Minimum standard non-parole periods

FINAL REPORT

September 2011

SENTENCING ADVISORY COUNCIL

Minimum standard non-parole periods

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This report is not intended to provide legal advice, and has been prepared by the Council only to respond to the Terms of Reference issued to it by the Attorney-General. While all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

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30 September 2011

The Honourable Paul Lucas MP
Attorney-General,
Minister for Local Government and Special Minister of State
GPO Box 15009
CITY EAST QLD 4002

Dear Attorney-General,

Re: Terms of Reference on Minimum Standard Non-Parole Periods

On 20 December 2010, the Council received Terms of Reference from the former Attorney-General, pursuant to s200(1) of the *Penalties and Sentences Act 1992* (Qld), to examine and report on:

1. the appropriate offences to which a minimum standard non-parole period should apply, and
2. the appropriate length of the minimum standard non-parole period for each of the offences identified.

The reporting date under those Terms of Reference was amended, by your letter of 1 April 2011, to 30 September 2011.

On behalf of the Council, and in accordance with s203L(1)(b) of the *Penalties and Sentences Act 1992* (Qld), I enclose the Council's final report and recommendations: *Minimum Standard Non-Parole Periods: Final Report.*

Yours sincerely,

Professor Geraldine Mackenzie
Chair
Sentencing Advisory Council

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Preface

This report presents the Council's advice, pursuant to s 203L(1)(b) of the *Penalties and Sentences Act 1992* (Qld), on Terms of Reference issued by the Queensland Attorney-General to examine and report on the offences to which a Queensland minimum standard non-parole period scheme should apply and the levels at which those non-parole periods should be set.

This reference has been challenging and controversial. Views on sentencing are strongly held, both by those who work in the criminal justice system and members of the general public. Many in the legal profession and other key stakeholder groups have expressed the view that the introduction of standard non-parole periods is potentially a form of mandatory sentencing, and are concerned about the possible impact on judicial discretion. Conversely, many in the general community are of the view that minimum standard non-parole periods will not go far enough to curb what they perceive to be wrong decisions made in sentencing serious violent offenders and sexual offenders who have caused significant harm. Balancing the complexity of opposing views has represented a significant challenge for the Council.

At the same time, there is broad agreement that consistency and transparency are legitimate and important objectives of any modern sentencing system, and that sentencing must not just be about punishment, but also making the community safer. Where there are differences is in views on the best means of achieving these objectives, and the capacity of the current sentencing system to deliver them.

The Council has listened carefully to all views expressed during the course of the Reference. The Council has also been careful to acknowledge the serious nature of the offending behaviour we have been asked to take into account. The community's concern about serious violent offending and sexual offending is understandable, as members of the community have a right to be safe, and to feel safe, in their day-to-day lives. Community concern must be, and is, taken very seriously by the Council. The impacts on victims of serious crime and their families can be devastating, and continue long after an offender has served their sentence.

As part of our consultations on the Reference, the Council has also sought the views of Aboriginal and Torres Strait Islander community members, many of whom have expressed grave concerns about the potential impact of a minimum non-parole period scheme on members of their communities. The over-representation of Aboriginal and Torres Strait Islander people in prison cannot be ignored, and the commitment of the Queensland and Commonwealth governments to addressing this issue has remained central to the Council's considerations.

Those support services who work with other vulnerable groups (for example, people with a mental illness or cognitive impairment) have also voiced their concern about the potential negative impacts of such a scheme on these individuals. In developing its recommendations, the Council has been very conscious of the need to balance the interests of ensuring the harm caused to victims is properly recognised and reflected in the sentence imposed, with the need to ensure vulnerable offenders are not disproportionately affected by any new approach adopted.

Finally, the Council has taken into account how standard non-parole period schemes operate in other jurisdictions, with particular regard to the approach in NSW, as requested in the Terms of Reference. In developing its recommendations on the best form of scheme for Queensland, the Council has considered the functionality of these schemes and how elements of them might apply in Queensland. The Council has also been conscious of the need to ensure that any model recommended will operate effectively in the Queensland context.

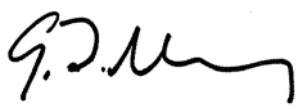
While there is some evidence that the NSW scheme has improved consistency in sentencing in that State (Judicial Commission of NSW (2010)), equally it has been criticised on the basis that it has increased costs to the criminal justice system and made sentencing considerably more complex.

There are concerns that this form of scheme does not deliver what victims of crime and the members of the public were hoping for – clarity, transparency and predictability in sentencing; nor has it led to reduced rates of serious crime or improvements in community safety.

The absence of strong evidence that minimum standard non-parole period schemes are effective, and achieve better sentencing outcomes than existing approaches, has led the Council to question the merits of introducing a minimum standard non-parole period scheme in this State. While the scheme presented in this report is the preferred scheme of the full Council, a majority of members do not support the introduction of a new standard non-parole period scheme of any form in Queensland. The reasons for this are discussed more fully in this report.

The proposed scheme we outline in this report – a new Serious Offences Standard Non-Parole Period Scheme – strengthens guidance for courts with regard to the non-parole expectations for the sentencing of serious violent offenders and sexual offenders, and will have a significant immediate impact on parole eligibility for these offenders following its introduction. It is consistent with current sentencing practices in Queensland, it balances the sentencing aims of punishment with those of deterrence, protection and rehabilitation and, importantly, preserves judicial discretion in response to the individual circumstances of a case.

It is the Council's view that the proposed scheme presented in this report is the best form of minimum standard non-parole period scheme for Queensland, and will meet the objectives articulated by the Queensland Government when it announced an intention to introduce such a scheme. Ongoing monitoring and evaluation of the scheme, if introduced, will be critical to ensure it operates as intended.



Professor Geraldine Mackenzie
Chair
Sentencing Advisory Council

Acknowledgments

The Council would like to thank those individuals and organisations who attended the statewide consultations, roundtable discussions and those who provided submissions on the introduction of standard non-parole periods in Queensland.

The Council also thanks the Department of Justice and Attorney-General and Queensland Corrective Services for making data available to it, and Mr Jim Walker who assisted the Council as a facilitator with its consultations with Aboriginal and Torres Strait Islander community members.

