is involved in a riot it is usually charged separately, e.g. grievous bodily harm (which is on the schedule)
- Threatening violence
- Escape by lawful persons in custody
- Procuring engagement in prostitution
- Stupefying in order to commit an indictable offence
- Carrying or sending dangerous goods in a vehicle
- Endangering the safety of a person in a vehicle with intent
- Bomb hoax – by its very nature does not involve violence or have violence as a consequence
- Failure to supply necessities
- Endangering life of children by exposure
- Cruelty to children under 16
- Dangerous operation of a motor vehicle (if this type of offending involves violence in the criminality as opposed to the outcome then that can be captured by another charge that remains on the schedule, e.g., manslaughter)
- Taking control of an aircraft
- Preventing escape from wreck
- Unlawful assembly, riot and mutiny – CSA 2006 and CSA 2000
- Other offences CSA s. 124(a) a prisoner must not prepare to escape from lawful custody – CSA 2006 and CSA 2000
- Trafficking in dangerous drugs
- Supplying dangerous drugs
- Producing dangerous drugs.

Inclusion of drug offences particularly in the current schedule undermines the intention of the legislation. The Issues Paper (p. 7-53) notes that some drug offences were to be captured by this legislation “because of the enormous damage done in the community by drug trafficking.” It is LAQ’s position that this sentiment is at odds with the general purpose of the SVO scheme and undermines the theme of the legislation. The gravity of drug offending and the harm it causes to the community is adequately captured by the existing sentencing principles and case law. These issues are already reflected in the sentences being imposed by the courts without the need for the overlay of the SVO scheme.

22. Should the ability to make a declaration for an offence not listed in the schedule be retained and if so, are the criteria under s 161B(4) appropriate?

No, the scheme should apply to the nominated offences only. If the SVO scheme is amended to allow for increased discretion by the sentencing court, the schedule of prescribed offences is updated to include only relevant offences and the schedule is reviewed regularly then there would be no need to have a catchall legislative provision such as s. 161B(4). This current provision is a broad one where there may be a risk of unintended consequences.

23. If retained, should the scheme be renamed to better reflect the types of offences captured by it?

If the legislative scheme is amended to only apply to serious violent offences, then the name of the scheme should remain. The current name of the scheme adequately and appropriately reflects the tenets and goals of the legislative scheme. The application of the scheme and the offences captured by it need to be amended in the ways suggested in this response to give proper effect to the intent and purpose of the SVO scheme.

7.7 Victim satisfaction and the impact of the SVO scheme

LAQ does not consider a response to this question to be within our expertise.

7.8 Human Rights issues

27. Is the current SVO scheme compatible with rights protected under the Human Rights Act 2019 and other human rights instruments (e.g. UN Convention on the Rights of Persons with Disabilities)? If it is not compatible, are any existing limitations reasonable and demonstrably justifiable (Human Rights Act 2019, s 13)?

LAQ considers the current SVO scheme is not compatible with the rights protected under the *Human Rights Act 2019 (*Qld) ('HRA') and multiple international human rights instruments. The incompatibility is not reasonable and demonstrably justifiable.

The HRA commenced on 1 January 2020. The Act requires that a member introducing a bill into the legislative assembly must prepare a statement of compatibility.[107] Compatibility with human rights for the purposes of the Act means that something does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable.[108]

The HRA outlines the criteria for an assessment as to whether a limit on a right is reasonable and justified in section 13. Significant considerations include the purpose of the limitation and whether

[107] *Human Rights Act 2019 (*Qld) s38.
[108] Ibid s8.

there are any reasonable less restrictive ways to accomplish that purpose. Section 13(g) requires a balancing exercise between the importance of the purpose as against the importance of the human right, considering the nature and extent of the limitation.

Right to liberty and arbitrary detention

Section 29 of the HRA confers the right to liberty and a prohibition on arbitrary detention. The concept of arbitrariness is not only concerned with unlawfulness.

The concept of arbitrary has been defined to mean capricious, unpredictable, unjust or unreasonable in that it is not proportionate to a legitimate aim sought.[109] It has been argued that arbitrary should be interpreted to include inappropriateness, injustice, lack of predictability and due process of law.[110]

When the scheme was introduced it was designed to reflect the 'true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it'.[111] The schemes intended purpose was said to be community safety and denunciation.[112]

The application of the scheme to offences which do not involve violence and have a tenuous connection to its purposes, for example drug offending or any addition of offences such as fraud, are clearly inappropriate or unreasonable to meet its purposes. It is difficult to see how the limits on this human right might be justified where these offences are not consistent with the purposes of the scheme.

The appropriateness or reasonableness of the scheme can also be analysed through the evidence about whether it achieves its purpose. The available literature does not support the use of minimum parole periods to achieve deterrence or rehabilitation.[113] This suggests the current scheme is not appropriate for achieving its intended purposes.

The lack of predictability is of significant concern. Judges experience difficulty in arriving at an appropriate sentence where the sentence straddles the 10-year mark.[114] The sentences for the offences of manslaughter and trafficking in dangerous drugs tending towards sentences of 9 years, rather than 8 or 10,[115] suggests sentences maybe being imposed to navigate mandatory SVO

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[109] Explanatory note, *Human Rights Bill 2018* (Qld) 22; *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85].

110 *Policy Statement on Principles applying to Detention in a criminal law context* 22 June 2013, Law Council of Australia, 4.

[111] Queensland, Parliamentary Debates, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice).

[112] Ibid, 595.

[113] Andrew Day, Stuart Ross and Katherine McLachlan, The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation (Summary Report, 2021) ('University of Melbourne Literature Review'), 12.

[114] Queensland Sentencing Advisory Council, The '80 per cent rule': The serious violent offences scheme in the Penalties and Sentences Act 1992 (Qld) (issues paper, November 2022) 45-46.

[115] Ibid, 44-45.

declarations. It is further noted that the case law and the interpretation of how a Judge arrives at a decision to impose an SVO has changed a number of times since the scheme's inception.[116]

The *International Covenant on Civil and Political Rights (*ICCPR)*[117]* was signed by Australia in 1972 and ratified in 1980. Article 9 of the ICCPR provides that no person should be subject to arbitrary detention. The same considerations discussed that apply to the HRA apply to Article 9 of the ICCPR.

The *Convention on the Rights of Persons with Disabilities* (CRPD)[118] was signed by Australia in March 2007 and ratified in July 2008. Article 14 of the CRPD requires that persons with disabilities, on an equal basis with others to have the right to liberty and are not deprived of their liberty arbitrarily.

