Queensland Sentencing Advisory Council

History of the serious violent offences scheme

Background paper

A review of the serious violent offences scheme

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

Background paper 1

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

The background papers aim to provide those who may wish to contribute to the review with more detailed information on specific aspects of the Terms of Reference than will be included in the Council's Issues Paper when it is released for public consultation later this year. Other background papers will explore Queensland caselaw on the SVO scheme, minimum non-parole period schemes in other Australian jurisdictions and select international jurisdictions, and data on the application of the SVO scheme.

The Council's Issues Paper, which will be released later this year, will include questions for public comment. A call for submissions will be made on the paper's release. Information about how to make a submission is available on the Council's website at: www.sentencingcouncil.qld.gov.au. Feedback on the background papers can be provided by email to info@sentencingcouncil.qld,gov.au.

The Queensland Sentencing Advisory Council

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

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Abbreviations

ADCQ	Anti-Discrimination Commission Queensland
A-G	Attorney-General
CCC (2d)	Canadian Criminal Cases (Second Series)
CLAA	*Criminal Law Amendment Act 1997* (Qld)
Cr App R	Criminal Appeal Reports
DMA	*Drugs Misuse Act 1986* (Qld)
fn	footnote
PSA	*Penalties and Sentences Act 1992* (Qld)
QCA	Queensland Court of Appeal
Qd R	Queensland Reports
s	section
SL	subordinate legislation
SVO	serious violent offence under the SVO scheme
SVO Amendment Act	*Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld)
SVO scheme	serious violent offence scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld)
VR	Victorian Reports

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1 Introduction

This background paper considers the history of the introduction of the serious violent offences (SVO) scheme in Queensland, and changes over time.

The SVO scheme was created as a result of a National Liberal Coalition ('Coalition') election commitment[1] in the lead up to the 1995 State election. Once established, it has sat largely unchanged as the parole system was overhauled around it.

The legislation creating the SVO scheme did not occur in a vacuum. It made its way through Parliament at the same time as extensive reform to the Criminal Code ('Code'),[2] which resulted from reviews earlier in the 1990s.

In addition to these reforms, fundamental changes were made to the *Penalties and Sentences Act 1992* (Qld) ('PSA') in terms of its purposes and sentencing guidelines. Since then, a number of Queensland inquiries and reports have considered the scheme in the context of parole, mandatory sentencing and sentencing laws generally. However, this is the first direct review of the scheme since its introduction.

2 Queensland's legislative environment in 1997

2.1 Introduction

The SVO scheme in Part 9A of the PSA was introduced in the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ('*SVO Amendment Act*'). The Bill was introduced on 19 March 1997 and gained assent on 3 April 1997. It was justified as an election commitment.

This took place alongside large-scale reform to the Criminal Code, achieved through the *Criminal Law Amendment Act 1997* (Qld) ('CLAA'). The CLA Bill was introduced on 4 December 1996 and gained assent on 3 April 1997. The two Bills were part of the same 'policy platform'[3] and members of Parliament at times spoke to the subject matter of one Bill when debating the other (including on the same day).

A Government member told Parliament that 'law and order issues are close to the heart of every Queenslander'[4] and the CLAA was:

> part of a comprehensive and multifaceted approach that will deliver to the people of Queensland the appropriate level of protection and change that they have called for strongly for such a long time.[5]

This was 'a three-pronged legislative approach that is designed to approach the law and order problems from a legal perspective'.[6] The three prongs were:

- 'a greatly amended Criminal Code that sent a very deliberate signal to all of our population that this Government will not accept the previous standards'.[7]
- 'changes to the Juvenile Justice Act to finally provide some teeth for the police and the judiciary in dealing with young offenders.'[8]
- '[An] increase [to] the minimum parole term for serious and violent offenders to 80%'.[9]

Another Government member told Parliament that, in the context of the 80 per cent amendment and the system of remissions then in place:

> The Government's commitment to this task is reflected in its decision to build more gaols and expand existing facilities. I commend the Minister for Corrective Services for his desire to follow the wishes of ordinary Queenslanders on this matter. The community is tired of reading day in and day out of the early release of prisoners. By formalising the requirement that the worst prisoners stay where they belong—behind bars—the Government is further demonstrating its desire to listen and act accordingly.[10]

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1 Queensland National Liberal Coalition, Policy on Serious Violent Offences (1995) — reproduced in Karen Sampford, *The Penalties and Sentences (Serious Violent Offices) Amendment Bill 1997* (Legislation Bulletin No. 4/97, Queensland Parliamentary Service, March 1997) at Appendix A.
2 *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code').
3 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Criminal Law Amendment Bill', 619 (Luke Woolmer, Member for Springwood).
4 Ibid 618.
5 Ibid.
6 Ibid 619
7 Ibid 618.
8 Ibid.
9 Ibid 619.
10 Ibid 629 (Graham Healy, Member for Toowoomba North).

At the time, the balance of power in the Queensland Parliament was held by an independent Member, who supported the Coalition. She told Parliament that:

> One of the recurring themes right across this State in the 1995 election campaign and subsequently has been a call by the community for tougher sentences, for truth in sentencing—that is, if criminals are sentenced to seven years, let them serve an adequate amount of that time—and for criminals to recognise that once their criminal activity commences they trade off their rights.[11]
>
> …Generally, in spite of a lot of criticism of the Bill, I believe that it reflects the direction that people in the community want to see law and order take. They want folks to feel protected.[12]

The Coalition Government which implemented the reforms had made clear years earlier, when it was in opposition, its position regarding sentencing generally.

For instance, in October 1994, when the Goss Labor Government was in power, Denver Beanland, Member for Indooroopilly (and later Attorney-General in the Coalition Government responsible for the SVO reforms) made comments in Parliament regarding the (then) recently implemented PSA.[13] He criticised Labor 'promising that tougher and harsher penalties would be imposed for a range of criminal activities by amendments to the State Criminal Code',[14] because:

> The amendments to the State Criminal Code provide maximum penalties only and, based on precedent and the strict and binding provisions of the 1992 Penalties and Sentences Act, the maximum penalty or anywhere near it is rarely applied. The exception is murder, for which a mandatory life penalty applies. This is also misleading, as the Government has defined "life" as being generally 13 years [as it then was]. The pages of the daily newspapers frequently report cases of offenders convicted of breaking and entering, multiple offences of illegal use of motor vehicles or various types of serious assault charges and rapes being given short sentences—or no sentences at all in some cases, as they are given non-custodial sentences.
>
> Despite the political posturing and media management by this Government, little or nothing will be achieved unless the Government amends the Penalties and Sentences Act for, as has been shown, that Act overrules all other Acts; that is, it takes precedence over the Criminal Code in relation to penalties and sentences.
>
> Over the last 20 months, judges of the Supreme and District Courts have all expressed alarm and concern about provisions of the Penalties and Sentences Act because it limits the imposition and length of prison sentences. Clause 3 of the Penalties and Sentences Act of 1992 sets out the purpose of the Act. Under the heading "Purposes" it states—
>
> > "The purposes of the Act include collecting into a single Act general powers of courts to sentence offenders;
> >
> > . . .
> >
> > providing sentencing principles that are to be applied by courts; and
> >
> > . . .
> >
> > promoting public understanding of sentencing practices and procedures."
>
> So it is quite clear from that definition that that Act takes precedence over the Criminal Code. It is binding. However, this Government would have us believe that, by changing the maximum penalties under the Criminal Code, many of these convicted offenders will receive additional sentences. Of course, there is no guarantee of that whatsoever and, in spite of the perception that this Government has tried desperately to create within the community that it is now on top of the law and order issue, no assurances can be given. This is simply another political stunt leading up to the next State election. The Government is simply responding to the community and the National and Liberal Parties' campaign on the breakdown of law and order and the growth of crime in this State. Of course, in the meetings held by its law and order task force the coalition has seen that reaction from communities all around the State [these meetings were referenced later in the context of consultation on the SVO scheme, and are noted below].[15]

Mr Beanland then made the point four times, that 'it is not the maximum penalties that have been the problem, it is the minimum penalties'.[16] He gave as an example a recent case where 'an 85-year-old woman was raped and

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11 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 March 1997, 'Criminal Law Amendment Bill', 700 (Elizabeth (Liz) Cunningham, Member for Gladstone).

12 Ibid 703.

13 The Act commenced by proclamation (s 2) and this occurred in stages. Sections 3–15, 44–51, 143–206 and 207 (in a certain respect) commenced 27 November 1992 (1992 SL No. 377). Part 3 (ss 16–43) also commenced 27 November 1992 (1992 SL No. 378). Sections 52–110, 120–142 and 207 (in a certain respect) commenced 18 December 1992 (1992 SL No. 393). The remainder commenced on 1 September 1992 (1994 SL No. 288).

14 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 October 1994, 9612 (Denver Beanland, Member for Indooroopilly).

15 Ibid 9612-3.

16 Ibid 9613.

had her house burgled. The offender was sentenced to eight years' imprisonment with an eligibility for parole after serving only two years'.[17]

> It is minimum sentences that are causing the problems. These problems are occurring because the Penalties and Sentences Act not only sets out the purpose of the legislation but also sets out the governing principles for sentencing provisions [then discussing s 9].
>
> …If the Government was serious, it would be looking at amending the Penalties and Sentences Act and doing something about the minimum penalties—they are the problem—for these sort of crimes being carried out in this State. Currently, the maximum penalties under the Criminal Code are not being imposed; sentences are well short of the maximum penalties. Offenders always seem to receive the minimum penalty; that is the problem. That is the insufficient sentencing.[18]

The phrase 'serious violent offence' was also used:

> Whilst [the PSA] remains on the statute books as it is, it overrides the Criminal Code of this State and no amount of wailing from the Government—and no amendments to the Criminal Code—will lead to stiffer minimum penalties for these serious, violent offences.[19]

Mr Beanland made this speech in October 1994. Labor introduced a new Criminal Code on 24 May 1995, which was assented to on 16 June 1995. It was never proclaimed and was subsequently repealed by the subsequent Coalition Government when it introduced its own amendments to the existing Code in the CLAA, which dovetailed with the *SVO Amendment Act* (see below).

2.2 Reviews and consultation leading to the Criminal Code reforms

By 1997, the current Code had been the subject of two reviews (which did not cover sentencing legislation to any great extent). Those reviews bookended a failed replacement Code. The chronology was:

- a 1992 review (the 'O'Regan Review');[20]
- the failed 1995 replacement Code;[21] and
- the 'Connolly working group' ('Connolly Review') of 1996.[22]

The Connolly Review informed the CLAA, which repealed the unproclaimed 1995 replacement Code.

The Connolly Review recommended two sentencing amendments unrelated to the SVO scheme. These were accepted by the Coalition Government and given effect to by the CLAA.[23]

The Review's task 'was made very much easier by the O'Regan Committee Report on the one hand and [1995 Code] on the other, both of which [were] constantly consulted'.[24]

The CLAA's Explanatory Notes reveal that consultation on the CLAA was notably different to that regarding the SVO scheme, in that consultation was extensive:

> The proposed amendments represent the outcome of an extensive consultative strategy commencing with Cabinet's establishment of the Advisory Working Group in April 1996. That Advisory Working Group, which consisted of Mr Peter Connolly QC, a former Justice of the Supreme Court of Queensland, and two barristers in practice at the private bar, both possessing extensive experience in prosecution and defence criminal law work, produced a comprehensive set of proposed amendments for the Attorney-General in July 1996. These proposals were then released for public consultation, which period lasted until mid-September 1996. Since that time and until the introduction of the legislation, the submissions received from individuals and organisations, which totalled approximately 125, were assessed and examined in-depth. The material contained in those submissions was influential in determining the final outcome of the legislation.

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17 Ibid.
18 Ibid 9614.
19 Ibid.
20 R.S. O'Regan, J.M. Herlihy and M.P. Quinn, *Final Report of the Criminal Code Review Committee to the Attorney-General* (18 June 1992).
21 The 1995 Code was created by Labor. When in Opposition, the Coalition stated that all legal stakeholders opposed the amended Code: 'This legislation could no longer be described as even a shadow of the June 1992 draft prepared by the then O'Regan committee': Queensland, *Parliamentary Debates*, Legislative Assembly, 14 June 1995, 'Criminal Code — Second Reading', 12534 (Denver Beanland). Labor, when subsequently in opposition, stated that in respect of the CLAA: 'As to the comprehensive review, that was Labor's. This Bill contains many of the tough penalties recommended by Labor and included in Labor's 1995 Criminal Code': Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 1997, 515 (Peter Beattie).
22 Peter Connolly et al, *Report of the Criminal Code Advisory Working Group to the Attorney-General* (July 1996).
23 The introduction of PSA s 13A (Cooperation with law enforcement authorities to be taken into account—undertaking to cooperate) and expanding s 188 (Court may reopen sentencing proceedings) to apply to the Magistrates Courts. For more information see Sally Kift, 'How not to amend a *Criminal Code*' (1997) 22(5) *Alternative Law Journal* 215.
24 Peter Connolly et al (n 22).

> In the final stages of the consultative period, further discussions were held with members of the judiciary in order to incorporate refinements to advance drafts which they suggested.[25]

2.3 Changes made to the Criminal Code

In introducing the CLA Bill in December 1996, then Attorney-General and Minister for Justice Denver Beanland noted that it implemented the Coalition's undertaking to:

> repeal the much-criticised Labor Government's 1995 Criminal Code and, instead, implement a package of legislation containing a set of comprehensive amendments to the Griffith Code to update it in a way commensurate with the needs and expectations of contemporary society…[26]

The CLAA introduced or amended various offences throughout the Code. Those discussed here are of relevance because they were also included in the schedule relating to the new SVO scheme in the *SVO Amendment Act*.