Abbreviations

ABS	Australian Bureau of Statistics
A Crim R	Australian Criminal Reports
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
ALRC	Australian Law Reform Commission
ATSI	Aboriginal and Torres Strait Islander
BAQ	Bar Association of Queensland
CCYPCG	Commission for Children and Young People and Child Guardian
CJ	Chief Justice
CLR	Commonwealth Law Reports
Cth	Commonwealth
div	division
DJAG	Department of Justice and Attorney-General (Qld)
HCATrans	High Court of Australia transcript
Hon	Honourable
ICO	intensive correction order
J	Judge, Justice (JJ plural)
LAQ	Legal Aid Queensland
MP	Member of Parliament
MSNPP	minimum standard non-parole period
n	number
NPP	non-parole period
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLR	New South Wales Law Reports
NT	Northern Territory
NZ	New Zealand
ODPP	Office of the Director of Public Prosecutions
OESR	Office of Economic and Statistical Research
PACT	Protect All Children Today Inc
para	paragraph
pt	part
QCA	Queensland Court of Appeal
QCS	Queensland Corrective Services
Qd R	Queensland Reports
Qld	Queensland
QLS	Queensland Law Society
QPS	Queensland Police Service
QPUE	Queensland Police Union of Employees
QSC	Supreme Court of Queensland
R	Regina (the Crown)
s	section (ss plural)
SA	South Australia
SASC	Supreme Court of South Australia
SASCFC	Supreme Court of South Australia Full Court
SASR	South Australian State Reports
SCR	Supreme Court of Canada
SNPP	standard non-parole period
SO	serious offence pursuant to the Council's recommendations
SVO	serious violent offence pursuant to Part 9A of the *Penalties and Sentences Act 1992* (Qld)
Tas	Tasmania
Tas R	Tasmanian Reports
UK	United Kingdom
UN	United Nations
v	against
Vic	Victoria
VR	Victorian Reports
WA	Western Australia

EXECUTIVE SUMMARY

Background

In October 2010, the Queensland Government announced its intention to introduce standard non-parole periods (SNPPs) for serious violent offences and sexual offences in Queensland.

The former Attorney-General and Minister for Industrial Relations, the Honourable Cameron Dick, issued Terms of Reference to the newly established Sentencing Advisory Council on 20 December 2010, asking the Council to examine and report on the introduction of a SNPP scheme, including:

- the offences to which a minimum SNPP should apply, and
- the appropriate length of the minimum SNPP for each of those offences identified.

The Council was also asked to consider a range of related issues, including whether or not the NSW SNPP approach should be adopted in Queensland.

In addressing the Terms of Reference, the Council:

- hosted four preliminary roundtables with key stakeholders
- released a detailed Consultation Paper and a companion research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland*
- conducted targeted consultations in 13 locations throughout Queensland and engaged a consultant to co-facilitate sessions with Aboriginal and Torres Strait Islander communities and community members
- conducted a separate consultation session with prisoners at Lotus Glen Correctional Centre
- held a final roundtable with key stakeholders to discuss legal issues related to the Reference, and
- invited submissions from the community and received over 340, comprising 288 online response forms and 56 written submissions from individuals and organisations.

The SNPP scheme presented in this final report has been developed by the Council to function as a single integrated sentencing model. Individual

recommendations should therefore be read in the context of the broader structure of the scheme and how it is intended to operate.

What is a standard non-parole period (SNPP)?

A SNPP is a legislated non-parole period intended to provide guidance to the courts on the minimum length of time an offender found guilty of an offence should spend in prison before being eligible to apply for release on parole.

Although not formally identified as such, there are in effect already three forms of standard, or minimum, non-parole periods in existence in Queensland:

- a minimum non-parole period of 15 years, or 20 years in some cases, that applies to offenders sentenced to life imprisonment
- a minimum non-parole period of 15 years, or 80 per cent of the term of imprisonment imposed (whichever is the lesser), that applies to an offender declared by a court as convicted of a 'serious violent offence' under Part 9A of the *Penalties and Sentences Act 1992* (Qld), and
- a minimum non-parole period of 50 per cent of the term of imprisonment imposed, that applies to an offender for whom no parole release or eligibility date has been set by the sentencing court.

A SNPP that applied as a presumptive minimum non-parole period for certain serious violent offences and sexual offences would alter the current approach to setting non-parole periods in Queensland for prescribed offences by requiring courts to set the SNPP as the non-parole period unless there are grounds to depart.

SNPP-style schemes exist in NSW, the Northern Territory and South Australia. Some Commonwealth offences also carry standard, and in some cases mandatory, minimum non-parole periods. It is clear from views expressed by legal practitioners and the courts, including during the course of appeal decisions, that the interpretation and application of these SNPP schemes are not straightforward.

What are 'serious violent offences' and 'sexual offences'?

Sections 4 and 160 of the *Penalties and Sentences Act* define what are considered to be 'serious violent offences' and 'sexual offences' for the purposes of legislative provisions relating to parole.

Qualifying 'serious violent offences' are set out in Schedule 1 of the *Penalties and Sentences Act* and include over 50 offences. To be considered a 'serious violent offence', it is not enough for the offence to simply be listed in Schedule 1 as such. For an offence to qualify as a 'serious violent offence', the court must make a declaration, pursuant to Part 9A of the Act, that the offender has been convicted of a serious violent offence (SVO). In the case of sentences of 10 years or more imposed for a qualifying offence, the making of this declaration is mandatory, whereas a court has discretion to do so if the sentence imposed is for five years or more, but less than 10 years.

A court may also make a declaration when imposing a sentence of any length for offences not listed in Schedule 1, but that:

- involved the use of, counselling or procuring the use of, or conspiring or attempting to use, serious violence against another person, or
- resulted in serious harm to another person.

Murder, which carries a mandatory life sentence, is not listed in Schedule 1 as there are separate provisions in the *Criminal Code* (Qld) and *Corrective Services Act 2006* (Qld) that govern parole eligibility for these offenders. Manslaughter, rape and most child sexual offences are, however, listed in Schedule 1 of the Act as offences in relation to which a SVO declaration may be made.

Council views on the introduction of a SNPP scheme

The Terms of Reference request the Council's advice on key aspects of a Queensland SNPP scheme, not advice on the question of whether or not such a scheme should be introduced in Queensland. However, a number of comments have been directed at this issue over the course of the Reference, and the Council considers it appropriate to express its views on this matter.

A majority of the Council does not support the introduction of a SNPP scheme in Queensland. In particular, a majority of the Council is concerned that there is limited evidence that SNPP schemes meet their objectives, beyond making sentencing more punitive and the sentencing process more costly and time consuming. Added to this are the possible negative impacts of such a scheme on vulnerable offenders.

A minority of the Council supports the introduction of a SNPP scheme in Queensland, and the need to ensure that offenders sentenced to imprisonment for serious offences spend a substantial period of that sentence in prison, one of the aims being to appropriately acknowledge the harm caused by these offences. Although all Council members recognise that the experience of being a victim of serious violence or a sexual offence often has a significant and ongoing impact on people's lives, the minority view is that a SNPP scheme can be of benefit in reflecting community expectations of the minimum period an offender convicted of such offences must spend in prison.