There is no current data as to the proportion of those sentenced under the SVO scheme being people with disabilities. Studies into the Australian prison population suggest that 40% of prisoners have been diagnosed with a mental health condition,[119] 25-30% have a borderline intellectual disability and 10% have a mild intellectual disability.[120] Significantly more Aboriginal and Torres Strait Islander people have identified as having an intellectual disability. [121]

It is difficult to make inferences without specific data about the rates of disability within the SVO cohort, but given the significant incidence of disability in the prison population it can be extrapolated that the SVO scheme is likely to impact on people with disabilities. Thus, the same considerations discussed that apply to the HRA apply to Article 9 of the ICCPR.

Aboriginal and Torres Strait Islander People

Section 15 of the HRA provides that each person is equal before the law and is entitled to the equal protection of the law without discrimination.

The *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)[122] was signed by Australia in October 1966 and ratified in September 1975.

The CERD provides a condemnation of racial discrimination and an undertaking to eliminate racial discrimination in all its forms.[123] It provides that each signatory will review policies and laws which

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[116] Ibid, 38-39
[117] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[118] Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, A/RES/61/106, (entered into force 3 May 2008).
[119] Australian Institute of Health and Welfare, The health of Australia's prisoners 2018 (Catalogue no. PHE 246, 2019) vi.
[120] Ibid, See also: Mike Hellenbach, Thanos Karatzias and Michael Brown, 'Intellectual Disabilities Among Prisoners: Prevalence and Mental and Physical Comorbidities' (2017) 30(2) Journal of Applied Research in Intellectual Disabilities, 230.
[121] Anti-Discrimination Commission Queensland, *Women In Prison 2019: A human rights consultation report* (report, 2019) 80.
[122] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)
[123] Ibid Article 2.1.

have the effect of creating or perpetuating racial discrimination.[124] Article 5.1(a) of the CERD requires that each person has the right to equal treatment before a court, as an administrator of justice.

The definition of racial discrimination in the CERD specifically includes where the discrimination is in 'purpose or effect',[125] thereby including indirect forms of discrimination. It follows that Australia's obligations under CERD require that laws discriminating against a racial group, albeit indirectly, are eliminated.

Aboriginal and Torres Strait Islander people account for 3.8% of the Queensland population[126] and 20.1% of the offenders sentenced under the scheme.[127]

The current scheme clearly effects Aboriginal and Torres Strait Islander offenders at a much higher rate than other offenders. The outcome or effect of the scheme meets the definition of racial discrimination and is not compliant with Australia's obligations under the CERD.

28: What reforms could be made to the scheme to improve its compatibility with and/or to meet the test of being 'reasonably and demonstrably justifiable'?

The major concerns with respect to the infringements on human rights are that the SVO scheme could be considered arbitrary detention and that the scheme affects Aboriginal and Torres Strait Islander people disproportionately.

Reforms which ensure the scheme is consistent with its purposes and based on evidence to achieve those purposes would improve compatibility with human rights and ensure the necessary infringement on rights is justifiable.

There is 'consistent evidence that imprisonment has criminogenic effects and that the parole system plays a key role in protecting community safety'[128] One study showed that the prospect of a longer sentence was not a specific or general deterrent.[129]

While the SVO scheme achieves community safety in the sense that it operates to incapacitate people for longer periods of time, the High Court has said:

It is now firmly established that our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment

[124] Ibid Article 2.1 (c).
[125] Ibid Article 1.1.
[126] Queensland Sentencing Advisory Council, Baseline Report (Sentencing Profile, May 2021) 15.
[127] Queensland Sentencing Advisory Council, Analysis of Sentencing and Parole Outcomes: The Who, What and How Long of Serious Violent Offences (Background Paper 4, October 2021) 18.
[128] University of Melbourne Literature Review (n7) 13.
[129] Ibid.

beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.[130]

It is accepted that there are occasions where a lengthier non parole period would be preferable and proportionate to the offending. In *Free*[131] the Court found that the imposition of an SVO declaration is 'a forecast of future behaviour' in the sense that 'a finding that all prospects of rehabilitation for the offender are so limited as to require them to serve all, or almost all, of the sentence imposed'.

A discretionary model of the SVO scheme should allow Judges the maximum amount of discretion, by leaving the decision to a Judge to make an SVO declaration and determine the length of the non-parole period to take into account the offence, the offender and other relevant factors.

A discretion for Judges to make a declaration consistent with the decision of *Free* would ensure an evidence-based approach, based on the assessment of risk and the circumstances of the offender. This would result in sentences with an SVO declaration only in cases where that is the least restrictive approach to meet the purposes of sentencing. This would alleviate the concerns raised in relation to arbitrary detention and the inconsistencies with the scheme and domestic and international human rights obligations.

While discretionary SVO declarations are still likely to disproportionately effect people with disabilities and Aboriginal and Torres Strait Islander people, Judges will have greater scope to take into account particular circumstances. This will remove a legislated and structured process which indirectly discriminates against these particular cohorts.

7.10 Any other issues not addressed

LAQ cannot identify other issues that have not been addressed in the questions.

PART 8 – Options – SVO scheme – 8.2 – Reform Options

30. What would the benefits and risks be if the SVO scheme was:

(a) retained in its current form – with no changes to its operation or scope.[132]

Benefits

1. Deterrence

It is LAQ's position, that if the SVO scheme were to be retained in its present form, there remains on the face of it, a substantial deterrent to offenders. This is the substantial consequences on the

[130] *Chester v The Queen* (1988) 165 CLR 611, [20].

[131] *R v Free; Ex parte Attorney-General* (Qld (2020) 4 QR 80; [2020] QCA 58.

[132] See the summary in Table 1.

liberty of a person who is convicted of serious criminal offending. The question that arises is whether it is in fact effective as a deterrent.

The difficultly in assessing the effectiveness of this scheme can be demonstrated by considering data from sentences where more than 10 years imprisonment was imposed.[133] As of 30 June 1996, there were 338 defendants serving sentences in excess of 10 years imprisonment who would, if they offended post-amendment, be the cohort subject to a mandatory declaration. This can be contrasted with data obtained between 2011-12 to 2019-20 where there was a total of 318 mandatory SVO declarations made. On one view, the numbers are markedly less given the period over which the data applies. The integrated approach to sentencing however, often results in the reduction of a sentence below the mandatory threshold to arrive at a just outcome. As such, the data is not necessarily reflective of how well the scheme has worked as a deterrent. In reality, people continue to commit very serious violent offences.