In Parliament, Mr Beanland stated that submissions from interested parties received after the Connolly Review made its recommendations led to 'an exhaustive review of the maximum penalties for all sex offences' revealing 'a number of serious anomalies, in urgent need of repair, between the penalties'.[27] The CLAA would rectify this and 'generally increase the maximum sentences for most sex offences'[28] to:

> truly reflect the level of criminality which would exist in a worst-case scenario to which the proposed maximum would apply. It is also the Government's view that sentences being imposed and upheld by our courts for sex offences in general, and especially those related to offences against children are out of proportion to the criminality involved and out of proportion to the sentences in other cases such as offences of dishonesty. This Bill sends a clear message to the judiciary that existing lenient sentencing practices in these areas will need to be reexamined. It also sends a warning to would-be adult sex offenders not to expect sympathy. Of course, nothing being said here is intended to diminish the courts' independence and discretion to impose lenient sentences where they are called for by the facts of a particular case. The Government is maintaining the full range of sentencing options.[29]

The CLAA inserted new offences of torture (s 320A) and bomb hoax (s 321A) into the Code, which were both also added to the SVO schedule (now called schedule 1) by the *SVO Amendment Act*.

The CLAA increased maximum penalties/and or broadened culpability for the following Code offences listed in Table 1. which would be listed in the schedule.[30]

Table 1: Changes to Criminal Code (Qld) offences and maximum penalties made by the *Criminal Law Amendment Act 1997* (Qld) ('CLAA')

Offence under Criminal Code	Maximum penalty (pre-CLAA)	Maximum penalty (post-CLAA)
Aggravated threatening violence (s 75(2))	2 years	5 years
Sodomy (s 208)		
- simpliciter	7 years	14 years
- aggravated	14 years	Life
Indecent treatment of children under 16 years (s 210)		
- simpliciter	5 years	10 years
- aggravated	10 years	14 years
Owner etc permitting abuse of children on premises (s 213)		
- simpliciter	5 years	10 years
- aggravated (other than under s 213(3)(a))	10 years	14 years
Carnal knowledge of girls under 16 (s 215)		
- simpliciter	5 years	14 years
- aggravated (under 12 years, not in care of offender)	10 years	14 years
Abuse of intellectually impaired persons (s 216)		
sub-s (1) [unlawful carnal knowledge, including attempt]	5 years	14 years
sub-s (2) [other sexual acts]	3 years	10 years
sub-s (3)(b) [in care of offender, attempt to have unlawful carnal knowledge]	14 years	Life
sub-s (3)(c) [in care of offender, other sexual acts]	10 years	14 years

25 Explanatory Notes, Criminal Law Amendment Bill 1996 (Qld) 3.

26 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, 'Criminal Law Amendment Bill — Second Reading', 4870 (Denver Beanland, Attorney-General and Minister for Justice).

27 Ibid 4871.

28 Ibid 4872.

29 Ibid. This point was restated when introducing the SVO legislation the following year: 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).

30 Subsequent amendments mean this list is not an accurate list of the current law. Several of the offences were also changed from misdemeanours to crimes.

Offence under Criminal Code	Maximum penalty (pre-CLAA)	Maximum penalty (post-CLAA)
Procuring sexual acts by coercion etc (s 218)	7 years [14 years if victim child under 16, or an intellectually impaired person]	14 years
Taking child for immoral purposes (s 219)* - simpliciter - aggravated [other than if 'proscribed act' offence in ss 208 or 215]	 5 years 10 years	 10 years 14 years
Incest (s 222) [new widened/consolidated offence section created - increased penalty for female offender provision] - attempt	Life 10 years	Life 10 years
Maintaining a sexual relationship with a child (s 229B) - simpliciter - aggravated	 7 years Life	 14 years Life
Sexual assault (s 337) - simpliciter - some aggravating circumstances	 7 years 14 years	 10 years Life
Killing unborn child (s 313) [culpability widened in new section with same life maximum]	Life	Life
Acts intended to cause grievous bodily harm and other malicious acts (s 317) [culpability widened by inserting other malicious acts]	Life	Life
Carrying or sending dangerous goods in a vehicle (s 317A) [widened from aircraft to vehicle]	7 years	14 years
Obstructing rescue or escape from unsafe premises (s 318) [offence changed from 'Preventing escape from wreck']	Life	Life
Endangering life of children by exposure (s 326)	2 years	7 years
Dangerous operation of a vehicle (s 328A) - simpliciter	12 months	3 years
Assault with intent to commit rape (s 336) [culpability widened from previous 'assault with intent to have unlawful anal intercourse']	14 years	14 years
Sexual assault (s 337) - simpliciter - aggravated (some types)	 7 years 14 years	 10 years Life
Assaults occasioning bodily harm (s 339) - simpliciter - aggravated	 3 years 7 years	 7 years 10 years
Serious assaults (s 340)	3 years	7 years
Cruelty to children under 16 (s 364)* [new offence to replace 'Desertion of children']	12 months [former offence]	5 years [New offence]
Attempted robbery (s 412) [Subsection (3) widened] - simpliciter - aggravated [armed or in company]	 7 years 14 years	 7 years 14 years
Burglary (s 419) subs (3)(b) #- various aggravating circumstances added (beyond at night)	Life	Life
Entering or being in premises and committing indictable offences (s 421(2)) #[amended offence]	14 years	14 years

Notes: * Not in original schedule. Inserted in 2004. # Added to SVO schedule.

3 The SVO scheme legislation and reasons for it

3.1 Changes made by the *SVO Amendment Act*

The *SVO Amendment Act* also contained other sentencing amendments to the PSA.[31] It:

- changed one of the purposes in section 3(b):
  - *from this:* 'providing for a sufficient range of sentences to balance protection of the Queensland community with appropriate punishment for, and rehabilitation of, offenders';

31 For a discussion of these, see *R v Eveleigh* [2003] 1 Qd R 398, 406–408 [28]–[40] (Fryberg J).

  - to *this* (as it remains today): 'providing for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders, and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration';
- changed some of the sentencing purposes in section 9(1)(c) and (d) (replacing 'discourage' with 'deter' and 'does not approve of' with 'denounces');
- inserted ss 9(2A) and (3) (as they are now numbered) regarding offences involving physical violence/causing physical harm and the overriding factors to be applied;
- set out guidelines for courts faced with deciding whether to order that a person serve the whole of a suspended term of imprisonment on breach;
- inserted s 156A (Cumulative order of imprisonment must be made in particular circumstances); and
- reformed the evidentiary provisions in Part 10 "Indefinite Sentences".

The amending Act omitted these subsections from section 9:

> (3) A court may impose a sentence only if the court, after having considered all available sentence options, is satisfied that the sentence—
>
> (a) is appropriate in all circumstances of the case; and
>
> (b) is no more severe than is necessary to achieve the purposes for which the sentence is imposed.
>
> (4) A court may impose a sentence of imprisonment on an offender who is under the age of 25 years and has not previously been convicted only if the court, having—
>
> (a) considered all other available sentences; and
>
> (b) taken into account the desirability of not imprisoning a first offender;
>
> is satisfied that no other sentence is appropriate in all circumstances of the case.

The Criminal Code was amended to require a 20-year minimum non-parole period for multiple or repeat convictions for murder.

As to judicial recognition of the purposes of these amendments, Court of Appeal analysis has since recognised, at least in respect of the section 9 amendments, Parliament's prioritising of 'the protection of the community from the offender and from others who might be tempted to commit similar offences'.[32]

3.2 The Explanatory Notes to the SVO Amendment Bill

The Explanatory Notes to the SVO Amendment Bill noted consultation had occurred only with the Minister for Police and Corrective Services who produced broad numbers regarding projections for the 10 year plus sentence cohort only. The Bill was not referred to a parliamentary committee.

The impact of the discretion to impose an SVO for head sentences of less than 10 years was not projected because it would be up to the individual judge in the individual case. The Explanatory Notes stated:

> At the end of the day it is unclear to what extent the policy will impact financially because, as anecdotal evidence has it, many of these types of prisoners are not granted parole when it would otherwise be available.
>
> These estimates take into account also the discontinuation of remission for serious violent offenders.
>
> It was not possible to provide the number of prisoners for each offence in the Schedule as the Queensland Corrective Services Commission (QCSC) stores offence information using a modified Australian National Classification of Offences (ANCO) coding system. These codes are used by all Australian correctional institutions, and as such, do not directly match specific Queensland offences.
>
> The QCSC has matched Queensland offences with the ANCO codes to the best extent possible and has erred on the side of including, rather than excluding, ANCO offence types. The resulting data is thus more likely to over-count offenders on current available figures.
>
> Further, the estimates are based upon an assumption that the increased time actually served by all serious violent offenders will increase from the 30% mark (when prisoners can generally gain access to community release schemes) to the 80% mark.[33]

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32 *R v Lovell* [1999] 2 Qd R 79, 83 (Byrne J, Davies JA agreeing, Pincus JA generally agreeing); cited with approval in *R v Dullroy; Ex parte A-G (Qld)* [2005] QCA 219, 10 [33] (White J, McMurdo J agreeing), see 17–18 [57]–[59] (McMurdo P).

33 Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld) 2-3.

4 Post sentence release was different in 1997

The *Corrective Services Act 2006* (Qld) introduced the parole scheme (largely) as it currently exists in Queensland. In 1997, the system was different. For instance, remission and home detention existed. At the time, the Attorney-General explained how the SVO scheme would impact under that different system:

> Ordinarily, if a court imposes a term of imprisonment on an offender he or she will be eligible to apply for parole after serving 50% of the sentence, but the court may recommend that the offender be eligible for release on parole after having served a period of time specified by the court (section 157(2) of the *Penalties and Sentences Act*) [which no longer exists].
>
> This is usually something less than half.
>
> There will be no such early recommendations for serious violent offenders.
>
> No recommendation made in respect of any offence that is not a serious violent offence (where the other offence is served concurrently or cumulatively with the serious violent offence) will affect the operation of the 80 per cent rule for a serious violent offence.
>
> The remissions scheme may currently result in a release from prison at approximately two-thirds of the sentence imposed where that sentence is one of imprisonment for two (2) months or longer.
>
> The remissions scheme operates whether or not a prisoner is eligible to apply for parole or to take part in release programs.
>
> Some prisoners prefer not to take parole at half time but wait until their release after remission so that they are not subjected to the supervision which would take place under parole.
>
> There will be no remissions for serious violent offenders.[34]

The relevance of remission is that (a) it existed and was exercised separately from the prior exercise of judicial power and (b) it shortened a head sentence and involved no supervision whatsoever.

Obiter comments by one Court of Appeal judge shortly after the SVO scheme was introduced, show the difference made by Part 9A of the PSA in an environment where remission may have otherwise constrained a court, in a practical sense, from making a parole recommendation (as the law then allowed) of well over the 50 per cent mark. In *R v Collins*,[35] Ambrose J wrote:

> For many years now it has been assumed that if the circumstances of a case warrant, it is possible for a sentencing judge to make an order that an offender become eligible for parole only after serving perhaps 60 per cent or more of the sentence; of course the length of effective postponement of eligibility has been constrained to some extent by any remission of sentence which might be obtained.
>
> If such a recommendation for postponement of eligibility beyond the halfway mark in service of a sentence were made, it would clearly be part of the sentence and an offender could seek leave to appeal against such a recommendation on the basis that it rendered the sentence ''manifestly excessive''.
>
> Up to the present time it has not been within the power of a sentencing judge to make any order having effect on any entitlement to remission of part of the sentence (for good behaviour etc). The power to grant remission has traditionally been regarded as being within the administrative powers of the Community Corrections Board and designed to assist in the administration of the prison system.
>
> Part 9A of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997*, however, gives a sentencing judge a discretion to make a declaration which will have the effect of –
>
> (a) depriving the offender of an eligibility for remission of sentence which he would otherwise have pursuant to the *Corrective Services Regulations* etc.; and also
>
> (b) postponing eligibility for parole until 80 per cent of the imposed sentence has been served.
>
> With respect to (a), this is a power never before bestowed upon a sentencing judge, whereas with respect to (b), this is a power of the sort which has been exercised at least since 1983 when *R. v. Lennard*[36] was decided.[37]

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34 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill — Second Reading', 595 (Denver Beanland, Attorney-General and Minister for Justice). The original s 161D of the PSA stated: 'the sentence of an offender convicted of a serious violent offence cannot be remitted under the *Corrective Services Act 1988*'.

35 [2000] 1 Qd R 45.

36 'In *R. v. Lennard* [1984] 1 Qd.R. 1 the Court of Criminal Appeal held that in making a recommendation for eligibility for release on parole, a sentencing judge had a discretion to recommend that the offender be released at a time earlier than or later than halfway through the custodial term imposed': *R v Collins* [2000] 1 Qd R 45, 61 [72] (Ambrose J).

37 *R v Collins* [2000] 1 Qd R 45, 62 [73]-[72] (Ambrose J).

History of the serious violent offences scheme

The *Queensland Parole System Review: Final Report* (2016) ('Parole System Review Report') summarised the 'modern evolution' of parole in Queensland.[38] A number of key reforms to the parole system have taken place since 1997, although the SVO scheme's inherent 80 per cent rule has never been displaced.