Structuring a Queensland SNPP scheme: guiding principles

The following recommendations present the Council's advice on what the elements of a Queensland SNPP scheme should be, if introduced. In identifying what type of SNPP scheme Queensland might adopt and how it might apply, the Council has had regard to the overarching interests of:

- meeting the Queensland Government's objectives, as set out in the Terms of Reference, of ensuring that penalties imposed for serious violent offences and sexual offences in Queensland are 'commensurate with community expectations' and that 'offenders who commit serious violent offences and sexual offences serve an appropriate period of actual incarceration'
- providing a useful benchmark for courts on the non-parole period offenders convicted of certain serious offences should serve in prison relative to the sentence imposed, while preserving judicial discretion to impose a just and appropriate sentence in individual cases
- targeting the scheme at the most serious forms of offending, and offences of mid to high level seriousness that ordinarily warrant an offender serving a substantial term of actual imprisonment, including 'to punish the offender to an extent or in a way that is just in all the circumstances'[1]
- minimising the risks that the scheme will disproportionately affect Aboriginal and Torres Strait Islander offenders and other vulnerable groups, such as offenders with an intellectual impairment or mental illness, taking into account their over-representation in the criminal justice system and high levels of disadvantage
- acting consistently with existing Queensland government strategies and commitments made at a national level, including the Queensland *Aboriginal and Torres Strait Islander Justice Strategy 2011–14* (in draft), the *National Indigenous Law and Justice Framework 2009 –2015* and the *National Disability Strategy 2010–2020*
- achieving a coherent and transparent sentencing framework for the sentencing of serious offences that promotes public confidence
- preserving, as far as possible, the current sentencing procedures of the courts and ensuring the scheme operates in a complementary way with provisions in the *Penalties and Sentences Act* and *Corrective Services Act* that govern parole eligibility
- ensuring consistency with statutory and common law principles and purposes of sentencing, including those which apply to the sentencing of young offenders, and
- introducing a SNPP scheme that is relatively unambiguous, simple to understand and apply, and that does not overcomplicate what is an already complex sentencing process.

The Council has also taken into account how SNPP schemes operate in other jurisdictions, with particular regard to the approach in NSW as requested in the Terms of Reference. In developing its recommendations on the best form of SNPP scheme for Queensland, the Council has considered the functionality of these schemes and how elements of them might apply in Queensland. Although the Council has been asked to consider applying the NSW

SNPP model in developing its recommendations, it has been conscious of the need to ensure that any SNPP model recommended will operate effectively in a Queensland sentencing context.

What form of scheme should be introduced?

The Council put forward for consultation two approaches to structuring a SNPP scheme:

- Option 1 was a defined term scheme, where the length of time in years and months would be set in legislation as the minimum period that an offender should be ordered to serve in prison for prescribed serious violent offences and sexual offences before being eligible to apply for parole.
- Option 2 was a standard percentage scheme, which would specify a set percentage of the prison sentence that an offender convicted of prescribed serious violent offences and sexual offences should serve in prison before being eligible to apply for parole.

The Council has considered not only what scheme will meet the Queensland Government's objectives, but also the type of SNPP that will best fit with the existing approach to sentencing in Queensland.

Taking all matters into consideration, the Council has determined that a standard percentage scheme would deliver a number of the intended outcomes of a defined term scheme, including the minimum term an offender must spend in prison for a given offence, while preserving the current approach to sentencing in Queensland. It would also largely avoid many problems that have arisen in NSW, including the additional complexity such a scheme has introduced to sentencing in that State, increasing the risks of sentencing errors and appeals, and the need for detailed and broad grounds for departure, which compromise the ability of the scheme to operate as a 'standard' non-parole period scheme.

RECOMMENDATION 1

A Queensland minimum standard non-parole period scheme should take the form of a standard percentage scheme.

A new Serious Offences Standard Non-Parole Period Scheme for Queensland

The Council's view is that the existing SVO scheme under Part 9A of the *Penalties and Sentences Act* should be recast as a new form of SNPP scheme, the Serious Offences SNPP Scheme, which would provide for:

- a SNPP of 65 per cent of the period of imprisonment for prescribed offences, including offences of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, which applies if an offender is sentenced for these offences to five years or more, but less than 10 years imprisonment
- in accordance with the existing SVO scheme under Part 9A of the *Penalties and Sentences Act*, a minimum non-parole period of 15 years or 80 per cent of the period of imprisonment (whichever is the lesser) in the following circumstances:
  - where the offender is sentenced for a Schedule 1 offence, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, to 10 or more years imprisonment and the court must declare the offender convicted of a 'serious offence' (SO)
  - where the offender is sentenced for a Schedule 1 offence, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, to five years or more, but less than 10 years and the court has a discretion to declare the offender convicted of a SO, or
  - where the offender is convicted on indictment of an offence of counselling or procuring the use, or conspiring or attempting to use, violence against another person, or that resulted in serious harm to another person, and the offender is sentenced to a term of imprisonment of any length, the court has a discretion to declare the offender convicted of a SO.

Consistent with the current SVO scheme, the proposed scheme would apply only to offenders convicted on indictment of an offence, and would therefore exclude matters dealt with summarily in the Magistrates Court.

The effect of this would be that, for sentences imposed for a prescribed offence for the purposes of the new SNPP where the total period of imprisonment imposed for those offences is five years or more, but less than 10 years, a court may either:

- declare the offender convicted of a serious offence (a SO declaration, which is discretionary for this group of offenders), in which case the offender will have to serve a minimum of 80 per cent of the sentence in prison, or
- set the non-parole period at 65 per cent of the sentence unless it is of the opinion that it would be 'unjust to do so' (in which case the court will be able to set a shorter or longer non-parole period, provided it gives reasons for doing so, and identifies the factors taken into account in reaching its decision).

RECOMMENDATION 2

A Queensland minimum standard non-parole period scheme should be integrated with the existing Serious Violent Offences scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld), which should be recast as the 'Serious Offences Standard Non-Parole Period Scheme'.

RECOMMENDATION 3

3.1 Part 9A of the *Penalties and Sentences Act 1992* (Qld) should be retitled 'Convictions of Serious Offences'.

3.2 Part 9A of the *Penalties and Sentences Act* should be amended to state that a court may (or, in the case of sentences of 10 years or more for a qualifying offence, must) declare an offender convicted of a 'serious offence' in all circumstances in which a court can currently declare an offender convicted of 'a serious violent offence'.

3.3 In the case of sentences of imprisonment of five years or more, but less than 10 years, imposed for prescribed offences for the purposes of the new minimum standard non-parole period (see Recommendation 16), and that are also offences in relation to which a court may make a serious offence declaration pursuant to Part 9A of the *Penalties and Sentences Act* (as amended), courts should retain the power to make a declaration under Part 9A of the Act that the offender is convicted of a serious offence, with the result that the offender must serve a minimum of 80 per cent of the sentence in prison before being eligible to apply for release on parole.

Limiting the scheme to serious forms of offending

Consistent with the focus of the Terms of Reference on sentencing for serious violent offending and sexual offending, the Council has targeted more serious forms of offending. The Council recommends that a period of five years imprisonment be adopted as the lower limit to activate the application of the new SNPP scheme. In the Council's experience, offences attracting a term of imprisonment of this length are generally those falling at the higher end of offence seriousness which justify a longer term of imprisonment being served to meet the purposes of just punishment. This approach also has the benefit of preserving the availability of court-ordered parole and other parole arrangements for offenders serving sentences of less than five years, and aligns with the power of the court to make a SVO declaration under s 161B(3) of the *Penalties and Sentences Act*.