2. Victim/survivor satisfaction

In reaching a sentence that reflects the seriousness of offending, a court must have regard to the various impacts of the offending on a victim. There is of course not one consideration that overwhelms all others and so there needs to be proportionality between the offending and sentence.[134]

By maintaining the SVO scheme, not only is there confidence that serious offending will be met by a proportionate punishment, but also that victims have confidence that this will take place. For Schedule 1 offences involving offending against a person, particularly of a violent or sexual nature, the justice being achieved is for the victim. Where there is a lack of confidence that there will be a just outcome for a victim of serious offending, this would tend to undermine the confidence in the justice system itself.

The importance of this issue cannot be understated. In cases involving sexual and violent offences, the degree of degradation and fear felt by victims can be compounded by then discussing the matters with other persons such as Police. There can also be invasive and personal procedures conducted. If a victim lacks faith in a just outcome, this may undermine their confidence to report offending.

However, in the approach taken by courts to allow for mitigating factors to be taken into account, at times the scheme has resulted in sentences that may on the face of it appear to minimise some of its intentions. The end result may not be unjust however, it may give the appearance of being artificial and unclear.

3. **Greater effectiveness of programs offered to prisoners**

A further benefit of maintaining the SVO scheme, is that there is a protracted period of time in custody where programs designed to identify and reduce risk can be more effective than in the community.

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[133] It is difficult to draw inferences from data of prisoners serving sentences of less than 10 years at the time of the introduction of the scheme due to the discretionary nature of SVO declarations in sentences below that threshold.
[134] *Veen v The Queen (No 2)* (1988) 164 CLR 465.

Under the SVO scheme, there is only a comparatively short period of time an offender, who successfully applies for parole, can be supervised in the community. This time may also be reduced by the delays in the consideration of parole. The irony of this concept is that observations have been made that offenders who are convicted of serious violent or drug offences benefit the most from extended supervision on parole.[135] The benefit which this creates however is that there is a longer period of time in custody which allows for programs to be completed at a time when an offender may not be exposed to the same triggers which counter their rehabilitation including: substance misuse, financial constraints and deterioration of mental health. It is accepted that these triggers do not apply to all prisoners and that these triggers do exist in prison as well.

In order to bolster this argument, some consideration can be given to rehabilitative programs offered to respondents under the DPSOA regime. There are a number of respondents who struggle to cope with life in the community. This may be contributed to by an offender becoming institutionalised because of the length of time in custody or personality structure. Daily stressors such as needing to search for housing and meeting treatment regimens can quickly lead to decompensation. Certain respondents do respond positively to engaging in programs while in custody as they do not have those same stressors and can focus on their rehabilitation. Respondents are then equipped with resources to appropriately adapt upon their release. By applying this logic, there are some classes of prisoners who are in a better position to respond to rehabilitation and treatment prior to release.

Risks

1. The application of the scheme to non-violent offenders

In sentences where a mandatory declaration must be made, there is a risk that the scheme is applying to a cohort of prisoners who do not require a substantial non-parole period to achieve community protection and just punishment. This risk arises particularly in sentences for Schedule 1 offences where there is no inherent violence such as trafficking in dangerous drugs.

The data obtained indicates that of the 318 mandatory declarations made between 2011-12 and 2019-20, 18% of those declarations related to trafficking in dangerous drugs. However, the data for discretionary declarations is telling. Of the 119 discretionary declarations, only 5 were for drug offences. The fact of there being such a disparity could likely be the result of the offending not typically being violent albeit it is in some cases. This data highlights the issue whether drug offending itself is of such a nature that it requires a mandatory non-parole period to meet the objectives of protection and punishment beyond ordinary sentencing discretion.

Another issue, related to the application of the scheme to drug offending, is that sentencing for serious drug offending is often directly connected with the quantity of the drug traded and the value of the operation. This does not require there to be violence or for the offender as an individual to pose a real danger to the community if not treated in some way.

[135] Queensland Corrective Services, Queensland Parole System Review: Final Report (2016) [517].

2. The SVO scheme may not incentivise rehabilitation

The effect of a SVO declaration is that if an offender was found eligible for parole, he/she would be released into the community under supervision for a comparatively short period of time of their sentence.

The risk is that while this does achieve a protective function for the Queensland community for a defined period of time, there is no guarantee of any subsequent rehabilitation. There is no requirement to engage in programs other than if a prisoner is seeking a lower risk classification or secure parole. This may lead to a result where a prisoner would simply complete his/her sentence in custody in order to achieve release without supervision. The irony of this outcome is that it was the very situation which the government at the time were seeking to avoid by introducing the scheme.

At the time of the introduction of the scheme, prisoners were eligible for the remission of sentences. Section 186 of the *Corrective Services Act 1988* (Qld) provided as follows:

Reduction of parole period

Section 186(1): *Where having regard to a prisoner's behaviour during the parole period the chief executive is of the opinion that the prisoner's parole should be amended by reducing the parole period the chief executive may so recommend—*

(a) in the case of a prisoner referred to in section 182 or a prisoner released on parole pursuant to an order of the Queensland Community Corrections Board—to that board; or

(b) in the case of a prisoner released on parole pursuant to an order of a regional community corrections board—any such board.

The effect of this remission created two streams for release – parole at 50% of a sentence of imprisonment or the remission of the sentence, without supervision, at two thirds of the sentence. This was not without criticism. The Kennedy Review of 1988 identified this system as flawed and the community was better served by its abolition. This view was understandably so as a practice had emerged whereby prisoners who, either by choice or lack of ability to comply with parole, would not apply for parole in order to secure their release by remission. This involved a release without supervision.

One of the intended evils sought to be cured by the introduction of the scheme was to prevent serious and violent offenders from securing a remission. It was intended that prisoners could not secure a reduction of their sentence and would remain in custody for a longer period of time. The remission scheme was repealed by the enactment of the *Corrective Services Act 2000* (Qld). The importance of this change cannot be understated in so far as an examination of the efficacy of the SVO scheme.

Prior to the repeal of remissions, in a scenario where a prisoner was serving a substantial sentence of imprisonment (such as 10 years or more imprisonment), a prisoner could secure his/her release at approximately two thirds of that sentence without applying for parole. This did not incentivise prisoners to work towards parole. It also meant there was no time in the community under supervision. The introduction of this scheme did not change the fact that a prisoner would remain in custody for a substantial proportion of the sentence. Largely, all that is achieved is a certainty of greater punishment and possibly a short period of supervision.

3. **The legislated trigger for a mandatory declaration is not evidence based**

Section 161A of the PSA, prescribes that a serious violent offence declaration must be made where a sentence of 10 years imprisonment or more is imposed.