Prior to the SVO scheme's creation, for an offence that might have triggered the scheme's operation, this reform chronology shows what an offender was instead liable to face in terms of release on supervision (or outright early release).

Parole started in Queensland in 1937, introduced as an alternative to remission[39] with a Board comprised of senior public servants. In 1959 a Board independent of government was established, and 'with certain exceptions, a prisoner was eligible for parole after serving half a sentence'.[40]

In 1980, other legislation maintained this but added court power to 'recommend a period after which the prisoner would become eligible for parole at the time of sentence' (both options excluded life sentences and those declared habitual criminals[41]).[42]

In 1986, remission 'of one third of a prisoner's sentence for good behaviour' was introduced. 'The decision to grant or to withdraw remission was in the hands of the Prison Service'.[43] Remissions were:

> An administrative arrangement whereby the Prisons Department could release a prisoner on the grounds of good behaviour. Previously, a remission system had operated on a rewards basis for good behaviour in custody by the Queensland Prison Service.[44]

This 'created two streams of release from custody, via parole at one half or remission at two-thirds'[45] and 'many offenders stopped applying for parole':[46]

> In weighing up the pros and cons, it is easy to see why one would wait a further period for unconditional release rather than risk being released and then breached and returned to custody with a parole order cancelled. As a consequence some prisoners were serving more time in custody waiting for remission when they could have been on parole, rehabilitating in the community and relieving the State of the cost of their incarceration.[47]

Subsequent 1988 legislation left remission in place and gave the Community Corrections Board power to 'reduce a parolee's parole period. It was a system of remission of a sentence while on parole'.[48]

The Parole System Review Report notes that 'the parole system was not changed under the *Penalties and Sentences Act 1992* as it was first enacted. Parole was still available after an offender had served half of a sentence and remission still operated for the final one third of an offender's sentence'.[49] The PSA as passed, did give courts discretion to 'recommend that the offender be eligible for release on parole after having served such part of the term of imprisonment as the court specifies in the recommendation'.[50] This was the system in place when the SVO scheme was created.

The *Corrective Services Act 2000* 'created new parole legislation':[51]

> Remissions were abolished to create an incentive for prisoners to work towards parole. The two tier system was abolished, being considered as involving wasteful duplication of work. Instead, the regional boards decided

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38 See Queensland Parole System Review, *Queensland Parole System Review Final Report* (2016) 3–4 [13]–[28] for a summary, with further detail at 39–57 [142]–[264]. Footnotes in that report are excluded in these references.
39 Ibid 39 [143].
40 Ibid 34 [15].
41 These offenders were required to be released by the Governor-in-Council upon the recommendation of the Parole Board. Under Chapter 64A of the Criminal Code, a person could be declared by a court to be an habitual (repeat) criminal if convicted of indictment of one of a number of offences listed in specific Chapters of the Code in circumstances where they had been convicted on indictment on at least two previous occasions of one or more of these offences (for offences under Chapters 22 and 32) or on at least three occasions (for offences under other chapters of the Code captured within the scheme) A power existed, in some circumstances, for a person convicted summarily to be brought before the Supreme Court to be dealt with as a habitual criminal. This included offenders convicted of repeat child sex offences. These provisions were repealed in 1992 with the enactment of the PSA, which also introduced a new form of indefinite sentence.
42 Ibid 41 [159].
43 Ibid 3 [17].
44 Ibid 43 [171].
45 Ibid 43 [170].
46 Ibid 43 [173].
47 Ibid.
48 Ibid 50 [211].
49 Ibid 50 [214]. However, note also 4 [22]: 'In 1992 the *Penalties and Sentences Act* provided that a sentencing court could state a parole eligibility date; the system of eligibility after serving half a sentence was abolished'.
50 Section 157(2).
51 Queensland Parole System Review (n 38) 4 [24].

> parole applications for prisoners serving less than 8 years and the Queensland Board considered all other applications.[52]

Then, the current 2006 Act was passed. It was:

> Intended to represent a new phase in corrections in Queensland, the introduction of "truth in sentencing". The objective of the Bill was to ensure that every prisoner sentenced would serve 100 per cent of a sentence, either in custody or under supervision in the community.[53]

It also 'abolished a range of pre-release options that had previously been available, including conditional release (which was essentially remission), home detention and leave of absence schemes'.[54]

5 Parliamentary debate

5.1 Why the SVO scheme was introduced

In his second reading speech, then Attorney-General and Minister for Justice Denver Beanland described the SVO scheme as:

> introducing, within the existing legislative framework, a separate regime for the punishment of criminals convicted of serious violent offences, giving effect to a number of Government election promises. Serious violent offenders will serve at least 80% of their term of imprisonment before becoming eligible to apply for parole or for any form of leave of absence or home detention [which then applied].[55]

It was the result of this election promise:

> to introduce into the penalties and sentences legislation a section dealing with serious violent offences that reflects our concern for community safety as well as community outrage with this form of crime. This bill delivers that promise. The provisions of the new Part in the *Penalties and Sentences Act 1992* will expressly reflect the Government's concern with community safety in relation to serious violent offences, as well as community denunciation of this type of crime.[56]

The election promise also indicated that:

> there will be no remissions. Criminals will not be eligible for work release, day release or other release programs until they have served at least 80% of their sentence. Punishment will fit the crime.[57]

5.2 Why a schedule was used as an eligibility device

There are offences in schedule 1 that do not have violence of any kind as an element. The scope of this, being the tool to determine whether an offence qualifies for the SVO scheme's application, was explained, as well as the justification for its extension to inchoate offences:

> The Government went to the people at the last election and made a promise that: "serious violent offences will include rape, child molestation, armed robbery, serious assault, violent attacks in the home and attempted murder. Because of the enormous damage done in the community by drug trafficking, those convicted of this offence will be treated similarly."
>
> This Bill delivers that promise. The expression "serious violent offence" will extend to any of the indictable offences listed in the new Schedule.
>
> Because this Government is concerned to see that Queenslanders feel secure in their homes and on the streets, this Bill addresses both inherently violent crimes and all other crimes in which serious violence is used or contemplated or which results in serious harm.
>
> A solely Schedule based approach, though it can list most violence related offences, may fail to catch some offences in which a serious degree of violence or harm can be inflicted although actual violence is not an element of the offence.
>
> A conspiracy to murder is as serious a "violent" crime as any other, as is an attempted abduction which renders the victim afraid to go anywhere alone.
>
> Therefore attempts and conspiracies to use violence are included in the definition of a serious violent offence, as are the counselling or procuring of such offences.[58]

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52 Ibid.
53 Ibid 55 [249].
54 Ibid 55 [251].
55 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill — Second Reading', 595 (Denver Beanland, Attorney-General and Minister for Justice).
56 Ibid.
57 Ibid 598.
58 Ibid 596.

5.3 The anticipated effect of the scheme on head sentences

The Council raised concerns in 2018 and 2019, in two reviews, about the SVO scheme effectively operating counter-productively because, by removing the court's discretion, the ways to express the effect of mitigating factors (a fundamental aspect of a justice system in a democracy and an issue not referred to in the Explanatory Notes or Parliamentary speech) are severely limited:

> A review of cases where an offender has been declared to be convicted of an SVO indicates that head sentences are being reduced to take into account a plea of guilty and other matters in mitigation…
>
> Reducing a head sentence to take into account mitigating factors that cannot otherwise be taken into account in the setting of a parole eligibility date due to the mandatory nature of these provisions can result in a head sentence being imposed that does not reflect the true criminality of the offending.[59]

When introducing the Bill in 1997, the Attorney-General addressed this very point:

> The public need not fear that the 80% rule and the intention of Parliament will be circumvented by the lowering of sentences or tariffs. The public can have every faith in Queensland's criminal courts.[60]

As justification, he made these points:

- Court of Appeal comment from 1986 paraphrased as 'to be able to depart from a range of sentences which was then applicable it would need to see some legislative indication that the community regard certain offences more seriously now than before and evidence that current sentences are not achieving a sufficient deterrent effect'.[61] 'This Bill will right that wrong'.[62]
- Queensland Corrective Services Commission advice that 'the number of prisoners serving 10 years to less than life for offences which come within the Schedule and housed as at 30 June 1996 had increased to 338 from 237 on 30 June 1994; an increase of about 42%. Clearly then current sentences for serious violent offences have not had and are not having a sufficient deterrent effect'.[63]
- A 1994 Court of Appeal case which pointed out that courts should not be constrained to any sentence range established by prior court decisions when Parliament increases maximum penalties.[64]

5.4 Scope of the schedule

Apart from calling for Committee examination of the Bill encouraging consultation with experts, there was little Opposition criticism of the SVO scheme.

Opposition members attempted one amendment, to remove section 421(2) (Entering or being in premises and committing indictable offences) from the schedule on the basis that it was 'essentially a property offence [and] not of its essence an offence of violence'. This objection was to one of 57 offences in the schedule, which also included unlawful assembly, bomb hoaxes and three drug offences:[65]

> The introduction of this list of serious violent offences introduces a new aspect of the criminal law, and "serious violent offences" should mean what the plain words of that phrase mean, namely, offences of violence… If it becomes a violent offence, then it can be picked up in the provisions of new section 161B(4) … It devalues the currency.[66]
>
> It really is nonsensical to call something which is not a serious violent offence, a violent offence. Otherwise, we may as well rename the Criminal Code the "Serious Violent Offences Act" and say that everything is a serious violent offence: fraud, forgery, stealing, the lot. …If this is a species of getting tough on law and order by re-labelling them, then I really do not know where it is going to end. Perhaps when the crime of forgery or forging and uttering becomes a problem in the community we will re-label that as a serious violent offence, too. This is not good law; it is not good commonsense.[67]

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59 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options* (Final Report, 31 July 2019) 90 ('*Community-based Sentencing Orders, Imprisonment and Parole Options'*). See also Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences arising from the Death of a Child* (Final Report, 31 October 2018) xxxix (Advice 3), xxxiv, 158 [9.4.4] ('*Sentencing for Criminal Offences arising from the Death of a Child*').

60 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).

61 Ibid, citing *The Queen v. F.*, C.A. No. 1 of 1986, unreported decision, 26 May 1986.

62 Ibid.

63 Ibid.

64 Ibid, quoting *The Queen v. David Glen Sheppard* (CA No. 391 of 1994, unreported decision on 8 February 1995) comments by Dowsett J and Fitzgerald P.

65 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill', 931, 934 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts).

66 Ibid 932.

67 Ibid 933.

The Attorney-General replied that the schedule included:

> matters such as the production of drugs, another offence that does not directly involve violence. Of course, each of these crimes involves a violation which poses a serious threat to the physical safety and integrity of members of the community. This might become part of a cumulative sentence provision ... This is not, as I say, the only provision in the schedule that does not actually include something to do with violence. There are others.[68]

Section 421 would later be removed from the schedule by section 84 of the *Justice and Other Legislation Amendment Act 2004* (Qld) under a Labor Government.

At the time the Bill was debated, Opposition members agreed with much of the scheme otherwise, for example:

- including drug offences;[69]
- the general proposition of 'tougher sentences' (in the context of not opposing the Bill);[70]
- the 80 per cent mandatory non-parole period (with a reluctance to see it go higher, it being 'at the higher range of the non-parole periods in other States. It is very important that we have some carrot to hold in front of prisoners to ensure that they behave themselves whilst in custody ... I think society probably accepts 20% as a reasonable figure'.[71]

One Opposition member questioned the mandatory non-parole scheme, being concerned that:

> Judges will adjust the quantum of the sentences that they give by their knowledge of the sentence management procedures. Because of that change, we will start to see people being sentenced to shorter times in gaol rather than longer.[72]

5.5 The value of supervision

During debate on the Bill, some Opposition members pointed to the value of supervision on parole in the community, and that by applying an 80 per cent non parole period, it would reduce the time under supervision.

> Usually, if it is a well-resourced parole system, that person who is on parole is on a string. That person is regularly in contact with his or her parole officer. A well-resourced parole system is a very, very much cheaper option for the community as a whole and it is also beneficial to that prisoner.
>
> ...People need to have time out of prison on parole, on a string under the guidance of a parole officer, so that they can be helped to fit back into society and hopefully not become that one person out of three who commits another crime straightaway.[73]

5.6 The usefulness of deterrence

Some Opposition members also questioned the usefulness of tougher sentences as an effective deterrent. For instance:

> multitudes of studies have demonstrated that the chief deterrent is not the length of the sentence or, indeed, the circumstances of gaol or the nature of the punishment that somebody will receive in gaol. ... the chief deterrent has always been found to be the certainty of apprehension. .... To attempt to use a Penalties and Sentences Bill for the purposes of deterrence is not the most effective way to do that. One should use the police force for that purpose. One should use community policing, neighbourhood watches and all kinds of crime prevention programs to deter ... Of course, there are some crimes of passion where people do not think ahead. However, a crime which involves preparation is carried out on the basis of the criminal's estimate of his or her likelihood of being caught. That is what we should turn our attention to.[74]

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68 Ibid 932 (Denver Beanland, Attorney-General and Minister for Justice).
69 Ibid 891 (Jonathan H. Sullivan, Member for Caboolture).
70 Ibid 895 (Peter Beattie, Shadow Minister for Economic and Trade Development).
71 Ibid 901 (Paul Lucas, Member for Lytton).
72 See also Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Criminal Law Amendment Bill', 648 (Jonathan H. Sullivan, Member for Caboolture).
73 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill', 905 (Demetrios (Jim) Fouras, Member for Ashgrove). See also Jonathan H. Sullivan, Member for Caboolture at 892 and Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 1997, 'Criminal Law Amendment Bill', 542 (Raymond (Ray) Hollis, Member for Redcliffe).
74 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill', 907 (Dean Wells, Shadow Minister for Emergency Services, Public Service Matters and Federal/State Relations). See also Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Criminal Law Amendment Bill', 647 (Jonathan H. Sullivan, Member for Caboolture).