RECOMMENDATION 4

The new minimum standard non-parole period should apply to sentences of immediate full-time imprisonment of five years or more, but less than 10 years, in circumstances where the court has not made a declaration that the offender is convicted of a 'serious offence'.

RECOMMENDATION 5

The calculation of the specified years of imprisonment for eligibility for the new minimum standard non-parole period should be consistent with the approach under s 161C of the *Penalties and Sentences Act 1992* (Qld).

Sentences of life imprisonment and indefinite sentences

Several offences, such as murder, being considered for inclusion in a Queensland SNPP scheme, carry a maximum penalty of life imprisonment. A different non-parole period regime already applies to offenders sentenced to life imprisonment in Queensland than that which applies to other offences.

Because the Council recommends that a SNPP scheme, if introduced in Queensland, should take the form of a standard percentage scheme, rather than a defined term scheme, it recommends that any offence for which a life sentence or an indefinite sentence is imposed should be excluded from the operation of the scheme. In the Council's view, there is no logical way in which to approach calculating a standard percentage of what is a sentence that the offender must serve for the remainder of their natural life or a sentence that is, by definition, indefinite.

RECOMMENDATION 6
The new Serious Offences Standard Non-Parole Period Scheme should not apply to offences for which an offender is sentenced to life imprisonment or an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Qld), including for murder.

Offences dealt with summarily in the Magistrates Court

As a consequence of the Council's recommendation that the new SNPP should be limited to sentences of imprisonment of five years or more, it will not apply to offences dealt with in the Magistrates Court which has a jurisdictional limit of a maximum of three years imprisonment (or four years imprisonment in certain circumstances pursuant to the *Drug Court Act 2000* (Qld)).

RECOMMENDATION 7
The new Serious Offences Standard Non-Parole Period Scheme, including the new minimum standard non-parole period, should apply only to offenders convicted on indictment and should not apply to indictable offences dealt with summarily in the Magistrates Court.

Suspended sentences, intensive correction orders and probation orders

The SNPP scheme will only apply to sentences of immediate full-time imprisonment, and will not affect courts' ability to make other forms of sentencing orders, that is a sentence of imprisonment that is suspended in whole or in part, ordered to be served by way of intensive correction in the community under an intensive correction order (ICO), or combined with a probation order.

Application of the scheme to young offenders

By a majority, the Council recommends that the new SNPP should apply only to offenders who are 18 years or over at the time of the commission of the offence.

The Council accepts that this aspect of the scheme is anomalous with the current operation of the SVO scheme, although in practice it would be very unusual for a young person to be sentenced to 10 years or more imprisonment and subject to the automatic operation of the scheme. The Council has not been able to access any data on the number of SVO declarations made on a discretionary basis since the scheme's introduction, although it could also be assumed that these declarations would be rarely made in the case of a young offenders aged 17 years on the basis of the usual principles that apply to the sentencing of young people.

RECOMMENDATION 8
The new minimum standard non-parole period should apply only to offenders aged 18 years or over at the time of the commission of the offence.

Defining what a SNPP represents

NSW, the Northern Territory and South Australia define their SNPPs by reference to a representative level of offending (for example, the non-parole period for an offence in the middle of the range of objective seriousness). Because the Council has recommended that the minimum non-parole period should be a standard percentage of the total sentence imposed for qualifying offences, it has determined that it is not appropriate to define the level of offending to which the SNPP would apply. Rather, differences in the objective seriousness of individual offences can be taken into account by sentencing courts in setting an appropriate head sentence.

RECOMMENDATION 9

A 'standard non-parole period' should not be defined under the *Penalties and Sentences Act 1992* (Qld). The minimum standard non-parole period should apply to any offence or offences that meet the eligibility criteria.

Setting the standard non-parole period

Setting an appropriate SNPP for the offences included in a SNPP scheme is one of the most challenging aspects of structuring a SNPP scheme. Even under the Council's proposal to introduce a standard percentage scheme, the selection of an 'appropriate' percentage involves some degree of subjective judgment, although this criticism could equally apply to a defined term scheme.

There is limited evidence to support what 'works' in terms of the quantum of imprisonment that meets the purposes of punishment, deterrence, community protection or rehabilitation, although there is some evidence of the minimum parole period that is necessary to enhance community safety for more serious offences after an offender's release from custody. In a research brief on the effectiveness of community supervision, Queensland Corrective Services concludes there is 'no definitive answer on how long an offender should be supervised after release, without consideration of the individual's circumstances' but that 'empirical evidence suggests that the first 12 months post-release remains the highest period of re-offending'.[2] On this basis, it suggests that, for higher-risk offenders, 'community safety would most likely be enhanced by a minimum offender supervision period of one year post release'.[3]

The new form of SNPP also needs to fit with existing minimum non-parole periods in Queensland, including the 50 per cent non-parole period that applies where the court does not set a parole eligibility date, and the 80 per cent minimum non-parole period that applies to offenders declared convicted of a SVO.

After taking these considerations into account, the Council has concluded that a new SNPP of 65 per cent should apply to those offenders to whom a discretionary SVO declaration for offences listed in Schedule 1 applies (that is, sentences of five years or more, and less than 10 years for a prescribed offence). The application of the new SNPP will mean that those offenders convicted under the scheme and sentenced to five years full-time imprisonment will be subject to a minimum non-parole period of three years and three months, which will allow for the possibility of them spending up to one year and nine months being supervised in the community on parole. In the case of offenders sentenced to just under 10 years, it means the minimum non-parole period will be six and a half years, with provision for them to spend up to three and a half years being supervised in the community. Under these proposals, the actual period of time an offender spends on parole, assuming parole is granted, would remain a decision for the parole boards.

The Council further recommends that, in accordance with the approach taken under s 182 of the *Corrective Services Act*, an offender should be eligible to apply for release on parole after serving 65 per cent of the term, or terms, of imprisonment imposed for prescribed serious offences, or after serving such other period as fixed by the court.

RECOMMENDATION 10
The new minimum standard non-parole period should be set at 65 per cent of the term of full-time imprisonment imposed for a scheme offence or offences where the total period of imprisonment imposed for those offences is five years or more, but less than 10 years.

RECOMMENDATION 11
In accordance with the approach taken with offenders declared convicted of a serious violent offence under Part 9A of the *Penalties and Sentences Act 1992* (Qld), pursuant to s 182 of the *Corrective Services Act 2006* (Qld), an offender to whom the new standard minimum non-parole period applies should be eligible to apply for release on parole after serving 65 per cent of the term, or terms, of imprisonment imposed for a prescribed offence, or after serving such other period as fixed by the court.

Grounds to depart from the SNPP

After considering a range of options, the Council has concluded that a court should be required to set the SNPP as the non-parole period for the offence unless it is of the opinion that it is 'unjust to do so'.