At the time of the introduction of the scheme, the decision that a sentence in excess of 10 years imprisonment should require a prisoner to serve 80% of that sentence was not evidence based. This justification has not advanced. There is no indication that an offender who engages in offending of a certain magnitude requires such a period of time to be adequately rehabilitated before release. There was, nor is, an indication that re-offending rates are heightened where offending of a certain magnitude is engaged in. Nor is there evidence that such a period of imprisonment reduces re-offending rates. There are also issues in being able to assess these matters with risk assessment tools because the seriousness of offending and risks of re-offending are often mutually exclusive concepts subject to the nature of the offending.

In so far as offences of a sexual nature, a prisoner can be convicted of serious offences that do not warrant a sentence of 10 years or more. However, if that prisoner were to refuse to admit responsibility for their offending and refuse to engage in treatment, their risk profile and danger to the community can be high based on a psychiatric assessment. There are of course post-sentence orders available in such cases for their care, control and treatment. The purpose of this example however is to demonstrate that to maintain the current scheme without change would require an evidence base to justify protection beyond other sentences purposes.

b) Automatically applied to sentences for listed offences of 5 years or more, but less than 10 years.[136]

Benefits

1.`Consistency

One of the issues highlighted in the discussion paper and is common in practice, is that the existence of the scheme may result in sentences of less than 10 years to reflect mitigating circumstances or the sentencing of an offender to the lower end of the range due to either a mandatory or discretionary declaration. One benefit of introducing mandatory sentencing for offences above 5 years but less than 10 years will allow some greater consistency in sentencing.

One complexity is the sentencing of co-offenders where one, usually the principal, is sentenced to 10 or more years imprisonment. This was discussed in the decision of *R v Crossley.*[137] There the principal offender Crossley applied for leave to appeal against his sentence of 10 years imprisonment on the grounds of parity as his co-accused Banks was sentenced to a notional sentence of 4 years imprisonment. The sentence application was dismissed on the basis that the principle of parity did not require the reduction of the head sentence below 10 years. On one view, there may be a justified sense of grievance for one who is subject to a mandatory declaration and their co-accused is not. The decision however stands as authority for the proposition that the law

[136] See Appendix 2.
[137] [1999] QCA 223.

requires that where one is caught by the 80% requirement, that circumstance is to be ignored in considering parity between the two.[138] If mandatory declarations were also applied to sentences above 5 years, there could be greater consistency in sentencing where there are co-accused. In those circumstances, the discretion of the sentencing court is that the head sentence can be reduced to reflect the relative involvement of each offender without a sentence of 10 years being the trigger.

Risks

1. Impact on the rate of guilty pleas

The data accumulated on sentences for Schedule 1 offences suggests that the percentage rates of pleas of guilty for serious offending, such as attempted murder, were lower. This has been attributed to the possibility that the risk of a sentence of 10 years or more, as well as the seriousness of the offences, meant that offenders were less willing to plead guilty. There may also be a correlation with this logic in higher numbers of pleas of guilty for less serious offending to avoid the possibility of a sentence of 10 years or more. The risk this raises is whether the introduction of mandatory sentencing for sentences above 5 years, would result in offenders being less willing to plead guilty.

A plea of guilty can be entered for a number of reasons including an acceptance of guilt, an acceptance of the strength of the prosecution case, to avoid victims giving evidence and to preserve the mitigating effect of a plea of guilty. There are cases where offenders plead guilty out of convenience so as to avoid a mandatory sentencing regime if at all possible. If an offender was placed in a position where they faced a mandatory sentence upon a plea of guilty to comparatively less serious offending, this may in fact pose a deterrent to taking that course. The effect would be an increase in the cost of additional criminal trials, the number appeals trials and victims and witnesses giving evidence unnecessarily.

2. Increased prison population and cost

The broader application of a mandatory sentencing regime and, consequently, longer sentences of imprisonment result in a direct cost to the community.

If the baseline for a mandatory sentence was 5 years imprisonment, this may also give rise to the cost of further appeals against sentence where offenders are aggrieved by a sentence of imprisonment above that lower threshold.

3. Further impedes judicial discretion

The difficulty with adopting an expanded model of mandatory sentencing is a presumption that one fixed penalty is appropriate. Once a sentence has exceeded 5 years imprisonment, it is no longer possible to suspend a term of imprisonment. This means that only a parole eligibility date can be fixed. This does not allow for any discretion to set an earlier non-parole period including for matters such as extreme youth, co-operation pursuant to section 13A and lower criminal culpability, etc.

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[138] Ibid at 15 (Pincus JA).

4. **Higher risks of flight**

It is not uncommon for offenders who have committed serious crimes to avoid detection and arrest by Police. This can be for a number of reasons but includes knowledge of the consequences of their actions. If those consequences upon the liberty of an offender are increased for comparatively less serious offending, there is risk that further offenders may take drastic action to avoid their arrest and prosecution.

c) Presumptive (as to sentences of 10 years or more for listed offences) rather than mandatory.[139]

Benefits

1.Retention of judicial discretion

The general criticism of any mandatory sentencing regime is that it does not allow for a court to determine the appropriate penalty based on all relevant matters including an individual's circumstances.

If the Parliament were to reflect that an individual who engages in offending of such severity that a sentence exceeds 10 years imprisonment, there can still be appropriate scope to reflect matters if it were in the interests of justice to do so. This is already known to sentencing in Queensland and appears in the sentencing regime under the *Youth Justice Act 1992* (Qld). Pursuant to section 227 of that Act, a child sentenced to a period of detention must serve 70% of that sentence which may be reduced to 50% if special circumstances exist. While there is no prescribed period of time that applies to the length of the sentence before such an order is made, a similar model could be adopted in so far as the test that applies.

2. **Positive impacts on rate of pleas of guilty**

As stated above, the data accumulated indicates that there is a correlation between the likelihood of a mandatory declaration and pleas of not guilty. If there was some judicial discretion that applied, this may in fact increase the number of pleas of guilty.

An analogy can be drawn with the mandatory sentence that applies to murder and repeat child sex offending in Queensland. Given there is no discretion available, the statistics of guilty pleas are low. Charged persons, even in the face of an overwhelming prosecution case, will plead not guilty if there is some small prospect of success. The flow on effect of proceedings conducted in this way are significant including costs, emotional trauma to witnesses and overloading of the criminal justice system.

[139] See Table 3

3. **Increased consistency**

As stated above, there is often a difficulty faced when sentencing co-offenders where a mandatory sentencing regime applies to one or more of them but not all. Where there is a legislated discretion to vary the non-parole period, a court can properly consider parity between the offenders.

Risks

1. **Loss of community confidence in protection**

The role of mandatory sentencing carries with it the deterrent to the community that those who engage in serious offending face substantial consequences on their liberty but also public confidence that they will be protected from those who do so. There is a risk that if there is not a clear message that the community will be protected from serious offenders the confidence in the criminal justice system could be undermined.