6 Consultation on the *SVO Amendment Act*

In contrast to the extensive expert consultation on the CLAA, the Explanatory Notes for the *SVO Amendment Act* noted only that 'There has been extensive consultation and cooperation with the Honourable the Minister for Police and Corrective Services'.[75]

The lack of consultation attracted strong criticism by the shadow Attorney-General, with apparently 'no consultation with victims of crime, with the legal profession, with Aboriginal and Islander groups,[76] with domestic violence groups or groups concerned with the rehabilitation of offenders' despite the 'significant changes' being made 'to the principles governing the penalties and sentences applicable under Queensland's criminal law'.[77]

His amendment 'to refer this Bill to the all-party Legal, Constitutional and Administrative Review Committee with a direction that the committee undertake public consultation on the Bill and report to the House by the next sitting day' about a month later, was defeated.[78]

One suggested benefit of community consultation was ensuring that 'the net is cast in the appropriate way and not simply cast in a way which picks up circumstances that would not normally of themselves fall under the category of "serious violent offence"'.[79]

The Opposition Leader considered it a 'very basic tenet' that certain stakeholders be consulted:

> such as the Law Society, the Bar Association and the judiciary itself. After all, this Bill deals with penalties and sentences and it deals with the behaviour of the judiciary. I would have thought that the Chief Justice, for example, should have been involved in detailed discussion … a very detailed consultation should have involved the whole community, the various victims of crime associations—and many people are involved in victims of crime associations—some of the larger offender groups and Aboriginal groups.[80]

The Attorney-General responded that 'the Explanatory Notes only mention the consultation that occurred in recent times'.[81] In particular:

- This issue had more public consultation than any other 'prior to the last election' and 'this legislation became a very clear election commitment for this Government … which we gave clearly and in some detail'.
- 'Well advertised' Public Law and Order Task Force meetings, which 'were not campaign meetings … were held around the State for 18 months to two years prior to the election' and 'everyone had an opportunity to attend'. The Attorney-General, the Minister for Police and Corrective Services, and three other members attended.
- 'We are allowing appropriate time for people to consider the Bill … there has been a great deal of public comment … Wherever one travels in the State, people say that they want tougher provisions in respect of serious violent offenders'.
- 'The Scrutiny of Legislation Committee did not indicate that it shared the [Opposition's] concerns'.[82]

Mrs Cunningham, who held the balance of power, said a number of post-election meetings had been held in her electorate addressing 'crime issues in our region'. The message conveyed reflected the legislation's sentiment: 'they want serious offenders dealt with toughly. They want truth in sentencing—and I guess that is a catchphrase. They want people who commit serious crimes to do the time'. While the Bill itself 'may not have been specifically circulated for comment', she thought 'it embodies many of the issues raised with individual elected members and also their parties … the community has telegraphed its concern'.[83]

Another Opposition member argued that expert opinion was lacking, and Parliamentary debate and general community 'will' have had:

> nothing to do with consultation … people who attended the meetings … were those who were demanding loudly that we should hang offenders or castrate them or whatever else. The people who had a different point of view did not attend … The Government has heard one side of the argument and one side only.

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75 Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld) 4.

76 'The lack of consultation with Aboriginal and Islander people and the lack of relation of these measures to the royal commission into Aboriginal deaths in custody is truly worrying': Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill', 884 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts).

77 Ibid 878 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts).

78 Ibid. The next sitting day was 29 April 1997. The vote is at 889.

79 Ibid 881 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts).

80 Ibid 884 (Peter Beattie, Leader of the Opposition).

81 Ibid 908 (Denver Beanland, Attorney-General and Minister for Justice).

82 Ibid 886 (Denver Beanland, Attorney-General and Minister for Justice).

83 Ibid 886 (Elizabeth (Liz) Cunningham, Member for Gladstone).

> ...There should be consultation [not just] with the Police and Corrective Services Minister on whether there is enough accommodation in gaol, but consultation with people in the community who can put an expert point of view on the various issues: what effect this will have; whether or not it will increase the severity of some crimes against people ... whether or not the penalty is appropriate to the crime.[84]

7 The relationship between section 9 and Part 9A

A portion of the Attorney-General's second reading speech which was incorporated into Hansard appears to outline a Government expectation of the reforms that went beyond the scope of the Bill (this was not repeated in the Explanatory Notes).

The speech stated that 'the new Part 9A will provide that in considering the question of the protection of the community, a court must have regard to'[85] a list of 11 factors. Part 9A does not do this in itself, in the specific way as stated.

Justice Fryberg, in his judgment in *R v Eveleigh*[86] in 2002, noted this: 'However, care must be exercised in using that speech, as the provisions described in it seem different from those enacted. Perhaps the Attorney was referring to a different version of the bill'.

Those 11 factors mentioned in the speech appear instead, almost verbatim, in s 9(4) in Part 2 (now numbered as section 9(3)), also introduced by the *SVO Amendment Act*. While some matters appear to be matters of drafting preference, the following text in italics was in the speech version (being attributed to Part 9A) but were and are not in section 9(3):

- the nature or extent of the violence, *whether apparent or real*...
- the past record of the offender ... and the number of previous offences committed *whether serious violent offences or not*

This current version of section 9(3) (or s 9(4) in 1997) is linked to a removal of the general presumption that imprisonment is a sentence of last resort. It replaced the original section 9(4), that had placed obstacles to courts in sentencing a first-time offender under 25 to imprisonment. The Attorney-General explained that the old section 9(4):

> Would not in all cases sit well together with a legislative requirement that the court take into account the protection of the community from a serious violent offender as a primary sentencing consideration. As it is also pointless for stating the obvious and acts as a fetter on a court's sentencing discretion, section 9(4) will also be repealed. The restriction on a court's sentencing discretion in respect of people under 25 will be removed.[87]

The 11 factors, to which a court must primarily have regard to, apply when sentencing an offender under section 9(2A)[88] for any offence:

> (a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
>
> (b) that resulted in physical harm to another person.

Section 9(2A) disengages two fundamental principles (contained in section 9(2)(a)), being that:

> (i) a sentence of imprisonment should only be imposed as a last resort; and
>
> (ii) a sentence that allows the offender to stay in the community is preferable.

The Council has previously noted that 'section 9(2A) applies to any offence involving violence or physical harm, thereby reaching beyond the very serious offences to which the SVO scheme applies'.[89]

Part 9A only applies to schedule 1 offences dealt with on indictment (save for the widened discretion in s 161B(4)). Section 9 applies to any sentence for potentially any offence, including Magistrates Courts sentences that represent the overwhelming bulk of sentences imposed in Queensland.

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84 Ibid 887 (Len Ardill, Member for Archerfield).

85 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill — Second Reading', 596 (Denver Beanland, Attorney-General and Minister for Justice), emphasis added. Two further statements on that page repeat the intention that the 11 factors apply to serious violent 'offenders' (a term which does not appear in the PSA, as distinct from serious violent 'offences' as defined).

86 [2003] 1 Qd R 398, 408 [37] fn 17 (Fryberg J).

87 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill — Second Reading', 596 (Denver Beanland, Attorney-General and Minister for Justice).

88 Section 9(2A) was also introduced by the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld), s 6 (originally numbered as s 9(3)).

89 Queensland Sentencing Advisory Council, *Penalties for assaults on public officers* (Final Report, 31 August 2020) 229-230 [10.2.4].

As Fryberg J noted in *Eveleigh*:

> Offences covered by s. 9(3) [as then numbered] are not necessarily serious violent offences, nor are serious violent offences necessarily covered by s. 9(3). Section 9(3) contains no requirement for serious violence or harm such as is to be found in s. 161B(4). Since the Schedule does not list "Assault", many assaults would fall under s. 9(3) but not constitute a serious violent offence. On the other hand … many serious violent offences as defined will not involve violence against or physical harm to a person, so will not fall under s. 9(3).[90]

Other than the term 'serious violent offence', Part 9A uses other language that is also not reflected in section 9: 'serious violence against another person' and 'resulted in serious harm to another person' (s 161B(4)).

As passed, Part 9A in itself provided no guidance or criteria to sentencing courts in deciding whether to make a discretionary SVO declaration for a schedule offence.

In 2010, violence against, or death of a child under 12 years was added as an aggravating factor 'in deciding whether to declare the offender to be convicted of a serious violent offence' (s 161B(5)).[91] The primary objective of this change was 'to strengthen the penalties imposed upon … offenders who commit violence upon a young child and/or who cause the death of a young child',[92] to 'ensure that genuine regard is had to the special vulnerability of these young victims'.[93]

The Explanatory Notes identified the reasons for this change:

> **Violence to young children**
>
> The community rightly has a keen interest in the penalties imposed upon offenders who commit violence upon a young child and/or who cause the death of a young child. These cases generate a strong emotive response. The intention is to ensure that sufficient weight is placed upon the age of the victim and genuine recognition made of their special vulnerability. The disproportionate position of an adult to that of a young child and the comparative level of force needed to cause significant harm to a young child as distinct from another adult, must be recognised by the court in deciding whether to declare the offender to be convicted of a serious violent offence.

And how its objective would be achieved:

> **Violence to young children**
>
> The amendment will strengthen, when appropriate, the penalties imposed upon offenders convicted of an offence of violence against a young child or an offence that caused the death of a young child, without fettering judicial discretion in deciding whether to declare the offender to be convicted of a serious violent offence. Maintaining judicial discretion in this process is essential given that there will be cases where the community, despite the tragic consequences of the conduct, would not expect such a severe sanction.[94]

The reference to a 'child aged under 12 years' was identified as being:

> consistent with the approach adopted in the Criminal Code where certain offending is aggravated by virtue of the victim being under twelve years and where a child under twelve years is legally incapable of giving consent. These provisions acknowledge the special vulnerability of young children and the need to legislatively protect them.[95]

At the time of its introduction, the Deputy Leader of the Opposition, Lawrence Springborg, criticised this addition on the basis of the discretionary nature of the decision as to whether to make a declaration, suggesting:

> Surely the deliberate actions of an adult that result in the death of a child, such as a fatal assault, must automatically attract a serious violent offender declaration, which is not what this amendment suggests should happen.[96]

Beyond this limited guidance, criteria and guidance specific to Part 9A beyond the general purposes and principles of sentencing in Part 2 (Governing principles) has otherwise been left to the Court of Appeal in developing the common law (see below).

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90 *R v Eveleigh* [2003] 1 Qd R 398, 408 [38] (Fryberg J).

91 Inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 7.

92 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 2.

93 Queensland, Parliamentary Debates, Legislative Assembly, 3 August 2010, 'Penalties and Sentences (Sentencing Advisory Council) Amendment Bill' 2308–9.

94 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 2 and 5.

95 Ibid 5.

96 Queensland, Parliamentary Debates, Legislative Assembly, 27 October 2010, 'Penalties and Sentences (Sentencing Advisory Council) Amendment Bill' 3898.

7.1 Parliamentary analysis

The Shadow Attorney-General, Matthew Foley, moved an amendment to keep the old section 9(4) along with the new subsections, which was defeated.[97]

While there is no express link between the SVO scheme in Part 9A and the general sentencing purposes and principles in section 9, language was used that in part justified global section 9 amendments by an association with the term 'serious violent offender'. The then Attorney-General, Denver Beanland, told Parliament of the election promise that:

> "In determining the appropriate length of a custodial sentence for a serious violent offender, a court will take into account the protection of the community as a primary sentencing consideration."
>
> This Bill delivers that promise by amendments to the purposes section and the sentencing guidelines of the Act.[98]

He stated that:

> The [11] matters listed [in current section 9(3)] are to be regarded as primary sentencing considerations and in addition to those sentencing guidelines currently referred to in section 9(2) of the Penalties and Sentences Act 1992.
>
> The matters referred to do not limit the matters to which a court may have regard in determining the length of any custodial sentence imposed upon a serious violent offender, but that they shall be the primary considerations.
>
> The principles, contained in section 9(2)(a), that a sentence of imprisonment shall only be imposed as a last resort and that a noncustodial sentence is preferable to one of imprisonment, will have no application to serious violent offenders sentenced under the new part.[99]

The Attorney-General described the existing section 9 as a 'stumbling block' for sentencing judges, partly because:

> while the Act currently mentions protection of the community among the purposes of sentencing, section 9(1), there is nothing in section 9(2), the sentencing principles, requiring the court to actually have regard to the protection of the community as a sentencing consideration. Significantly, the sentencing criteria which might arguably be said to be paramount are those of section 9(2)(a), that prison is a last resort and that a non-custodial sentence is preferable to one of imprisonment. This logically cannot always be the case, and certainly not in the case of serious violent offenders.[100]

Opposition criticism of this replacement was largely levelled at the omission of the principles relating to young people, as opposed to the expansion of the 11 factors applying well beyond the new Part 9A, although one Member did state:

> The Attorney-General is not clear about the proposal in his own Bill in relation to its effect or otherwise on serious violent offences and other offences … It does pick up serious violent offences … but it also picks up everything in its net. To try to present this as a provision that is targeted at serious violent offences is absolutely dishonest and a distortion of his proposal. If that is the target, that is what it should say; if it is not the target, it should not cast its net so widely.[101]

Other criticism of the replacement clauses (current sections 9(3) and (4)) otherwise went to their breadth, in the context of replacing a provision relating to people aged under 25. For example:

- It was 'ludicrous' that 'the words "resulted in physical harm to another person" are in the clause' because 'it is such a broad definition that it is the worst aspect of this legislation'.[102]
- The Attorney-General spoke of 'serious and violent offenders' but also the phrase 'resulted in physical harm to another person' - such a 'broad definition of "injury"' could include 'a kick in the shin'.[103]
- 'This provision does not apply simply in relation to violent offences. It applies in relation to all offences'.[104]

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97 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill', 927-8.