This form of words will create a clear presumption that the SNPP is to apply, while ensuring that judicial discretion is maintained. The court will be permitted to depart only where it is of the opinion it would be 'unjust to do so'.

The recommended form of words addresses the issue raised in the Terms of Reference of how the scheme might accommodate the offence of unlawful carnal knowledge where a young offender is engaged in a consensual, but unlawful, sexual relationship with an underage partner. Although it is unlikely that such an offender will receive a term of imprisonment of five years or more, in the unlikely event that this occurs, the Council is of the view that the recommended grounds for departure will provide courts with sufficient flexibility to respond to these circumstances by setting a shorter non-parole period than the SNPP.

In addition, where a court departs from the SNPP by setting a longer or shorter non-parole period, the Council recommends that the court should be required to state and record its reasons for doing so.

RECOMMENDATION 12
A court should be required to set the minimum standard non-parole period as the non-parole period for a prescribed offence otherwise meeting the eligibility criteria, unless it is of the opinion that it would be 'unjust to do so'. In such circumstances, a court should have the power to set either a shorter or longer non-parole period than the minimum standard non-parole period.

RECOMMENDATION 13
The new Serious Offences Standard Non-Parole Period Scheme should not include specific grounds for departure for the offence of unlawful carnal knowledge based on the offender being in an unlawful, but consensual, sexual relationship with the victim. The closeness in age between the victim and the offender will be a circumstance the court can take into account in determining whether it is unjust to order the offender to serve 65 per cent of their sentence before being eligible to apply for release on parole.

RECOMMENDATION 14
In circumstances where a court departs from the minimum standard non-parole period, it should be required to state and record its reasons for doing so.

Offences to be included in a Queensland SNPP scheme

The Council recommends that the new Serious Offences SNPP Scheme should be integrated with the existing SVO scheme under Part 9A of the *Penalties and Sentences Act*.

For this reason it has concluded that the scheme should apply to all SVO offences currently listed in Schedule 1, as well as offences that involve counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in Schedule 1,

where the offender is sentenced to immediate full-time imprisonment for five years or more, and less than 10 years, and the court has not declared the offender convicted of a serious offence. The list of offences in Schedule 1 is broad, and the Council believes it captures what are the majority of those serious violent offences and sexual offences of concern to the community.

Recommended modifications to the SVO offences

To accommodate the new SNPP scheme, the Council recommends the following modifications to the existing SVO scheme:

1. The existing SVO offences should be recast as 'serious offences', acknowledging that actual violence against the person is not an element of some offences included in the current SVO scheme (such as the drug offences to which Part 9A of the *Penalties and Sentences Act* applies).
2. Offences in the *Criminal Code* that fall within the definition of a 'sexual offence' for the purposes of the *Penalties and Sentences Act*, but which are not listed in Schedule 1 of the Act, should be prescribed offences for the purposes of the new SNPP. There is recognition that these offences are serious and ordinarily warrant a term of imprisonment.

RECOMMENDATION 15

Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) should be retitled 'Serious Offences'.

RECOMMENDATION 16

The new minimum standard non-parole period should apply to the same list of offences to which the current Serious Violent Offence Scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) applies; that is, the offences listed in Schedule 1 of the Act, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in Schedule 1, as well as the following *Criminal Code* (Qld) sexual offences:

- using electronic communication (eg the internet) to procure children under 16 (s 218A)
- obscene publications and exhibitions (s 228)
- involving a child in the making of child exploitation material (s 228A)
- making child exploitation material (s 228B)
- distributing child exploitation material (s 228C)
- possessing child exploitation material (s 228D)
- permitting a young person or a person with an impairment of the mind to be at a place used for prostitution (s 229L), and
- bestiality (s 211).

Application of the SNPP to manslaughter, rape and unlawful carnal knowledge

The Terms of Reference refer to the Queensland Government's intention that a SNPP scheme will apply, at a minimum, to the *Criminal Code* offences of murder, manslaughter, rape, and child sexual offending.

The Council acknowledges that manslaughter, which involves the death of a person, is one of the most serious criminal offences and, on this basis, the community has a reasonable expectation that the serious harm caused should be reflected in the sentences imposed. At the same time, there are persuasive reasons for excluding manslaughter from the application of a SNPP scheme, including the broad scope of conduct captured within this offence category, and differences in offender culpability. Manslaughter represents a broad range of conduct and levels of offender culpability, ranging from deliberate, vicious attacks falling just short of murder, to cases where there is no intention to cause harm, but that involve criminal negligence. This offence category also includes some instances where victims of domestic violence have killed their abusive partners or other family members.

Because the Council recommends that a court should be permitted to depart either up or down from the SNPP in circumstances where it is satisfied it would be unjust for the SNPP to apply, a majority of the Council does not consider it necessary to exclude manslaughter from the operation of the scheme.

The same types of arguments regarding a wide range of offending behaviour arguably apply to excluding rape from a SNPP scheme. Following amendments to the *Criminal Code* in 2000, the definition of rape was extended to include penetration by the offender of the vagina, vulva and anus of the victim by any body part or object, and penetration of the mouth of the victim by the offender's penis. This conduct was previously captured within the scope of the offence of sexual assault and, if committed against a child, indecent treatment of a child under 16.

For similar reasons to those identified in relation to manslaughter, the Council does not support excluding rape from the list of offences to which the SNPP applies. Any differences in offence seriousness can be accommodated by the courts in setting the head sentence and considering whether the application of the SNPP would be unjust in the circumstances.

Similarly, any differences in offence seriousness for the offence of unlawful carnal knowledge, such as the closeness in age between the offender and the child and their relationship, can be accommodated when sentencing by setting the head sentence accordingly. Courts will also have the power to depart from applying the SNPP if they consider it unjust to do so.

The Council further recommends that the courts' approach to sentencing for manslaughter, rape and unlawful carnal knowledge after the introduction of the new Serious Offences SNPP Scheme, including the circumstances in which courts are departing from the SNPP, should be considered as part of the broader evaluation of the scheme recommended by the Council after the scheme has been in operation for a three-year period (see Recommendation 21).

RECOMMENDATION 17

17.1 The *Criminal Code* (Qld) offences of manslaughter (ss 303, 310), rape (s 349) and unlawful carnal knowledge (s 215) should be included in the list of prescribed serious offences under Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) to which the new minimum standard non-parole period will apply.

17.2 The application of the new minimum standard non-parole period to manslaughter, rape and unlawful carnal knowledge, and the circumstances in which courts have departed from the minimum standard non-parole period in sentencing for these offences, should be considered as part of the formal evaluation of the scheme.

Focusing on specific criminal conduct

As the Council has recommended a standard percentage scheme that will apply to all prescribed serious offences, it has not been necessary to examine whether specific forms of conduct should be captured rather than the offences under which that conduct will be charged. If the conduct concerned falls under one of the prescribed offences and is serious enough to warrant a sentence of five years or more, it will be subject to the new SNPP of 65 per cent or, in cases in which a SO declaration is made under Part 9A of the *Penalties and Sentences Act*, to a minimum non-parole period of 80 per cent of the term of imprisonment.