2. **Lack of deterrence**

As stated above, a mandatory sentencing regime carries with it a substantial deterrence to offenders who engage in serious offending. If there are limitations imposed upon that as a deterrent, then it may not be as effective. There is an inherent issue with assessing the effectiveness of deterrence. This is because there has to be a presumption made that offenders are in fact aware of likely outcomes in order for them to be a deterrent and that is was considered at the time prior to the offending.

3. **Negative impacts on rates of pleas of guilty**

The ethical obligations of solicitors and barristers in Queensland include advice to clients as to the alternative resolution of a matter without a fully contested hearing.[140] In cases involving serious offending, where there is less certainty of the outcome, this may in fact act as a deterrent to entering a plea of guilty.

This would need to be resolved by way of clearly defined sentencing ranges in order for plain advice to be given.

d) Presumptive (as to sentences of 5 years or more, but less than 10 years) rather than discretionary[141]

Benefits

1.Deterrence

Much like a mandatory sentencing regime, if an SVO was presumptive it would ostensibly be a substantial deterrent to offenders who engage in serious offending. However, as previously stated the effectiveness of mandatory SVOs is difficult to assess. The same problem will exist for a

[140] *2011 Barristers' Rule (as amended), Rule 38.*
[141] See Table 4.

presumptive SVO scheme, as an assessment of its effectiveness as a deterrent will assume an offender was aware of the outcome prior to the offending.

It should also be noted that while the substantial consequences of an SVO on a person's liberty should act as a deterrent, existing studies have found that the setting of non-parole periods is not an effective deterrent to offenders.[142]

2. Community confidence in protection

Concerns about community safety in relation to serious violent offences was a key driver when introducing the current SVO scheme.[143] A presumptive SVO for sentences of 5 years or more, but less than 10 years will continue to address these concerns.

3.Promote consistency in sentencing

As stated above, mandatory sentences will allow for greater consistency in sentence. For similar reasons presumptive sentences are likely to promote consistency in sentencing, particularly in sentencing co-offenders.

4. **Victim/survivor satisfaction**

See response above.

Risks

1. Increased prison population and cost

A scheme that legislates a presumptive SVO for sentences of 5 years or more would have the effect of increasing the cost to the state as prisoners would be detained in prisons for a much longer period of time. For example, a person sentenced to a term of imprisonment of 5 years would be required to serve at least 4 years before being eligible for parole compared to present cases where a person sentenced to 5 years imprisonment would ordinarily serve between 20 months and 2½ years before being eligible for release. There would also likely be an increase in the number of appeals. This would result in further strain on a system already struggling.

2. The SVO scheme may not incentivise rehabilitation

See response above.

3. Reduced period on parole

While the SVO scheme might result in offenders spending longer in prison, the concern as outlined above, is that the limited duration of community supervision for SVO offenders may

[142] Queensland Sentencing Advisory Council, *The '80 per cent rule': The serious violent offences scheme in the Penalties and Sentences Act 1992 (Qld)* (Issues Paper, November 2021) 33.
[143] Queensland Sentencing Advisory Council, *The '80 per cent rule': The serious violent offences scheme in the Penalties and Sentences Act 1992 (Qld)* (Issues Paper, November 2021) 26.

actually increase the risk to the community.[144] Research published by the Australian Institute of Criminology in 2014 suggests that prisoners who receive parole have significantly lower rates of recidivism or commit less serious offences than those released unsupervised.[145] SVO offenders spend a shorter time on parole, and therefore the risk of re-offending may be higher.

4. Negative impacts on rate of pleas of guilty

It is noted that other than for offences of grievous bodily harm, the proportion of guilty pleas were consistently lower for declared SVO cases as opposed to non-SVO cases.[146] This may be indicative of the reduced incentive to enter a plea of guilty when there is the likelihood of an SVO declaration.

The presumption of an SVO declaration for sentences of between 5 and 10 years reduces the incentive for offenders to enter a plea of guilty because the court's discretion to take a guilty plea into account when sentencing is reduced. This would result in an increase in the number of criminal trials, impacting on already strained resources and requiring victims and witnesses to give evidence unnecessarily.

5. Constraint on the exercise of judicial discretion

Presumptive sentencing provisions may prevent courts from imposing penalties tailored appropriately to the circumstances of the offence and the offender.

6. Inconsistency in sentencing

One of the purposes of the PSA is to promote consistency in sentencing of offenders.[147] One of the problems that has been identified with the setting of 10 years as the cut-off point for a mandatory SVO declaration is that the only way the court can take mitigating factors into account, such as an early plea of guilty, is to reduce the head sentence. This issue may continue if a presumptive scheme was imposed, resulting in the reduction of head sentences within the lower end of this sentencing bracket to avoid the SVO and leading to further inconsistencies in the sentencing approach.

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[144] Queensland Sentencing Advisory Council, *The '80 per cent rule': The serious violent offences scheme in the Penalties and Sentences Act 1992 (Qld)* (Issues Paper, November 2021) 36.
[145] Australian Institute of Criminology, *Parole Supervision and Reoffending* (Trends & Issues in Crime and Criminal Justice No 485, September 2014).
[146] Queensland Sentencing Advisory Council, *Analysis of sentencing and parole outcomes: the who, what and how long of serious violent offences* (Background Paper No 4, October 2021) 21.
[147] *Penalties and Sentences Act 1992* (Qld) s 3(d).

5. Entirely discretionary (applying to listed offences dealt with on indictment, in a discretionary way, regardless of sentence length)[148]

Benefits

1.Retention of judicial discretion

One of the biggest criticisms of mandatory or presumptive minimum non-parole periods is the constraint on judicial discretion and the capacity of the court to take all relevant factors into account, which is thought to lead to poorer outcomes.[149] A scheme that is entirely discretionary will ensure that judicial discretion is able to be properly exercised.

The data indicates that the courts presently exercise their discretion to make SVO declarations, most commonly in circumstances of non-sexual violent offences involving malicious acts and torture.

However, the limited statutory guidance for making discretionary SVO declarations has clearly been identified as an issue. The lack of guidance as to what factors should be considered when exercising the discretion was noted in *R v Collins*.[150] Increased judicial discretion would be a key benefit of a discretionary scheme; however, it should be supported by legislative guidance around the definition of a 'serious violent offence', and the circumstances in which an SVO declaration should be made.

2.Reduce anomalies and inconsistences in sentencing

The current SVO scheme gives rise to a number of potential anomalies and inconsistences in sentencing. A court's ability to deliver individualised justice is necessary to achieve proper consistency in sentencing. A scheme that allows for complete discretion by the sentencing judge would also reduce the issues associated with inconsistencies between State and Commonwealth sentences and parity sentences.