98 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill — Second Reading', 595 (Denver Beanland, Attorney-General and Minister for Justice).

99 Ibid 596.

100 Ibid 595.

101 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill', 927 (Anna Bligh, Shadow Minister for Families, Youth and Community Care).

102 Ibid 911 (Demetrios (Jim) Fouras, Member for Ashgrove).

103 Ibid 926.

104 Ibid 925 (Matthew Foley, Shadow Attorney-General). Also at 912.

7.2 Judicial interpretation

Two Court of Appeal judges noted the lack of guidance in Part 9A itself, in *R v Collins* in September 1998.[105] They disagreed on the nexus between section 9(3) and the discretionary SVO component of Part 9A. The third judge did not view such reasoning as helpful to the disposition of that appeal.

This issue, to the extent that it remains one in practical terms for the application of the scheme, does not since appear to have been resolved with certainty.[106]

7.2.1 *R v Collins* [2000] 1 Qd R 45

In *R v Collins*, McMurdo P wrote:

> The Act gives no specific guidance as to what factors should be considered by a sentencing judge exercising the discretion pursuant to s. 161B(3) of the Act [a discretionary SVO decision]... In the absence of guidance from the Act one would expect that normally no such declaration would be made unless there were reasons to justify the making of a declaration.[107]

The President then examined the amended purposes of the PSA, and new sections 9(3) and (4), in the *SVO Amendment Act*[108] and stated:

> In the absence of specific guidelines in the Act as to what considerations should be taken into account when exercising this discretion, the general sentencing principles including those set out in s. 9 of the Act should be considered. It is conceded that this offence is one that comes within s. 9(3) of the Act and therefore the principles mentioned in s. 9(2)(a) do not apply. Section 9(4) of the Act requires that the sentencing judge ''must'' have regard primarily to the 11 factors listed in it. The word ''primarily'' does not exclude other relevant matters also being taken into account as long as the 11 matters listed in s. 9(4) are the primary considerations.[109]

McMurdo P then quoted parts of the Attorney-General's second reading speech, including that portion repeated and bolded above[110] and stated 'the intention to protect the community from future violent offending seems to have been the paramount consideration of the legislature in enacting the 1997 Act'.[111] In determining the question of SVO discretion, Her Honour considered and applied 'sections 9(3), 9(4)(a) and 9(4)(b) [which] reinforce the view that the legislature was primarily concerned to protect the community from offenders who pose an ongoing risk to the community'.[112] She would have allowed the appeal against the SVO declaration in that case.

McPherson JA noted that:

> The provisions of Part 9A provide no specific guidance about the way in which the discretion under s. 161B(3) is to be exercised in making a declaration of a serious violent offence. That being so, the general principles or considerations ordinarily governing the sentencing of offenders fall to be applied so far as they are relevant and applicable to a matter like this.[113]

His Honour therefore considered section 9 and the new subsections (3) and (4), but disagreed with the President's conclusion that there was:

> An error in the sentencing process in the present case, in that the material provided at sentence did not suggest that the applicant was likely to be at risk of causing physical harm to members of the community in the future; and, further, that ss 9(3) and 9(4)(a) and (b) reinforce the view that the legislature was primarily concerned to protect the community from offenders who pose an ongoing risk to the community. The drafting of all these provisions is no doubt in some respects unsatisfactory; but, with great respect, I am unable to accede to this interpretation of these and other relevant provisions or, in consequence, to regard them, when so construed, as governing the exercise of the discretion conferred by s. 161B(3) to declare a serious violent offence.[114]

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105 [2000] 1 Qd R 45.

106 In *R v Eveleigh* [2003] 1 Qd R 398, 433 fn 104, Fryberg J stated that it was 'quite arguable' that ss 9(3) and (4) did not apply to that case (in the context of the question whether the use of trivial force amounts to violence for the purposes of the PSA). He cited *'R. v. Dawson* (1977) 64 Cr.App.R. 170; *R. v. Lew* (1978) 40 C.C.C. (2d) 140; *R. v. Jerome* [1964] Qd.R. 595 at 601; *R. v. De Simoni* (1981) 147 C.L.R. 383 at 393; *R. v. Butcher* [1986] V.R. 43. In *R. v. Collins* [2000] 1 Qd.R. 45, the applicability of s. 9(4) was dealt with by the President on the basis of a concession (at 49). McPherson J.A. left the question open (at 58–59) and Ambrose J. did not deal with it'.

107 *R v Collins* [2000] 1 Qd R 45, 48 [14] (McMurdo P).

108 Ibid 48 [15] – 49 [17].

109 Ibid 49 [19].

110 Ibid 49–51 [20].

111 Ibid 51 [20].

112 Ibid 52 [29].

113 Ibid 56 [46] (McPherson JA).

114 Ibid 57 [50].

His Honour noted the 'subjunctive mood'[115] regarding the drafting of sections 9(4)(a)[116] and (b)[117] — assessments of future risk regarding physical harm to members of the community 'if a custodial sentence were not imposed' and the need to protect any members of the community from that risk. He juxtaposed this with the requirement in section 161B(3) that 'the judge must already have concluded at least that a sentence of imprisonment of not less than five years ought to be imposed. Otherwise the jurisdiction to make the declaration under s. 161B(3) would not exist'.[118]

> It follows in my opinion that ss 9(4)(a) and 9(4)(b) cannot be considered as governing, or indeed even relevant to, the exercise of the discretion to make a declaration under s. 161B(3). Having regard to the express exclusion by s. 9(3) of ''the principles mentioned in subsection (2)(a)'' of s. 9, it seems reasonably clear that the function of paras (a) and (b) of s. 9(4) is limited to filling the void created when those two paragraphs of s. 9(2) were specifically displaced in their application to sentencing of offenders for offences involving (a) the use of violence, or (b) the infliction of harm, against another person. Without some provision like those inserted in s. 9(4)(a) and s. 9(4)(b), there would have been no statutory prescription of the kind that the legislature intended to supply for the sentencing of such offenders of the kind described in s. 9(3) and, indeed, no statutory guide at all in such cases.[119]
>
> The conclusion I have reached therefore is that s. 9(3) and s. 9(4)(a) and (b) do not control the discretion exercisable under s. 161B(3) to declare a serious violent offence to have been committed. If it is correct to say that in other respects s. 9(4) provides guidance in the exercise of that discretion, then the succeeding paragraphs of the subsection provide ample authority for performing that task, concluding as they do with the final para. (k), which enjoins the court to have regard in sentencing to: ''(k) anything else about the safety of members of the community that the sentencing court considers relevant.''[120]

McPherson JA would not allow the appeal, because:

> Given that, for reasons already explained, ''the risk of him physically harming a member of the community in the future'' was not a matter to which he was required to have primary regard under s. 9(4)(a), I am unable to agree with the conclusion that his Honour failed to consider the critical issue in making the declaration that is challenged before us.[121]

The third justice was Ambrose J. He did not endorse the reasoning of either of his colleagues:

> In my judgment it is unhelpful to compartmentalise factors relevant to imposition of the sentence in this case by reference to the various provisions of the *Penalties and Sentences Act*. One must approach the balancing of the serious nature of the offence committed by the applicant against matters of his background, remorse and employment prospects etc. which are personal to him. These, of course, are all matters upon which the proper exercise of a sentencing discretion must be based – both in selecting the length of sentence and in determining whether or not the declaration be made. The declaration is merely part of the sentence. It is the whole of the effective sentence which in my view must be considered to determine whether or not it is manifestly excessive.
>
> In my view, the learned sentencing judge appears to have considered all matters relevant both to the length of the sentence imposed and the making of the declaration having the inevitable statutory consequence of destroying eligibility for any remission and the postponement of eligibility to apply for parole.[122]

7.2.2 *R v Bojovic* [2000] 2 Qd R 183

In 1999, a unanimous Court of Appeal in *R v Bojovic*,[123] noted that 'the court in *Collins* searched for some guidance that might assist the court in exercising its discretion under s. 161B, but no clear consensus emerged from the separate reasons of the members of the court'.[124] The Court agreed, relevantly to the narrow question in focus, with McPherson JA's comment that in determining whether to make a declaration under s. 161B(3):

> [T]he question that the court will be considering will not be whether the offender should be sentenced to imprisonment as a protection to the community, but whether, having been so sentenced, he is to be deprived of eligibility for parole after serving half his sentence and further penalised by deferring it until 80 per cent of that sentence has been served.[125]

However, it did not support any view that:

> the court's sentencing discretion is compartmentalised into separate exercises of first determining the quantum of the imprisonment and then, having decided on that, considering the further question whether a declaration

115 Ibid 58 [53].
116 Ibid 57 [51].
117 Ibid 58 [52].
118 Ibid 57-8 [51].
119 Ibid 58 [54].
120 Ibid 58–9 [55].
121 Ibid 59 [58].
122 Ibid 63 [83]-[84].
123 [2000] 2 Qd R 183 (de Jersey CJ, Thomas JA, Demack J).
124 Ibid 190 [29].
125 Ibid 190-1 [30] (in Collins at 58 [52]).

> should be made under s. 161B. The sentencing process is a single integrated one in which the combination of all available options needs to be considered.[126]

This paragraph was later discussed by Fryberg J in *R v Eveleigh*:[127]

> In that passage, the Court unequivocally rejected the two-step approach favoured by McMurdo P. and McPherson J.A. in *Collins*. Since the Court made explicit reference to the judgment of McPherson J.A. in that case, it must be assumed that his Honour's grammatical analysis of s. 161B(3) was not persuasive.[128]

His Honour also noted that:

> *Bojovic* also addressed the question whether the protection of the community was a proper objective of a declaration. It held that it was, referring to s. 9(1)(e) of the Act. It made no reference to ss 9(4)(a) and (b), the question which had divided McMurdo P. and McPherson J.A. in *Collins*.[129]

The Court's ultimate position in *Bojovic* was arguably closest to that of Ambrose J in *Collins*:

> In the absence of positive guidance in the legislation, the courts should act according to principles which they have traditionally followed in imposing sentences. Sentencing is a practical exercise. Courts have traditionally fashioned sentences to meet circumstances of the particular offence, having regard to the needs of punishment, rehabilitation, deterrence, community vindication and community protection. They did so before legislative expression was given to such factors in s. 9.
>
> The power given by s. 161B(3) is simply another option that has been placed in the court's armoury.[130]

7.2.3 *R v Free* [2020] 4 Qd R 80

In 2020, the Court of Appeal endorsed comments in McMurdo P's judgment in *Collins* that:

> The intention to protect the community from future violent offending seems to have been the paramount consideration of the legislature in enacting the 1997 Act.[131]

And:

> The clear intention of the legislature in enacting the 1997 Act was that judges should exercise the s. 161B(3) discretion in appropriate circumstances. Section 3 demonstrates that protection of the community was an important consideration for the legislature, as was punishment and rehabilitation. Sections 9(3), 9(4)(a) and 9(4)(b) reinforce the view that the legislature was primarily concerned to protect the community from offenders who pose an on-going risk to the community. The Attorney-General's second reading speech of the 1997 Act is also consistent with this approach.[132]

That endorsement was made in *R v Free*,[133] where the Court wrote:

> As identified in *R v Collins* [2000] 1 Qd R 45, 49 [20], 52 [29], [the two quotes directly above] having regard to extrinsic materials, it appears the paramount consideration of the legislature in enacting the legislation by which ss 161A and 161B were included in the *Penalties and Sentences Act 1992* was protection of the community from offenders who pose an ongoing risk to the community.
>
> Where a case calls for consideration of whether to exercise the discretion to make a serious violent offence declaration, as part of the integrated process, what the sentencing court is required to do is consider all relevant circumstances, including in a case such as this the matters in ss 9(1), 9(2) and, primarily, s 9(6) *Penalties and Sentences Act 1992*, to determine whether there are circumstances which aggravate the offence in a way which suggests that the protection of the public, or adequate punishment, requires the offender to serve 80 per cent of the head sentence before being able to apply for parole.[134]

Free was a case involving sexual conduct as opposed to violence in the context of marked physical injury. Section 9(6), read with s 9(4) ('sentencing an offender for any offence of a sexual nature committed in relation to a child

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126 Ibid 191 [31].
127 *R v Eveleigh* [2003] 1 Qd R 398.
128 Ibid 413 [52].
129 Ibid 413-14 [54].
130 *R v Bojovic* [2000] 2 Qd R 183, 191 [32]-[33].
131 *R v Collins* [2000] 1 Qd R 45, 51 [20].
132 Ibid 52 [29].
133 *R v Free, Ex parte A-G (Qld)* [2020] 4 Qd R 80 (Philippides JA, Bowskill J, Callaghan J).
134 Ibid 99 [52]-[53]. See also an earlier decision of *R v BAW* [2005] QCA 334, 8 [27] (Jerrard JA, McMurdo P and Wilson J agreeing): 'The analysis of earlier decisions undertaken by Fryberg J in *R v Eveleigh* [2002] QCA 219 resulted in that learned judge summarising the position resulting from earlier decisions of this Court on Part 9A of the *Penalties and Sentences Act 1992* as including the principle that where the making of a declaration is discretionary, the considerations which potentially may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing. That accords with the position the President took in *R v Collins* [2000] 1 Qd R 45 at 49. Matters which a court sentencing BAW must take into account, for his sexual offences committed on children, are set out in s 9(6) of that Act, and include the effect of the offences on the children'.

under 16 years or a child exploitation material offence')[135] is the analogue provision to ss 9(2A) and (3) (regarding an offence that 'involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or that resulted in physical harm to another person').