RECOMMENDATION 18

The new minimum standard non-parole period should apply to prescribed offences listed in Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) and otherwise identified as 'prescribed offences' rather than specific forms of conduct that fall under these offence categories (eg 'glassing').

Implementation issues

Whatever scheme is introduced in Queensland, it is highly probable that it will have implications across the criminal justice system, including the cost arising from some offenders spending a longer period in prison. Detailed modelling will be needed to assess the possible effects of delayed release on prisoner numbers.

If the new SNPP scheme results in significant numbers of offenders serving longer periods of actual incarceration, there will need to be an associated increase in the availability of programs to address offending behaviour and increase

rehabilitation of offenders in the State's prisons. It is important that Queensland Corrective Services, which is responsible for such programs, is provided with adequate funding to ensure that prisoners affected will have access to appropriate programs, both within and outside prison, to assist in rehabilitation and post-release support, and importantly, to reduce the risks of re-offending after extended periods of incarceration.

The Council recommends that the Queensland Government should ensure there is an adequate level of investment in rehabilitation services so that offenders convicted of serious violent offences and sexual offences receive the necessary programs and support to minimise their future risks of re-offending.

RECOMMENDATION 19

The Queensland Government should ensure there is an adequate level of investment in rehabilitation services as they apply to offenders convicted of prescribed serious violent offences and sexual offences, to support reduced rates of re-offending and to improve community safety.

Commencement of the scheme

There is a common law presumption against the retrospective application of provisions that result in the additional punishment of an offender, which is consistent with Australia's international commitments under the United Nations International Covenant on Civil and Political Rights. This principle is recognised in s 11(2) of the *Criminal Code*, which states that an offender 'can not be punished to any greater extent' than was authorised by the law at the time the offence was committed, and in s 20C(3) of the *Acts Interpretation Act 1954* (Qld), which provides that if legislation increases the penalty for an offence, this increase applies only to an offence committed after the Act commences.

Taking into account the potential for the SNPP scheme to result in offenders spending longer minimum periods in prison, the Council recommends that the new SNPP should apply only to offences committed on, or after, the commencement of the legislation introducing the new scheme.

RECOMMENDATION 20

20.1 The new minimum standard non-parole period of 65 per cent of the term of imprisonment for a prescribed offence, which applies to immediate terms of full-time imprisonment of five years or more, but less than 10 years, should apply to all relevant offences committed on, or after, the commencement of the scheme and exclude those committed before this date.

20.2 Following the commencement of the new Serious Offences Standard Non-Parole Period Scheme, offenders sentenced for an offence committed before the commencement of the new scheme and who would have been eligible to be declared convicted of a serious violent offence, should be sentenced in accordance with the existing provisions under Part 9A of the *Penalties and Sentences Act 1992* (Qld).

Monitoring and evaluation

The Council has undertaken an analysis of courts data to give an indication of the number of defendants who may be impacted by the proposed new 65 per cent SNPP after its introduction. The Council estimates that about 200 offenders per year will be affected if recent offending and sentencing patterns continue.

In developing its recommendations, the Council has endeavoured to minimise the possible disproportionate impacts of a SNPP scheme on Aboriginal and Torres Strait Islander offenders and other vulnerable groups.

The Council considers it important to monitor and evaluate the impacts of the new scheme. As a guide, the Council suggests that the scheme be formally evaluated three years after its commencement. Although it will not be possible at this time to measure the impact of the scheme in terms of increasing prisoner numbers or, for example, rates of return to custody for offenders sentenced under the scheme, this evaluation should be able to assess what the immediate impacts of its implementation have

been, including preliminary data on changes in sentencing patterns and impact on the courts.

RECOMMENDATION 21

21.1 The new Queensland Serious Offences Standard Non-Parole Period Scheme should be monitored and evaluated to assess its impacts on the operation of the criminal justice system.

21.2 The initial evaluation of the scheme should be scheduled for three years after the scheme has commenced operation and include, but not be limited to, an assessment of any changes that can be attributed to the scheme's introduction to charging practices, sentencing and parole practices and outcomes, rates of guilty pleas, rates of appeals, time taken to finalise matters and impact on the courts. The evaluation should also examine and report on outcomes for Aboriginal and Torres Strait Islander offenders, as well as other vulnerable groups such as offenders with an intellectual impairment or mental illness.

RECOMMENDATION 22

The Queensland Government should ensure that the necessary arrangements are made to support any future evaluation of the Serious Offences Standard Non-Parole Period Scheme, including ensuring that information on prescribed offences falling within the scope of the scheme can be collected, and is recorded, for future analysis.

RECOMMENDATIONS

RECOMMENDATION 1

A Queensland minimum standard non-parole period scheme should take the form of a standard percentage scheme.

RECOMMENDATION 2

A Queensland minimum standard non-parole period scheme should be integrated with the existing Serious Violent Offences scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld), which should be recast as the 'Serious Offences Standard Non-Parole Period Scheme'.

RECOMMENDATION 3

3.1 Part 9A of the *Penalties and Sentences Act 1992* (Qld) should be retitled 'Convictions of Serious Offences'.

3.2 Part 9A of the *Penalties and Sentences Act* should be amended to state that a court may (or, in the case of sentences of 10 years or more for a qualifying offence, must) declare an offender convicted of a 'serious offence' in all circumstances in which a court can currently declare an offender convicted of 'a serious violent offence'.

3.3 In the case of sentences of imprisonment of five years or more, but less than 10 years, imposed for prescribed offences for the purposes of the new minimum standard non-parole period (see Recommendation 16), and that are also offences in relation to which a court may make a serious offence declaration pursuant to Part 9A of the *Penalties and Sentences Act* (as amended), courts should retain the power to make a declaration under Part 9A of the Act that the offender is convicted of a serious offence, with the result that the offender must serve a minimum of 80 per cent of the sentence in prison before being eligible to apply for release on parole.

RECOMMENDATION 4

The new minimum standard non-parole period should apply to sentences of immediate full-time imprisonment of five years or more, but less than 10 years, in circumstances where the court has not made a declaration that the offender is convicted of a 'serious offence'.

RECOMMENDATION 5
The calculation of the specified years of imprisonment for eligibility for the new minimum standard non-parole period should be consistent with the approach under s 161C of the *Penalties and Sentences Act 1992* (Qld).

RECOMMENDATION 6
The new Serious Offences Standard Non-Parole Period Scheme should not apply to offences for which an offender is sentenced to life imprisonment or an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Qld), including for murder.

RECOMMENDATION 7
The new Serious Offences Standard Non-Parole Period Scheme, including the new minimum standard non-parole period, should apply only to offenders convicted on indictment and should not apply to indictable offences dealt with summarily in the Magistrates Court.

RECOMMENDATION 8
The new minimum standard non-parole period should apply only to offenders aged 18 years or over at the time of the commission of the offence.