3.Positive impacts on rates of pleas of guilty

If the scheme was entirely discretionary it gives the sentencing judge the ability to properly reflect an offender's plea of guilty. This may have the effect of encouraging offenders to plead guilty.

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[148] See Table 5.
[149] Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Summary Report, University of Melbourne, August 2021) 12.
[150] *R v Collins* [2000] 1 Qd R 45, 48 [14].

4.Increased incentive to participate in rehabilitation programs

Offenders who have an earlier parole eligibility date are more likely to participate in rehabilitative programs while in prison to strengthen their prospects of parole. Participation in programs reduces the risk of reoffending once released back into the community.

Risks

1. Dissatisfaction of victims/survivors

The setting of a parole date is important for victims, survivors and their families. When an offender is in custody, victims and survivors feel less fearful and anxious. Thus, the longer an offender is in custody, often the higher degree of victim and survivor satisfaction at the outcome. Victims and survivors may feel their interests are not being met by a scheme that allows for serious violent offenders to be released back into the community before they have served a significant portion of their sentence.

2. Negative impacts on rates of pleas of guilty

As stated above, where there is less certainty of the outcome, offenders may be less inclined to plead guilty and more inclined to take the risk of running a matter to trial.

3. Lack of deterrence

See above.

6. Abolished completely, without replacing it[151]

Benefits

1.Complete judicial discretion

The abolition of any form of a SVO scheme would give the courts complete judicial discretion in every case. This will promote consistency in sentencing and allow the courts to impose individualised justice while still imposing sentences that protect the community.

Presently, in matters where an SVO declaration is not made, courts have the discretion to set a non-parole period. In doing so courts take into account the interests of rehabilitation but also just punishment of the offender, deterrence and community protection. Courts have the discretion to set the parole eligibility date beyond the halfway point of the sentence provided for when no parole eligibility date is set[152] although the Court of Appeal has found that there must

[151] See Table 6.
[152] Section 184(2) *Corrective Services Act 2006*

be ‘good reason’ for doing so.[153] The abolition of the SVO scheme would therefore not prevent the court from imposing a longer non-parole period in appropriately serious cases.

2.Transparency

Transparency in the sentencing process would be enhanced as the court would have a duty to give reasons for the imposition of an eligibility date beyond the half-way point.[154]

3.Positive impacts on rate of plea of guilty

See response above.

4.Increased incentive to participate in rehabilitation programs

See response above.

Risks

1. **Dissatisfaction of victims/survivors**

See response above.

2. **Negative impacts on rate of pleas of guilty**

See response above.

3. **Lack of deterrence**

See response above.

[153] R v McDougall & Collas [2007] 2 Qd R 87, [14], [21]; R v Assurson (2007) 174 A Crim R 78, 82 [22] (Williams JA), 83

[154] see R v Kitson [2008] QCA 86 at [17].

Table 1 – Question 30(a)

What would the benefits and risks be if the SVO scheme was retained in its current form – with no changes to its operation or scope?

No.	Benefits	Risks
1	Deterrence	The application of the scheme to non-violent offenders Example - This is apposite in cases of serious drug offending that do not involve violence or a need for rehabilitation (e.g. entirely commercial operations).
2	Victim/survivor satisfaction	The SVO scheme may not incentivise rehabilitation
3	Greater effectiveness of programs offered to prisoners	The legislated trigger for a mandatory declaration is not evidence based

Table 2 – Question 30(b)

What would the benefits and risks be if the SVO scheme was automatically applied to sentences for listed offences of 5 years or more, but less than 10 years?

No.	Benefits	Risks
1	Consistency	Impact on rate of guilty pleas
2		Increased prison population and cost
3		Further impedes judicial discretion
4		Higher risks of flight

Table 3 – Question 30(c)

What would the benefits and risks be if the SVO scheme was presumptive (as to sentences of 10 years or more for listed offences) rather than mandatory?

No.	Benefits	Risks
1	Retention of judicial discretion	Loss of community confidence in protection
2	Positive impacts on rate of pleas of guilty	Lack of deterrence
3	Increased consistency	Negative impacts on rates of pleas of guilty

Table 4 – Question 30(d)

What would the benefits and risks be if the SVO scheme was presumptive (as to sentences of 5 years or more, but less than 10 years) rather than discretionary?

No.	Benefits	Risks
1	Deterrence	Increased prison population and cost
2	Community confidence in protection	The SVO scheme may not incentivise rehabilitation
3	Promote consistency in sentencing	Reduced period on parole
4	Victim/survivor satisfaction	Negative impacts on rate of pleas of guilty
5		Constraint on the exercise of judicial discretion
6		Inconsistency in sentencing

Table 5 – Question 30(e)

What would the benefits and risks be if the SVO scheme was entirely discretionary (applying to listed offences dealt with on indictment, in a discretionary way, regardless of sentence length)?

No.	Benefits	Risks
1	Retention of judicial discretion	Dissatisfaction of victims/survivors
2	Reduce anomalies and inconsistences in sentencing	Negative impacts on rate of pleas of guilty
3	Positive impacts on rates of pleas of guilty	Lack of deterrence
4	Increased incentive to participate in rehabilitation programs	

Table 6 – Question 30(f)

What would the benefits and risks be if the SVO scheme was abolished completely, without replacing it?

No.	Benefits	Risks
1	Complete judicial discretion	Dissatisfaction of victims/survivors
2	Transparency	Negative impacts on rate of pleas of guilty
3	Positive impacts on rate of plea of guilty	Lack of deterrence
4	Increased incentive to participate in rehabilitation programs	

31. Are there any specific benefits or risks of the above listed reform options that would apply to:

(a) Aboriginal and Torres Strait Islander peoples

Benefits

a) Bugmy factors can be properly considered

A discretionary scheme or the complete abolition of the SVO scheme would allow for the court to properly consider and give full weight to the principles in the High Court decision of *Bugmy v The Queen [2013] HCA 27.* This will assist in delivering individualised justice and allowing for the true circumstances of life in an Indigenous community to be recognised in a sentencing proceeding.

Risks

a) Further contribute to the over-representation of Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander people are over-represented across all offence categories commonly attracting an SVO apart from trafficking in dangerous drugs.[155] The maintenance of a mandatory scheme or the introduction of a presumptive scheme for sentences of 5 years or more, but less than 10 years, would maintain and even further contribute to the over representation of Aboriginal and Torres Strait Islander people in prison. Both schemes are presumptive of an offender's "best case" being put forward with the risk that improperly prepared (or underfunded) matters may lead to unfair results for Aboriginal and Torres Strait Islander peoples.

b) Isolation from community

Lengthy periods of incarceration have the effect of isolating people from communities. An Aboriginal or Torres Strait Islander prisoner from a remote community often serves their sentence without any contact from their family. This has wide reaching negative effects, not only on the prisoner but also the prisoner's family, especially their children.