Section 9(6)(d) is: 'the need to protect the child, or other children, from the risk of the offender reoffending'. This text is comparable to s 9(3)(a) in that it requires assessment of future risk, but it lacks the phrase 'if a custodial sentence were not imposed' which formed part of McPherson J's reasoning in *Collins*.

7.2.4 *R v Townshend* [2021] QCA 106

For a few years, s 9(2A) was removed from the PSA. This was achieved by the *Youth Justice and Other Legislation Amendment Act 2014* (Qld) and section 9(3) then simply read 'in sentencing a violent offender, the court must have regard primarily to the following'. The 11 factors remained. The intention was to remove entirely the principle that imprisonment should be a sentence of last resort. This was then reversed through the *Youth Justice and Other Legislation Amendment Act (No. 1) 2016* (Qld) so that current section 9(2A) and (3) are identical to those versions in the 1997 SVO legislation (renumbering excepted).

In 2021, the Court of Appeal commented on this, in *R v Townshend*.[136] It refused leave to appeal a sentence of 10 years, meaning that it was an automatic, rather than a discretionary, SVO. The cases canvassed above were not discussed. However, Sofronoff P wrote:

> The *Penalties and Sentences Act* is not a statutory code so the common law principles of sentencing continue to apply. The sentencing discretion is, to that extent, at large. However, the legislative intention evinced by the 2016 amendment must be given effect by sentencing courts. It is a legislative command requiring a change to the principles of sentencing that had applied until then. The evident intent of this amendment was a shift that required prominence to be given to the objective circumstances of offending and to the ramifications of the offence for the safety of the community and particular sections of the community.[137]

8 Scrutiny of Legislation Committee analysis

8.1 Criminal Code reforms

In 1997, the Scrutiny of Legislation Committee considered the 'tougher offence' amendments to the Code, but noted also the Attorney-General's comments about nothing in (that) Bill being 'intended to diminish the courts' independence and discretion to impose lenient sentences where they are called for by the facts of a particular case'.[138] It therefore noted 'that although the penalties have been increased, the severity or leniency of the penalty remains a matter within the control of the Judge in each individual case'.[139]

This was then changed in respect of declared schedule 1 offences by the *SVO Amendment Act*.

8.2 *SVO Amendment Act*

In the same year, the same Committee noted that this Bill was the fulfilment of Government election policies. It concluded that the question of whether the legislation had had sufficient regard to the rights and liberties of offenders, was a question for Parliament to consider.[140] It did so after noting that it:

> does not examine policy unless, as in this case, it directly intersects with the Committee's terms of reference. The fundamental legislative principles require that legislation should have sufficient regard to the rights and liberties of individuals. There is no doubt that a bill dealing with matters like sentencing principles and periods of imprisonment will affect the liberties of certain offenders.[141]

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135 The first iteration of these provisions, numbered ss 9(5) and (6), was introduced by the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld). These disengaged the principle that imprisonment is a sentence of last resort in such cases and created the other primary sentencing factors. Later, the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* added this (now numbered as s 9(4)(c): 'the offender must serve an actual term of imprisonment, unless there are exceptional circumstances'. This is not replicated in the provisions regarding violence which precede it in s 9.

136 [2021] QCA 106 (Sofronoff P, Fraser and McMurdo JJA agreeing).

137 Ibid 11 [46].

138 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, 'Criminal Law Amendment Bill — Second Reading', 4872 (Denver Beanland, Attorney-General and Minister for Justice), cited in Scrutiny of Legislation Committee, Parliament of Queensland, *Alert Digest* (Issue No. 2 of 1997, 18 March 1997) 4 [1.14].

139 Scrutiny of Legislation Committee, Parliament of Queensland, *Alert Digest* (Issue No. 2 of 1997, 18 March 1997) 4 [1.15].

140 Scrutiny of Legislation Committee, Parliament of Queensland, *Alert Digest* (Issue No. 3 of 1997, 25 March 1997) 2 [1.8].

141 Ibid 1 [1.4].

It noted the 'justified rationale of the criminal law' being 'the application of sanctions that restrict the rights and liberties of those who engage in socially harmful or disruptive behaviour'.[142] However:

> Despite the justification for the use of such sanctions on deterrence, punishment or the reduction of the opportunity to re-offend, offenders remain citizens in our society with rights and liberties. Their liberties that should not be curtailed more than is necessary for the effective functioning of the criminal justice system.[143]
>
> As law makers, it is therefore arguable that parliamentarians should always carefully consider proposals for the increase of penalties under the criminal law. They should ensure that such increases are proportionate and necessary for the effective operation of the criminal justice system.[144]

9 Offences in the schedule

9.1 Changes to the schedule since its introduction

While the SVO provisions have remained largely unchanged since their introduction, some offence provisions have been added to, and removed from the schedule over time.

At the time of the scheme's introduction in 1997, the schedule included 46 provisions under the Criminal Code, five repealed Code provisions, three offences under the *Corrective Services Act 1988* (Qld) (escape from lawful custody, taking part in a riot or mutiny in custody and destruction of property while taking part in a riot or mutiny in custody) and three offences under the *Drugs Misuse Act 1986* (Qld) ('DMA') (trafficking in dangerous drugs, aggravated supply of dangerous drugs, and producing schedule 1 drugs in excess of quantities listed in schedule 3 of the *Drugs Misuse Regulation 1987* (Qld) '*Drugs Misuse Regulation*').

In its current form, the schedule (now schedule 1[145]) captures 47 offence provisions under the Criminal Code, six repealed Code provisions, two provisions under the *Corrective Services Act 2006* (Qld) (s 122(2) take part in a riot or mutiny, and s 124(a) prepare to escape from lawful custody, in addition to two equivalent provisions under the repealed *Corrective Services Act 2000* (Qld)), and three offences under the DMA (unchanged from those originally listed, but with changes over time to the types and classification of drugs captured under the Act and the *Drugs Misuse Regulation* and, in the case of the offence of trafficking in dangerous drugs, the period of its application – see discussion below).

An example of a recent addition to the schedule is section 324 of the Criminal Code (Failure to supply necessaries), inserted on 7 May 2019 by the *Criminal Code and Other Legislation Amendment Act 2019* (Qld).[146] Its inclusion, which took place in conjunction with an increase in the maximum penalty that applies to this offence from 3 years' to 7 years' imprisonment, was justified on the basis that it:

> reflects the seriousness of this offence and is consistent with the current inclusion of other offences such as endangering life of children by exposure (section 326 of the Criminal Code) and cruelty to children under 16 (section 364 of the Criminal Code).[147]

The offence of cruelty to children under 16 was itself added to the schedule in 2004, alongside the offences of:

- taking a child for immoral purposes (Criminal Code, s 219);
- conspiring to murder (Criminal Code, s 309); and
- taking control of aircraft (Criminal Code, s 417A).[148]

This Act also limited the potential application of the SVO scheme to burglary to situations in which the aggravating circumstances listed under sections 419(3)(b)(i) or (ii) (use or threatened use of actual violence, or while armed) of the Code apply. This had the effect of excluding offences committed in company, or involving damage, or threatened or attempted damage of any property initially captured by the schedule.[149] It also omitted the offences of unlawful assembly (Criminal Code, section 62) and entering or being in premises and committing an indictable offence (Criminal Code, section 421(2)).[150]

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142 Ibid 1 [1.5].
143 Ibid.
144 Ibid 1-2 [1.6].
145 While initially the only the schedule to the *Penalties and Sentences Act 1992* (Qld), it was renumbered as 'schedule 1' in 2010 with the insertion of schedule 2 listing 'qualifying offences' for the imposition of an indefinite sentence under s 162 of the Act: see *Dangerous Prisoners (Sexual Offenders) and Other Legislation Amendment Act 2010* (Qld) s 45 (inserting new sch 2) and sch (renumbering the schedule as sch 1).
146 *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 10.
147 Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019, 5.
148 *Justice and Other Legislation Amendment Act 2004* (Qld) s 84.
149 Ibid.
150 Ibid.

9.2 The 80% minimum non-parole period rule for drug trafficking (2013–2016)

9.2.1 Introduction of the 80% rule in 2013

One of the most significant changes to the application of the SVO scheme occurred in 2013, when legislation was introduced by the then Liberal National Party (LNP) Government proposing to remove the offence of trafficking in dangerous drugs from the schedule.[151] This provision ultimately retained in the schedule only to the extent that it applied to trafficking occurring prior to 13 August 2013.[152] At the same time, amendments were made to the *Corrective Services Act 2006* (Qld) requiring those sentenced to immediate imprisonment for a drug trafficking offence committed after the commencement of this provision[153] to serve a minimum of 80 per cent of their sentence prior to being eligible for release on parole.[154] A complementary provision was inserted into section 5 of the DMA (s 5(2)) requiring a court when sentencing a person to a term of imprisonment for the offence of trafficking to order that they serve a minimum of 80 per cent of their sentence before becoming eligible for parole, unless sentenced to an intensive correction order or suspended sentence.[155] This 80 per cent requirement applied regardless of the length of the prison sentence imposed, in contrast to the existing provisions of the SVO scheme that mandates this only where an offender is sentenced to imprisonment for 10 years or more.

The Explanatory Notes to the Bill justified these changes on the basis of the need:

> to ensure that the punishment for these serious offenders fits the severity of the crime and communicates the wrongfulness of their actions; and aims to promote community safety and protection of the community from such offenders. In turn, the new scheme should enhance public confidence in the criminal justice system by promoting consistency and transparency in sentencing.[156]

In his introductory speech for the Bill, the Attorney-General noted this was part of the LNP's 'pre-election pledge', stating:

> the bill adopts a tough new approach to the sentencing of drug traffickers. The reforms ensure that all convicted drug traffickers sentenced to immediate full-time imprisonment serve a minimum of 80 per cent of their sentence before being eligible to apply for parole release. Drug trafficking has the potential to cause considerable individual suffering but also significant broader social detriment and harm.[157]

9.2.2 Report of the Legal Affairs and Community Safety Committee

In its report following its examination of the Bill, the Legal Affairs and Community Safety Committee ('Committee') referred to New South Wales as at the time being the only other jurisdiction to have introduced a standard non-parole period scheme that applied to drug offences.[158]

The Committee noted submissions to an earlier review undertaken by the former Sentencing Advisory Council in Queensland that had cautioned:

- a standard non-parole period (SNPP) scheme would be likely to generate an increased number of appeals and lead to delays which should be avoided for a number of reasons including 'the impact of delays on victims of crime, and the prospect that persons charged with crimes but ultimately acquitted will have to wait longer for a trial, because of limited resources';
- 'the proposed non-parole periods effectively deprive an offender of adequate time to reintegrate which will in turn result in increased levels of recidivism';
- 'a SNPP can violate the principle of proportionality'; and
- 'within specific offences there are considerable gradations of severity and all offences are not equal'.[159]

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151 *Criminal Law and Other Legislation Amendment Act 2013* (Qld) s 65

152 *Justice and Other Legislation Amendment Act* 2013 (Qld) s 142H. This inclusion was stated to have effect on and from 13 August 2013—which coincided with the date the relevant provisions of the *Criminal Law and Other Legislation Amendment Act 2013* (Qld) came into effect (the date of assent). The initial proposed exclusion of this offence from the schedule appears to have been unintentional, or the implications not fully considered at the time the amendment Act was introduced.

153 *Criminal Law and Other Legislation Amendment Act 2013* (Qld) s 11 inserting a transitional provision into the *Corrective Services Act 2006* (Qld) (s 490C).

154 Ibid s 7 (inserting a new s 182A into the *Corrective Services Act 2006* (Qld)).

155 *Justice and Other Legislation Amendment Act 2013* (Qld) s 68B.

156 Explanatory Notes, Criminal Law Amendment Bill (No.2) 2012, 2–3.

157 Queensland, Parliamentary Debates, Legislative Assembly, 'Introduction – Criminal Law Amendment Bill (No. 2)', 29 November 2012, 2968 (Jarrod Bleijie, Attorney-General and Minister for Justice).

158 Queensland, Legal Affairs and Community Safety Committee, *Criminal Law Amendment Bill (No.2) 2012* (Report No. 27, April 2013) 15.

159 Ibid 16 citing submissions made by the Supreme Court of Queensland, a confidential submission, Bond University - Centre for Law, the Queensland Law Society and Prison Fellowship Queensland to that review.