RECOMMENDATION 9
A 'standard non-parole period' should not be defined under the *Penalties and Sentences Act 1992* (Qld). The minimum standard non-parole period should apply to any offence or offences that meet the eligibility criteria.

RECOMMENDATION 10
The new minimum standard non-parole period should be set at 65 per cent of the term of full-time imprisonment imposed for a scheme offence or offences where the total period of imprisonment imposed for those offences is five years or more, but less than 10 years.

RECOMMENDATION 11
In accordance with the approach taken with offenders declared convicted of a serious violent offence under Part 9A of the *Penalties and Sentences Act 1992* (Qld), pursuant to s 182 of the *Corrective Services Act 2006* (Qld), an offender to whom the new standard minimum non-parole period applies should be eligible to apply for release on parole after serving 65 per cent of the term, or terms, of imprisonment imposed for a prescribed offence, or after serving such other period as fixed by the court.

RECOMMENDATION 12
A court should be required to set the minimum standard non-parole period as the non-parole period for a prescribed offence otherwise meeting the eligibility criteria, unless it is of the opinion that it would be 'unjust to do so'. In such circumstances, a court should have the power to set either a shorter or longer non-parole period than the minimum standard non-parole period.

RECOMMENDATION 13
The new Serious Offences Standard Non-Parole Period Scheme should not include specific grounds for departure for the offence of unlawful carnal knowledge based on the offender being in an unlawful, but consensual, sexual relationship with the victim. The closeness in age between the victim and the offender will be a circumstance the court can take into account in determining whether it is unjust to order the offender to serve 65 per cent of their sentence before being eligible to apply for release on parole.

RECOMMENDATION 14
In circumstances where a court departs from the minimum standard non-parole period, it should be required to state and record its reasons for doing so.

RECOMMENDATION 15
Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) should be retitled 'Serious Offences'.

RECOMMENDATION 16
The new minimum standard non-parole period should apply to the same list of offences to which the current Serious Violent Offence Scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) applies; that is, the offences listed in Schedule 1 of the Act, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in Schedule 1, as

well as the following *Criminal Code* (Qld) sexual offences:

- using electronic communication (eg the internet) to procure children under 16 (s 218A)
- obscene publications and exhibitions (s 228)
- involving a child in the making of child exploitation material (s 228A)
- making child exploitation material (s 228B)
- distributing child exploitation material (s 228C)
- possessing child exploitation material (s 228D)
- permitting a young person or a person with an impairment of the mind to be at a place used for prostitution (s 229L), and
- bestiality (s 211).

RECOMMENDATION 17

17.1 The *Criminal Code* (Qld) offences of manslaughter (ss 303, 310), rape (s 349) and unlawful carnal knowledge (s 215) should be included in the list of prescribed serious offences under Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) to which the new minimum standard non-parole period will apply.

17.2 The application of the new minimum standard non-parole period to manslaughter, rape and unlawful carnal knowledge, and the circumstances in which courts have departed from the minimum standard non-parole period in sentencing for these offences, should be considered as part of the formal evaluation of the scheme.

RECOMMENDATION 18

The new minimum standard non-parole period should apply to prescribed offences listed in Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) and otherwise identified as 'prescribed offences' rather than specific forms of conduct that fall under these offence categories (eg 'glassing').

RECOMMENDATION 19

The Queensland Government should ensure there is an adequate level of investment in rehabilitation services as they apply to offenders convicted of prescribed serious violent offences and sexual offences, to support reduced rates of re-offending and to improve community safety.

RECOMMENDATION 20

20.1 The new minimum standard non-parole period of 65 per cent of the of the term of imprisonment for a prescribed offence, which applies to immediate terms of full-time imprisonment of five years or more, but less than 10 years, should apply to all relevant offences committed on, or after, the commencement of the scheme and exclude those committed before this date.

20.2 Following the commencement of the new Serious Offences Standard Non-Parole Period Scheme, offenders sentenced for an offence committed before the commencement of the new scheme and who would have been eligible to be declared convicted of a serious violent offence, should be sentenced in accordance with the existing provisions under Part 9A of the *Penalties and Sentences Act 1992* (Qld).

RECOMMENDATION 21

21.1 The new Queensland Serious Offences Standard Non-Parole Period Scheme should be monitored and evaluated to assess its impacts on the operation of the criminal justice system.

21.2 The initial evaluation of the scheme should be scheduled for three years after the scheme has commenced operation and include, but not be limited to, an assessment of any changes that can be attributed to the scheme's introduction to charging practices, sentencing and parole practices and outcomes, rates of guilty pleas, rates of appeals, time taken to finalise matters and impact on the courts. The evaluation should also examine and report on outcomes for Aboriginal and Torres Strait Islander offenders, as well as other vulnerable groups such as offenders with an intellectual impairment or mental illness.

RECOMMENDATION 22

The Queensland Government should ensure that the necessary arrangements are made to support any future evaluation of the Serious Offences Standard Non-Parole Period Scheme, including ensuring that information on prescribed offences falling within the scope of the scheme can be collected, and is recorded, for future analysis.

CHAPTER 1
INTRODUCTION

1.1 Background to this report

In October 2010, the Queensland Government announced its intention to introduce standard non-parole periods (SNPPs) for serious violent offences and sexual offences in Queensland.

The former Attorney-General and Minister for Industrial Relations, the Honourable Cameron Dick, issued Terms of Reference to the newly established Sentencing Advisory Council on 20 December 2010, asking the Council to examine and report on the introduction of a SNPP scheme, including:

- the offences to which a minimum SNPP should apply, and
- the appropriate length of the minimum SNPP for each of those offences identified.

The Council was also asked to consider a range of related issues, including whether or not the NSW SNPP approach should be adopted in Queensland. The Terms of Reference are set out in full in Appendix 1 of this report.

Implicit in the Terms of Reference is a need to consider and provide advice on the structure of a SNPP scheme as it might operate in the Queensland sentencing environment.

This report presents the Council's advice, pursuant to s 203L(1)(b) of the *Penalties and Sentences Act 1992* (Qld), on the Terms of Reference.

The former Attorney-General, in referring the matter to the Council, had regard to a number of matters, including existing sentencing principles and practices, and the need to maintain judicial discretion to impose a just and appropriate sentence. The Council must similarly have regard to these matters.

As requested in the Terms of Reference, the Council has considered a number of specific matters in providing its advice:

- the Queensland Government's intention that the new scheme will apply to serious violent offences and sexual offences and, at a minimum, to the offences of murder,

manslaughter, rape and child sex offending
- whether the offence of manslaughter sufficiently lends itself to a SNPP, given the range of circumstances in which this offence can be committed and differences in offender culpability
- the appropriate length of a SNPP for rape, given the range of conduct that is captured by this offence
- with respect to carnal knowledge, how the situation of a young offender engaged in a consensual, but unlawful, sexual relationship with an underage partner might be accommodated within a SNPP scheme
- the appropriateness of singling out specific criminal conduct (such as 'glassing') as the subject of SNPPs, or whether SNPPs should apply to specific offences that would ordinarily capture that conduct (for example, unlawful wounding, assault occasioning bodily harm while armed or grievous bodily harm)
- how a SNPP scheme is to operate in light of Part 9A of the *Penalties and Sentences Act* relating to non-parole periods for offences declared by a court as being a 'serious violent offence', including consideration of any reforms to ensure their complementary operation with the new scheme, and
- what the grounds for departure from SNPPs should be, to either increase or decrease those periods.