(b) People who are vulnerable or marginalised

Vulnerable or marginalised groups within the criminal justice system include, but are not limited to:

a. Aboriginal and Torres Strait Islander peoples
b. People living in poverty

[155] Queensland Sentencing Advisory Council, *Analysis of sentencing and parole outcomes: the who, what and how long of serious violent offences* (Background Paper No 4, October 2021) 18.

c. People with a mental illness, and
d. People with a disability.

Benefits

a) Personal circumstances properly reflected

A discretionary scheme or the complete abolition of the SVO scheme would allow for proper recognition of an individual's vulnerabilities and result in the court having the discretion to reduce a person's sentence if factors such as those identified in *Verdins*[156] exist.

b) Greater focus on rehabilitation

A sentence that allows for a marginalised prisoner to be in the community on parole for a longer period of time would encourage and assist in their rehabilitation. Issues such as housing, psychological counselling, and access to National Disability Insurance Scheme support could be addressed in a way that is not possible when a marginalised person is incarcerated.

Risks

a) Assumption of an absence of vulnerabilities

Many offenders have a long history of undiagnosed or untreated impairment or trauma.

Studies into the Australian prison population suggest that 40% of prisoners have been diagnosed with a mental health condition,[157] 25-30% have a borderline intellectual disability and 10% have a mild intellectual disability.[158]

A mandatory SVO scheme assumes the absence of vulnerabilities and does not allow the court to properly take into account an individual's circumstances.

b) Underfunding leading to unjust results

Both the mandatory SVO scheme and a presumptive SVO scheme assume an offender's "best case" will be put forward. The risk is that a person from a marginalised group may not have access to the necessary resources to ensure this, which may result in unfair or unjust results for people from these groups.

32. If the SVO scheme is retained (in its current or modified form), which of the options do you prefer and why?

If the SVO scheme is retained, the application of a split SVO model under Option D-2 (where there is a presumption in favour of a declaration for sentences in excess of a specified term), would most

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[156] *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102 considered in *R v Goodger* [2009] QCA 377
[157] Australian Institute of Health and Welfare, The health of Australia's prisoners 2018 (Catalogue no. PHE 246, 2019) vi.
[158] Ibid, See also: Mike Hellenbach, Thanos Karatzias and Michael Brown, 'Intellectual Disabilities Among Prisoners: Prevalence and Mental and Physical Comorbidities' (2017) 30(2) Journal of Applied Research in Intellectual Disabilities, 230.

adequately balance community expectations of punishment with that of proportionate sentencing. The rationale for this modification is as follows:

- This still allows for judicial discretion if special circumstances warrant it such as:
    - Co-operation with law enforcement or an undertaking to do so; or
    - Mental illness of such severity that the moral culpability of an offender is reduced significantly, or imprisonment would be far more difficult than for an ordinary prisoner; or
    - There are other exceptional circumstances that justify imposing a sentence less than the statutory minimum; and
    - Require a statement of the special reasons for imposing a shorter non-parole period so that there is a clear and transparent explanation for doing so.

- This represents the Parliament's intention that a sentence of imprisonment with a substantial non-parole period is to be fixed, unless displaced by special circumstances to do so.

- This allows for a sentence to be imposed that can have regard to section 13(2) of the *Human Rights Act 2019* (Qld) when assessing the appropriateness of such an order.

- This assists in the proper identification of prisoners who require a substantial sentence of actual imprisonment in order to meet the purposes of sentencing, principally the protection of the Queensland community. This does not require the removal of serious drug offending from Schedule 1 allowing it to be preserved for drug offending of a character that requires such a declaration.

- This preserves the integrity of the SVO scheme as a deterrent to persons within the community against engaging in serious criminal offending.

- This delivers a sentencing approach that has some consistency with other mandatory sentencing regimes in other jurisdictions. This can be compared to Victoria where, for example, there are legislated non-parole periods that must be imposed unless it would not be in the interests of justice to do so.[159]

This approach does not require the amendment to sections 161B (3)-(4) of the PSA. This is because the sentencing court maintains the discretion to make such a SVO declaration or to postpone the statutory parole eligibility date provided there is good reason to do so.[160]

[159] See for example s11A, *Sentencing Act 1992* (Vic).
[160] *R v McDougall and Collas* [2006] QCA 365 at [2].

33. If the SVO scheme was repealed or replaced, what approach would best ensure sentencing outcomes reflect the seriousness of offences to which the SVO scheme currently applies. For example:

a. **Give courts full discretion to set a parole eligibility date applying current legal principles about the setting of a parole eligibility date**

b. **Introduce a requirement that if a court sets a parole eligibility date for a listed offence, it must not be set below the statutory 50 per cent that applies where no parole eligibility date is set – or only be set below 50 per cent if the court considers it unjust not to do so or there are exceptional circumstances**

c. **Introduce a requirement that parole eligibility for listed offences not be set below a standard percentage of the head sentence set above the current 50 % statutory level (for example, at least two-thirds or 70%) but with an ability for a court to depart if unjust to do so or there are exceptional circumstances**

d. **Introduce a requirement that parole eligibility for listed offences not be set below a standard percentage of the head sentence set above the current 50 % statutory level (for example, at least two-thirds or 70%) but with an ability for a court to depart if unjust to do so or there are exceptional circumstances**

e. **Other?**

Full Discretion

LAQ supports the courts being provided full discretion when considering parole eligibility for listed offences. The evidence supports that the courts are best placed to consider sentencing trends and community attitudes to offending.

A broad judicial discretion allows courts to take into account all the circumstances of a case, including those of the offender and the offending, to formulate a sentence that is just and appropriate in the circumstances. Laws that restrict the consideration of relevant circumstances and prevent relevant matters being taken into account invariably create unintended and unforeseeable anomalies that tend against the public good and can operate against the principles of sentencing as contained in the PSA.

LAQ supports the Council's position that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the Act, or in reducing recidivism. This is because, as a matter of principle, it assumes that every offence and every offender are the same.[161]

[161] Page 5-28, The '80 per cent rule': The serious violent offences scheme in the *Penalties and Sentences Act* 1992 (Qld); Queensland Sentence Advisory Council.