The Committee also quoted comments made by the Queensland Law Society (QLS) in its submission to the Committee in which it expressed strong opposition to the introduction of the proposed mandatory minimum non-parole period:

> The Society does not support the introduction of the proposed mandatory minimum non-parole period. The Society's long-held position is that sentencing should have at its core a system of judicial discretion exercised within the bounds of precedent....We would object to the application of a mandatory minimum non-parole period constituting a de facto mandatory sentencing regime.[160]

The QLS expressed particular concern about 'any attempt to recast sentences in an effort to meet with community expectations, unless one can be satisfied that those community expectations have been determined on an accurate and justifiable basis'.[161]

The Department of Justice and Attorney-General, in its response to the Committee, noted the Bill implemented the Government's pre-election commitment. It acknowledged the creation of the 80 per cent minimum non-parole period regime for drug traffickers would result in 'some removal of judicial discretion', but submitted 'its impact, including that upon judicial discretion, must be balanced against the need for community protection and the need to denounce those who traffick in dangerous drugs', It submitted it would 'not alter the sentencing judge's discretion to impose a range of other sentencing orders where the circumstances are appropriate, such as a partially suspended sentence'.[162]

The Committee ultimately supported the amendments as being consistent with the policy objectives of the Bill:

> On balance, and after closely examining the relevant issues and viewpoints, the Committee considers that the amendments reflect the Government's commitment to deliver safer communities by taking a hard-line approach to drug traffickers with tougher sentencing laws. Mandatory minimum non-parole periods are true to the policy objective of the Bill, and therefore, receive the Committee's endorsement.
>
> It is vital that the serious harm caused by these offences is reflected in the sentences imposed by the courts, and that there is reasonable consistency in those sentences. The Committee considers this will be achieved with the mandatory non-parole period in new s182A of the *Corrective Services Act 2006*.[163]

9.2.3 Criticism by the Court of Appeal of the 80% rule in *R v Clark* [2016] QCA 173

The Court of Appeal in *R v Clark*[164] refused leave to appeal against a sentence of 3 years' imprisonment for the offence of trafficking in a dangerous drug (methylamphetamine) occurring over a two-and-a-half month period, committed both for commercial gain and to support the defendant's own drug habit. The applicant was aged 24 to 25 at the time of the offending, and 26 at the time of sentence. She commenced using drugs when her first born child died of sudden infant death syndrome. Prior to this, she was described as leading a 'law-abiding life with promising career prospects'.[165] She had two children aged five, and five months who were in foster care. She had failed to comply with the conditions of an earlier imposed probation order, and assessed as not suitable for a community based order.

Because of the 2013 legislative changes, the sentencing court was required to set a parole eligibility date after she had served 80 per cent of the sentence. She argued that the sentence was manifestly excessive, and that she should be resentenced to 3 years' imprisonment, suspended after 12 months, with an operational period of 3 years.

The Court found no error with the original sentencing judge's assessment that her trafficking was too serious to be dealt with by way of an intensive correction order (which is limited to a term of imprisonment of 12 months or less[166]) noting, in any event, she was not a suitable candidate for such an order. Her criminal history and recidivism also meant that she was 'not a suitable candidate for a suspended sentence. She needed a lengthy period of both supervision and support combined with tight controls over her behaviour if she was to successfully rehabilitate'.[167]

The Court noted the sentencing judge had sentenced her 'towards the lower end of the applicable range' moderating the head sentence to take into account mitigating factors, and taking into account what were described as the 'harsh requirements of s 5(2)' of the DMA.[168] The Court found the approach taken by the primary judge in this respect was an appropriate exercise of the sentencing discretion.[169]

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160 Ibid 16 referring to Submission No.3, Queensland Law Society.
161 Ibid.
162 Ibid referring to Letter from the Department of Justice and Attorney-General, 19 February 2013.
163 Ibid 18.
164 [2016] QCA 173.
165 Ibid [1] (McMurdo P).
166 *Penalties and Sentences Act 1992* (Qld) s 112.
167 *R v Clark* [2016] QCA 173 [5] (McMurdo P). See also Morrison JA at [37] and [39].
168 Ibid [5] (McMurdo P) and [56] (Morrison JA, citing the sentencing judge's remarks).
169 Ibid [68] (Morrison JA, McMurdo P and North J agreeing).

In refusing leave to appeal, Morrison JA made extensive comment about what he considered were the 'evident difficulties' with the application of the policy behind the 80 per cent requirement:

> Consider an offender who receives a sentence of a term of imprisonment, and is to serve 80 per cent under s 5(2). If that offender shows demonstrable rehabilitation whilst in prison, that will have no effect on the period of actual custody served, no matter how worthy the conduct and no matter how strong the rehabilitation. One would be forgiven for thinking that cannot be in the community's best interests.
>
> Further, in my view there is an inescapable tension created by s 5(2). That can be demonstrated by considering the factor central to the issue of whether s 5(2) applies in any given case, that is, whether the offender's circumstances warrant suspension of the sentence. Where an offender is charged it is obviously in that offender's interests to demonstrate as clearly as possible, by the time of the sentence, that steps to rehabilitate have been taken, and if not successfully so, then with sufficient promise of success as to warrant suspension. In other words, from the defence point of view it would be of great assistance, in attempting to persuade a court of the appropriateness of suspension, to be able to demonstrate that rehabilitation is under way and a rehabilitation regime is in place.
>
> That may lead, depending on the particular case, to the conclusion that it may be in the offender's interest to delay the sentencing hearing so that there is a greater, or surer, opportunity to obtain such evidence. The tension is obvious in that an offender should not be punished for pleading guilty at the earliest possible time. Section 13 of the *Penalties and Sentences Act 1992* (Qld), and long standing authority, recognise the importance of an early guilty plea in sentencing. Yet, to maximise the chance of achieving suspension of part of the sentence the offender may have to delay the plea.
>
> However, if the offender's legal representatives bring about, participate in, or encourage, such delay, it may be a breach of their duty to the court. Then again, if the court enforced that duty in a way that unfairly deprived an offender of the chance to demonstrate sufficient rehabilitation such as to deny the engagement of s 5(2), there is a risk that the Court will be seen as an arm of the legislature's policy. Policy matters such as that reflected in s 5(2) are not matters for the court.[170]

McMurdo P raised separate concerns that the applicant would have access to only a limited period of community supervision (7 months) due to the operation of this provision, and shared Morrison JA's concerns about the potential for court delays, also noting the potential inequities that might arise as a result:

> As a result of the 2013 amendments to s 5, the applicant, who previously would have spent about 12 months in prison for this offending, will now spend almost two years and five months in prison. Given her drug history and her vulnerability, it is in the community interest that, when she is released on parole, she be subject to extended supervision and support, combined with the tight controls of a parole order, as she struggles to reunite her young family and to reintegrate into the community. She will be subject to parole, however, not for two years as previously, but for a mere seven months. This result does not seem to be in the community interest. And, as Morrison JA points out, there is a real danger that s 5 in its present terms could result in significant delays in the criminal justice system. Offenders who have funds available may seek to delay their sentences to assemble evidence of a rehabilitative regime which could operate independently under a suspended sentence. Impecunious offenders who are unable to assemble such evidence may be ineligible for a suspended sentence and will be sentenced much more harshly. To avoid this consequence, judges may find it necessary to adjourn an offender's sentence until more information as to rehabilitation can be obtained. The legislature may wish to consider whether the amendments to s 5 have resulted in unintended consequences which are not in the interests of the criminal justice system or the community.[171]

9.2.4 Reversal of the 2013 changes

The 2013 changes were reversed in 2016 by the incoming Labor Government. This was achieved by repealing the 80 per cent mandatory minimum non-parole period requirement under section 5(2) of the DMA, and the corresponding provision of the *Corrective Services Act 2006* (Qld), with these provisions applying only to persons sentenced before the commencement of the amendment Act (9 December 2016).[172]

The Explanatory Notes explained this change with specific reference to the 'adverse comments of the Court of Appeal in *R v Clark* [2016] QCA 173'.[173]

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170 Ibid [69]–[72] (Morrison JA).

171 Ibid [6] (McMurdo P).

172 *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) ss 21 (amending *Corrective Services Act 2006* (Qld) s 182A (Parole eligibility date for prisoner serving term of imprisonment for other particular serious offences) and s 165 (amending *Drugs Misuse Act 1986* (Qld) s 5). These changes commenced on the date of assent.

173 Explanatory Notes, Serious and Organised Crime Legislation Amendment Bill 2016, 6.

In introducing the Bill, the then Attorney-General and Minister for Justice, Yvette D'Ath, noted the removal of the mandatory minimum 80 per cent non-parole period requirement, and the restoration of drug trafficking to the SVO scheme:

> restores the court's sentencing discretion and addresses the recent adverse comments of the Court of Appeal, which highlighted, among other concerns, that the mandatory 80 per cent non-parole period created delays in our criminal justice system and potential inequity in sentencing.[174]

9.3 Other use of schedule 1

Schedule 1 is not applied solely for the purposes of the SVO scheme. Its other application is as a basis for requiring courts to order a prison sentence imposed for a schedule 1 offence be served cumulatively with any other term of imprisonment the person is liable to serve where certain criteria are met. These include where the new offence was committed while the person was a prisoner serving a prison sentence, or while the person was released on parole.[175]

Any changes to the schedule therefore also affect the application of this provision.

10 Recommendations, reviews and inquiries related to the scheme

While there has not been a review of the SVO scheme since its commencement, there have been a number of recent inquiries and reviews in Queensland that have made comments and/or recommendations about the scheme, as well as mandatory sentencing more broadly. Those conclusions and recommendations are relevant to the Council's review.

10.1 Queensland Parole System Review

In 2015, the Queensland Government asked Walter Sofronoff QC, now the President of the Court of Appeal, to examine the parole system in Queensland. The Terms of Reference included reviewing the effectiveness and transparency of the parole boards, the adequacy of accountability mechanisms within the parole system, the effectiveness of the legislative framework for parole and what factors increase offenders' successful completion of parole.[176]

Mr Sofronoff delivered his final report to the Queensland Government on 30 November 2016. The report was publicly released, along with the Queensland Government's response, on 16 February 2017.

The report made 91 recommendations, of which two related to mandatory non-parole periods. Mr Sofronoff concluded:

> In my view, there is little doubt that mandatory non-parole periods is a flawed approach. It produces a regime without regard to important discretionary matters that may arise in a given case and which, in the interests of the safety of the community, ought be taken into account…The very essence of the exercise of judicial discretion requires a consideration of all the available sentencing options to decide upon the sentence that will achieve the purpose for which it is imposed – community safety being the paramount concern.[177]

Recommendation 6 of that report was to remove the minimum 80 per cent mandatory non-parole period that then applied under the DMA. This recommendation was accepted by the Queensland Government and, as discussed earlier in this paper, was given effect to in 2016 with the passage of the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld).

Recommendation 7 was that in the case where a sentence is to be imposed for an offence that carries a mandatory non-parole period, judges should be given the discretion to depart from that mandatory period. The SVO scheme was the only mandatory non-parole scheme considered in the report.[178] This recommendation was not supported by the Queensland Government. Citing mandatory non-parole periods for murder, a second eligible sexual offence under the 'Two Strikes' regime and unlawful striking causing death, the Government advised that there was no intention 'to deviate from mandatory non-parole periods for such serious offences at this time'.[179] This Queensland

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174 Queensland, Parliamentary Debates, Legislative Assembly, 'Introduction – Serious and Organised Crime Legislation Amendment Bill', 13 September 2016, 3402.

175 *Penalties and Sentences Act 1992* (Qld) s 156A. The other circumstances are where the offence is committed while the person was at large after escaping from lawful custody under a sentence of imprisonment, or while on a leave of absence granted under the *Corrective Services Act 2000* (Qld) or the *Corrective Services Act 2006* (Qld).

176 Queensland Parole System Review (n 38) x.

177 Ibid 104 [519].

178 Ibid 103 [510]-[511].

179 Queensland Government, *Response to Queensland Parole System Review recommendations* (2017) 5.

Government also expressed concern 'the potential risk to community safety by implementing recommendation 7 outweighs the benefits it could bring to the new parole system'.[180]

Mr Sofronoff also made another recommendation relevant to the SVO scheme – Recommendation 58. This recommendation called on the Government to review the policy 'excluding sexual offenders, life sentenced prisoners, those convicted of murder or manslaughter, or those with a serious violent offence declaration from placement in low security'.[181] The justification provided for this was that 'no process of resettlement and reintegration can be truly effective unless those prisoners who need such support are able to participate in a form of graduated release'.[182] It was made in response to a 2016 QCS-issued directive that permanently prohibited the placement of sexual offenders and prisoners convicted of murder or serious volent offences in low security facilities, regardless of how good their behaviour was over the duration of their sentence.[183]

As with Recommendation 7, this was not supported by the Queensland Government on the basis that 'even if it can be argued that some such prisoners constitute a relative low risk to community safety, the possibility of an escape by an offender in a low security program undermines the community's confidence in our system'.[184] This directive has since been revised and is considered in greater detail below.

10.2 Sentencing for criminal offences arising from the death of a child

In October 2017, the Queensland Government asked the Council to review penalties imposed on sentence for criminal offences arising from the death of a child. The focus of the review was on sentencing for the offences of murder and manslaughter (referred to as 'child homicide offences'). Part of those Terms of Reference was for the Council to identify any trends or anomalies that occur in sentencing for child homicide offences.

The Council delivered its final report to the Attorney-General on 31 October 2018. The report made 8 recommendations and provided advice on four issues some of which concerned matters considered by the Council as going beyond the scope of the Terms of Reference but that were nevertheless worthy of comment. The Queensland Government accepted all 8 recommendations, and at that time made no comment on the advice.[185]

One of those issues the Council provided advice about was the SVO scheme. The Council voiced its concern that the scheme was 'exerting downward pressure on head sentences for child manslaughter in Queensland'.[186] The Council had observed in its review that the mandatory SVO scheme for sentences of 10 years or more for listed offences (which included manslaughter) may have had unintended consequences on the sentencing outcomes for child homicide. In particular, that judicial discretion was fettered for sentences 10 years and over and limited the ability of the court to take into account an offender's plea and other factors in mitigation.[187]

The Council suggested that the Queensland Government consider reviewing the SVO scheme 'both in relation to its operation for child manslaughter and more generally' and 'identify how sentencing levels have been impacted by the introduction of the SVO scheme'.[188] As stated in the Terms of Reference for the current review, it is informed by the Council's earlier advice from the review into sentencing for criminal offences arising from the death of a child.

10.3 Community-based sentencing orders, imprisonment and parole options

In October 2017, the Attorney-General asked the Council to review community-based sentencing orders and parole options and to deliver its report by 31 July 2019. This review was initiated partly in response to Recommendations 3 and 5 of the *Queensland Parole System Review*.[189]

The Council made 74 recommendations to the Queensland Government, of which two pertained to mandatory sentencing. One of those is relevant to the current review of the SVO scheme. Recommendation 3 asked the Government to initiate a review of mandatory sentencing provisions in Queensland, with a view to clarifying the operation of these provisions and considering their modification or repeal where appropriate.[190] The SVO scheme was one of the mandatory sentencing provisions identified by the Council to be reviewed.[191]

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180 Ibid 3.
181 Queensland Parole System Review (n 38) 184 [916].
182 Ibid 194 [918].
183 Queensland Corrective Services, *Custodial Operations Practice Directive: Classification and Placement, Appendix 1: Criteria for placement in Low Security (*2016).
184 *Response to Queensland Parole System Review recommendations* (n 179) 3.
185 The Honourable Yvette D'Ath, Attorney-General and Minister for Justice (Qld), 'Palaszczuk Government toughens punishment for child killers' (Media Release, 21 November 2018) 1.
186 *Sentencing for Criminal Offences Arising from the Death of a Child* (n 59) *xxxix*.
187 Ibid 158.
188 Ibid xxxix.
189 Queensland Parole System Review (n 38) 23.
190 *Community-based Sentencing Orders, Imprisonment and Parole Options* (n 59) xxvi.
191 Ibid Appendix 4.

While a review of mandatory sentences was not specifically requested under the Terms of Reference, mandatory provisions were relevant to the Council's task of reviewing sentencing and parole legislation 'to identify anomalies in sentencing or parole laws that create inconsistency or constrain the available sentencing options available to a court and advise how these anomalies could be removed or minimised'.[192] In its final report, the Council briefly examined the SVO scheme, noting that the mandatory non-parole period of 80 per cent can impact community safety, as offenders will 'spend less of their sentence being supervised in the community and therefore have less time to receive supervision while they reintegrate into the community'.[193] Numerous submissions to the Council voiced concerns about the impacts of mandatory sentences, with particular emphasis placed on how such schemes: limit the ability of the courts to respond to the individual circumstances of a case; can increase sentencing complexity (including administratively in calculating an offender's sentence); and limit community-based monitoring and support to prisoners most in need of it.[194]

The Council recommended:

> The Queensland Government initiate a review of mandatory sentencing provisions in Queensland (with a view to clarifying the operation of these provisions and considering their modification or repeal, as appropriate, taking into account:
>
> (a) the original objectives of these provisions and whether these objectives are being met;
>
> (b) the importance of judicial discretion in the sentencing process; and
>
> (c) the need to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992* (Qld).[195]

It suggested this review:

> should give particular attention to the disproportionate impact of mandatory sentencing provisions on Aboriginal and Torres Strait Islander people, as highlighted by the Australian Law Reform Commission in its 2017 report *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, and other people experiencing disadvantage, as highlighted by stakeholders during this review.[196]

10.4 Inquiry into imprisonment and recidivism

In September 2018, the Queensland Government directed the Queensland Productivity Commission ('Commission') to undertake an inquiry into imprisonment and recidivism. The Commission's final report was provided to the Queensland Government on 1 August 2019, and the Government released its response in January 2020.

The Commission's report considered the impact of mandatory minimum sentencing on imprisonment, noting that it can result in 'unintended consequences and reduce the ability of judges and magistrates to impose sentences that align with the sentencing purposes'.[197] The Commission received many submissions that were critical of mandatory sentencing, and concluded that 'as a general rule, legislative prescriptions should be avoided, and there would be benefit in reviewing existing provisions to ensure they are having the effect that was intended'.[198] With that in mind, the Commission recommended the Government 'review legislated restrictions on judicial discretion, to ensure they are serving their intended purpose' with the Commission recommending this review 'be undertaken by an independent body, such as the Queensland Sentencing Advisory Council'.[199]

The Queensland Government did not respond directly to that recommendation, however noted in its formal response that:

> The Government will continue to explore options to keep communities safe now and into the future, including exploring the extent to which sentences appropriately respond to harms to individuals and communities. This will include ensuring that the criminal justice system delivers effective responses to offending that do not jeopardise community safety and do not impose unnecessary cost burdens on communities.[200]

192 Ibid Appendix 1.
193 Ibid 90.
194 Ibid, 87–90, 101–103.
195 Ibid 103, Recommendation 3.
196 Ibid.
197 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (2019) 299
198 Ibid.
199 Ibid 303.
200 Queensland Government, *Queensland Productivity Commission inquiry into imprisonment and recidivism: Queensland Government response* (2020) 8.

10.5 Women in Prison 2019: A human rights consultation report

The Anti-Discrimination Commission Queensland (ADCQ) commenced a consultation in 2017 with current and former female prisoners, QCS staff, non-government organisations working with the justice system and advocates to assess what progress had been made since it published its previous *Women in Prison 2006* report. Concerningly, the ADCQ found that 'in many ways, the situation had not improved in the intervening decade'.[201]

The report made 46 recommendations, and one them referred to the SVO scheme. Recommendation 32 asked that the Queensland Government review the policy restricting the placement of female prisoners convicted for murder, a sexual offence or with a serious violent offence declaration, with a view to introducing appropriate candidates to low security facilities.[202] As noted above, this was also a recommendation made in the Queensland Parole System Review final report. The ADCQ expressed the view that 'ideally, prisoners should be held at the lowest level of security appropriate for their circumstances to ensure maximum opportunities for rehabilitation'.[203] It found that because there are so few women's prisons in Queensland, 'women often serve their sentences in high security prisons even after they receive a low security classification'.[204]

Since the ADCQ released its report, QCS has revised its policy on the classification and placement of prisoners. The 2021 directive states that 'prisoners who have been convicted of a sexual offence listed in schedule 1 of the CSA [*Corrective Services Act 2006* (Qld)], convicted of murder or sentenced to life imprisonment, are not eligible to be accommodated in a low custody facility in accordance with s68A of the CSA'.[205] In relation to female offenders, the 2021 directive also states that as a first option, where possible, 'female prisoners are considered for low security classification and placement'.[206]

10.6 QLS 'Call to Parties Statement' for 2020 Queensland Election

Prior to the recent Queensland election in October 2020, the Queensland Law Society ('QLS') released its 'Call to Parties Statement'.[207] The Call to Parties sets out a range of policy issues identified by the QLS as needing reform and asks all parties running in the election to declare their position on those issues. Among the numerous issues identified, the QLS asked that parties, 'Refrain from the creation of new mandatory sentencing regimes and to take steps to repeal the current mandatory sentencing regimes'.

The Queensland Labor Party responded with:

> The Palaszczuk Government believes in the fundamental principle of the independence of the judiciary and judicial discretion. Labor holds concerns about mandatory sentencing because it restricts judicial discretion in the sentencing process and is contrary to the court's traditional role of ensuring individualised criminal justice.
>
> The Palaszczuk Labor Government has confidence in the ability of Queensland courts to impose appropriate penalties. Labor believes mandatory sentencing regimes should only be applied in exceptional circumstances only.[208]

The Queensland LNP did not respond to that particular issue, however its response included policy aims in support of mandatory sentencing.[209]

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201 Anti-Discrimination Commission Queensland, *Women in Prison 2019: A human rights consultation report* (2019) 10.
202 Ibid 20.
203 Ibid 134.
204 Ibid 134.
205 Queensland Corrective Services, *Custodial Operations Practice Directive: Classification and Placement* (June 2021) 10.
206 Ibid 4.
207 Queensland Law Society, *Call to Parties Statement – Queensland State Election 2020* (2020).
208 Deputy Premier Steven Miles MP, Call to Parties: Palaszczuk Labor Government response – *Proctor* (qlsproctor.com.au).
209 Shadow Attorney-General and Shadow Minister for Justice David Janetzki MP. For example, a commitment to 'protecting Queenslanders from violent and child sex offenders by introducing new laws that would require repeat offenders to wear a GPS tracker for life' and 'introducing new sentences for child killers, which would guarantee all convicted child killers spend at least 15 years behind bars for the manslaughter of a child and 15 years for the murder of a child': Call to Parties: Response from the LNP – *Proctor* (qlsproctor.com.au).

11 Conclusion

The SVO scheme, and other forms of mandatory sentencing, have attracted significant attention during recent reviews of parole, sentencing and the management of offenders in custody in Queensland as discussed above, as well as at a national level.[210] The Council's principal concern about the SVO scheme in the context of its review of sentences for child manslaughter was that it may be exerting downward pressure on head sentences for child manslaughter, which would not be avoided through the introduction of a new aggravating factor as recommended by the Council. The current review provides an opportunity for the Council to explore this issue and the other impacts of the scheme on sentencing practices in more detail and to identify any potential need for reform.

The SVO scheme was introduced in a very different legislative environment than exists now in Queensland. It occurred in a context in which remission may have otherwise constrained a court, in a practical sense, from making a parole recommendation (as the law then allowed) of well over the 50 per cent mark. Parole was still available after an offender had served half their sentence and remission still operated for the final one third of an offender's sentence.[211]

Understood in this context, the SVO scheme provided for a separate parole regime than that which applied to other offenders at the time it was introduced.

Under current legislation, independent of the operation of the SVO scheme, courts have the ability to set a later parole eligibility date than would otherwise apply under the 50 per cent statutory parole eligibility provision.[212] This power is provided by section 160C(5) of the PSA and section 184(3) of the *Corrective Services Act 2006* (Qld). Courts can do so unencumbered by the need to consider the impact of remission or other forms of early release. The Queensland Court of Appeal has found: ''The discretion to fix a parole eligibility date is unfettered; and there can be no mathematical approach to fixing that date, including on the basis of convention'.[213] The Court has, on a number of occasions, refused leave to appeal on the grounds that the sentence imposed was manifestly excessive in circumstances where the sentencing court has postponed parole eligibility to beyond the statutory half-way mark where the circumstances of the offending have been found to warrant this.[214]

Many of the same considerations that apply to delaying parole eligibility more generally also apply to the determination about whether it is appropriate to make a SVO declaration in circumstances where the decision is discretionary. The Court of Appeal's recent statements in *R v Free*,[215] make clear that courts, 'as part of the integrated process' are:

> to 'consider all relevant circumstances … and whether there are circumstances which aggravate the offence in a way which suggests that the protection of the public, or adequate punishment, requires the offender to serve 80 per cent of the head sentence before being able to apply for parole'.[216]

The Council's Issues Paper, to be released later this year, will consider whether the SVO scheme supports these objectives of community protection and just punishment and invite views on these issues.

Relevant case law on the application of the SVO scheme will be explored more fully in background paper 3.

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210 See, for example, Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No. 133, 2017) Recommendation 8-1. This recommended the repeal of mandatory or presumptive terms of imprisonment that have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. This considered the impact of mandatory sentencing provisions more generally, and did not comment specifically on the SVO scheme. Also, the Australian Law Council. *The Justice Project: Final Report* (August 2018). Recommendation 7.6. This recommended the repeal of mandatory sentencing laws and reform of bail and parole laws and conditions which disproportionately affect disadvantaged groups, with particular emphasis on the over representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

211 *Queensland Parole System Review* (n 38) 50 [214]. However, note also 4 [22]: 'In 1992 the Penalties and Sentences Act provided that a sentencing court could state a parole eligibility date; the system of eligibility after serving half a sentence was abolished'.

212 *Corrective Services Act 2006* (Qld) s 184(2).

213 *R v Free, Ex parte A-G (Qld)* [2020] 4 Qd R 80, 99 [55] (Philippides JA, Bowskill J, Callaghan J) citing *R v Randall* [2019] QCA 25, [43], referring to *R v Amato* [2013] QCA 158, [20].

214 See, for example: *R v Kirke* [2020] QCA 53; *R v Randall* [2019] QCA 25; *R v WBM* [2020] QCA 107.

215 *R v Free, Ex parte A-G (Qld)* [2020] 4 Qd R 80 (Philippides JA, Bowskill J, Callaghan J).

216 Ibid 99 [52]-[53].

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