Judicial discretion in setting sentences of imprisonment with parole requires flexibility to take into account the relevant criminogenic needs. In *Randall*, the Court of Appeal observed:

> *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.*[162]

In *Randall*, the Court stated that the discretion to set an appropriate parole eligibility date is 'relatively unfettered' and that 'there can be no mathematical approach to setting such a date'. However, the Court has also said that postponing an offender's parole eligibility date beyond the statutory 50 per cent mark must be supported by a 'good reason'.[163]

In our experience we can confirm the undesirable consequences of the current scheme, and mandatory sentencing in general, as cited in the Council's report:

- Having a 'distorting effect' on the sentencing process, where the Court is required to undertake complicated sentence construction to give effect to relevant considerations in mitigation and the PSA, such as by artificially reducing head sentences to arrive at a just sentence.[164]
- Discouraging pleas of guilty, where the court has no discretion to reduce the time required to be served in actual custody for a declared offence.[165] It is a well-established principle that a plea of guilty should be taken into account in mitigation; this is legislated under s.13 of the PSA. There is a benefit to complainants, the Courts and the wider community in avoiding unnecessary trials.
- Contributing further to over-representation of Indigenous persons, and other vulnerable and marginalised groups, in custody.[166]

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162 *R v Randall* [2019] QCA 25 at [38]. See also *R v Fisher* [2020] QCA 66, 4 – 5 (Sofronoff P, Boddice and Williams JJA agreeing).

163 *R v Randall* [2019] QCA 25 at [37].

164 Page 7-45, The '80 per cent rule': The serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld); Queensland Sentence Advisory Council, citing the Queensland Court of Appeal in *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116.

165 Page 7-40, '7.2 Impact on guilty pleas', The '80 per cent rule': The serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld); Queensland Sentence Advisory Council

166 Ibid, pages 4-23, 9-64

- Significantly reducing a prisoner's time while supervised on parole, which is designed to reintegrate offenders into the community, provide important rehabilitation, and in turn, reduce recidivism.

50 per cent

As discussed above, LAQ's position is that broad discretion is the best means to effect appropriate sentence outcomes.

If a non-parole period is imposed, a 50 per cent non-parole period is the preferred option. A 50 per cent non-parole period would provide the benefit of a longer period that an offender would serve on parole as opposed to the current 80 per cent. As stated previously, a longer parole period can provide more chance of rehabilitation.

The Queensland Parole System Review Report recognised parole as being primarily a method that has been developed in an attempt to prevent reoffending and pointed to evidence suggesting that parole has a beneficial impact on recidivism, at least in the short term and perhaps modestly. Paroled prisoners are less likely to reoffend than prisoners released without parole. The Report also found 'it is more risky to have a short period of parole' than a longer one.

The University of Melbourne, in the literature review commissioned for this review, reached a similar conclusion: 'More and not less time on parole would allow time to engage in rehabilitative programs' to reduce their risk of reoffending, build strengths and take steps towards desistence.[167]

If a 50 per cent non-parole period was legislated, LAQ would support a discretion to the minimum period be mandated. Such an exception should include that it would be unjust to impose a 50 per cent non-parole period. LAQ's position is that the wording of 'unjust to do so' would be preferred over 'exceptional circumstances. This would provide the courts the ability to consider matters on a case by case basis as opposed to applying a rigid rule of exceptional circumstances. These factors could include age, nature of offending, protection of the community, etc.

If a parole eligibility date was able to be set at 50% or below, if unjust not to do so, the head sentence could be increased against current sentencing standards to take into account the lesser non-parole period.

Between 50 and 70%

For the reasons articulated above, LAQ does not support non-parole periods whether they be between 50 – 70% or less.

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167 Page 5-27, The '80 per cent rule': The serious violent offences scheme in the *Penalties and Sentences Act* 1992 (Qld); Queensland Sentence Advisory Council.

Standard sentence model (similar to Victoria)

LAQ would oppose the introduction of a standard sentence model similar to Victoria. A standard sentence scheme represents a departure from long-standing sentencing principles and puts at risk the achievement of just and appropriately tailored sentences. A standard sentence scheme is likely to increase sentencing complexity, be resource intensive (in time and cost) and have the potential to disproportionately impact the disadvantaged.

LAQ agrees that not only is the scheme "incapable of being given any practical operation" as found by the Court of Appeal majority in *DPP v Walters*,[168] it is also far too complex. The ambiguity and mathematical technicality of the provisions would make it extremely difficult for lawyers and judges, let alone accused persons to navigate. The technicality of the legislation compromises sentencing transparency, which in turn has the potential to compromise public confidence.

If such a scheme was adopted in Queensland, LAQ considers a greater number of matters would be expected to be contested given the consequences in sentencing. There would likely be a reduction in the number of pleas of guilty, due to the high likelihood of a sentence of imprisonment and a greater number of contested pleas of guilty, where facts are disputed (in particular, aggravating factors) relevant to determining the objective seriousness of the offence. There would be longer pleas of guilty given the complexity in the sentencing process and cross-examination at committal hearings to resolve the factual basis for the plea. LAQ expects that there would be more appeals against sentences. LAQ is concerned that the Victorian sentencing approach will unhelpfully fetter judicial discretions such that a nuanced and individualised approach to victims, offenders and the community may be sacrificed to the objective of consistency in sentencing.

Other

LAQ does not propose any other sentencing option. Full discretion in the hands of the court is preferred.

34. If standard parole provisions were to apply in place of the SVO scheme to all Schedule 1 offences, are any legislative changes required to help guide the court in setting an appropriate non-parole period for serious violent (non-sexual) offences, serious violent sexual offences and serious drug offences (beyond the guidance contained in s 9 of the *Penalties and Sentences Act* 1992 (Qld)?

LAQ does not consider that there should be further legislative guidelines imposed should the SVO scheme be repealed.

Judicial discretion in sentencing is central to the administration of justice. Every criminal case is different and requires a tailored response. In some cases, lengthy terms of imprisonment are

168 *DPP v Walters* [2015] VSCA 303, [8] (Maxwell P, Redlich, Tate and Priest JJA).

required; in others, the right outcome having regard to the offending and the offender, is a merciful one.[169]

The greatest impediment to the courts imposing appropriate sentences for schedule offences is the fettering of discretion, and the related artificial formulation of sentences to try and accommodate the relevant considerations and principles. The current formulation of the PSA already requires the Court to take into account a number of factors and principles which aggravates the type of offending which falls into the current scheme.

In accordance with our response to question 7, LAQ considers that the developed body of case law is sufficient to provide guidance to sentencing courts as to the setting of appropriate non-parole periods in relation to the above identified offences.

[169] Page 6, VLA – Sentencing Guidance Reference – 12 February 2016.