1.2 Our approach

As part of initial consultations on the Terms of Reference, the Council hosted four roundtables in February 2011 attended by a range of stakeholders. A list of these consultations is provided in Appendix 2.

The main objective of these roundtables was to invite input on the Council's proposed approach to the Reference and to seek input on matters to be explored by the Council in responding to it.

To gain a better understanding of the impacts of SNPPs in NSW, members of the Council Secretariat travelled to Sydney in March 2011 to meet with representatives of the courts, legal practitioners, Corrective Services NSW and victim support service providers. A list of these meetings is also provided in Appendix 2.

On 10 June 2011, the Council released a detailed Consultation Paper, which contained 28 questions for response,[4] and a companion research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland*.[5] The research paper explored in some detail the sentencing of offenders for serious offences, parole eligibility and average time spent in prison prior to release. The research paper also separately considered the sentencing profile for Aboriginal and Torres Strait Islander offenders and how this differed from that of non-Indigenous offenders.

After the release of the Consultation Paper, the Council used print advertisements and other media channels to invite members of the community to make submissions. These could be made in a number of ways, including by using an online form that contained 14 questions for response.

The Council also conducted targeted face-to-face consultations throughout Queensland, beginning in mid-June 2011. The consultations held in the following 13 locations were attended by over 150 participants:

- Mt Isa
- Townsville
- Brisbane (two sessions)
- Thursday Island
- Cairns
- Gold Coast
- Ipswich
- Mackay
- Maroochydore
- Rockhampton
- Toowoomba
- Bundaberg, and
- Cherbourg.

A consultant was engaged by the Council to co-facilitate sessions with Aboriginal and Torres Strait Islander communities and community members.

A separate consultation session also took place with prisoners at Lotus Glen Correctional Centre, which is located south of Mareeba. This centre services the Cape York Region including Cairns,

isolated communities and the Torres Strait Islands, and has a high population (about 70%) of Aboriginal and Torres Strait Islander people. The majority of prisoners who participated in the consultation session hosted at Lotus Glen were Aboriginal or Torres Strait Islander.

In August 2011, the Council conducted a final roundtable consultation session in Brisbane with key criminal justice agencies and legal representatives to consider the legal aspects of a SNPP scheme.

For a full schedule of consultations see Appendix 2.

1.3 Overview of consultation process and feedback

Consultation and submissions process

Over 340 submissions were received, with a substantial number of these being from members of the public who responded by means of the online response form on the Council's website. In total, 288 response forms were completed using the Council's website.[6] Of other written submissions, 35 were received from members of the public, with the remainder submitted by organisations including legal service providers, professional bodies and associations, non-government support services and statutory government authorities.

The majority of people who completed the response form identified themselves as members of the community (n=193), followed by victims of crime (n=15). Other respondents included police officers, corrections officers, legal practitioners, victim support service providers and offender support service providers. Unlike the majority of other submissions received from members of the public, the submissions made using the response form provided some feedback on the possible structure of a SNPP scheme. A summary of responses received through the online response form will be published on the Council's website.

The Council also prepared a Consultation Response Form, which was distributed at consultation sessions and in response to enquiries received from members of the general public; nine completed forms were returned.

Through the roundtable discussions and targeted face-to-face consultations, the Council consulted with a wide range of participants, including representatives from:

- State government agencies involved in sentencing and the administration of the criminal justice system, including the Queensland Police Service, the Department of Justice and Attorney-General, Queensland Corrective Services, Child Safety Services, Community Services, Aboriginal and Torres Strait Islander Services, and Disability Services Queensland
- community advocacy and support groups for offenders, victims of crime, Aboriginal and Torres Strait Islander people and other vulnerable groups
- local government including mayors and councillors
- legal professional and representative bodies including community legal centres and Aboriginal and Torres Strait Islander legal services
- Indigenous groups, including Murri Courts, the Statewide Community Justice Reference Group, the Cape York Justice Committee and the Torres Strait Regional Authority
- universities and other research institutions, and
- community organisations representing people with a disability, including a mental illness or intellectual impairment, from culturally and linguistically diverse backgrounds, and who speak languages other than English.

Appendix 3 provides a list of some of the submissions received, including respondents to the online response form.

Overview of feedback

The views expressed in the feedback process were diverse. There was also a clear division between many of the views expressed by members of the general public, and the views of many legal stakeholders and agencies working with victims and offenders.

The complexity of developing a SNPP scheme was apparent during many of the face-to-face consultations and roundtable discussions, and few submissions provided detailed comment on the preferred elements of a SNPP scheme. The online response form invited respondents to make some comment on how a SNPP scheme should be structured, although not all respondents commented on all questions in the response form.

Most of the written submissions received were from the general public. Many of these did not make specific comment about the introduction of a SNPP scheme, but instead offered opinions about sentencing in Queensland. Many expressed the view that sentences imposed for serious violent offenders and sexual offenders were too lenient and a number expressed a desire for parole to be abolished.

Of the responses from the general public who did comment on a SNPP scheme, the majority supported the introduction of a scheme. Many comments were made that such a scheme would make sentences 'tougher', ensure that offenders serve the actual time in prison they are sentenced to, serve as a deterrent to future offending and protect the community.

In its Consultation Paper, the Council put forward for consultation two approaches to structuring a SNPP scheme:

- Option 1 was a defined term scheme, where the length of time in years and months would be set in legislation as the minimum period that an offender should be ordered to serve in prison for prescribed serious violent offences and sexual offences before being eligible to apply for parole.
- Option 2 was a standard percentage scheme, which would specify a set percentage of the prison sentence that an offender convicted of prescribed serious violent offences and sexual offences should serve in prison before being eligible to apply for parole.

Most of the written submissions from the general public did not make reference to the type of SNPP scheme preferred or how it should be structured. Of those respondents who completed the online response form and expressed a view on this issue, the majority preferred a defined term scheme (n=107, compared with 53 respondents who preferred the adoption of a standard percentage scheme).

The majority of the responses from legal practitioners and agencies working with victims and offenders strongly opposed the introduction of a SNPP scheme. This view was clearly evidenced during consultations, at roundtables and in submissions.

The consensus among these stakeholders was that there was no evidence to support the introduction of a SNPP scheme, and that more research was needed to provide an evidence base to support this policy decision before a SNPP scheme is introduced. Many participants expressed frustration that the Council was not asked to consider the merits of introducing a SNPP scheme. Many of these stakeholders also expressed the view that a SNPP scheme would be a form of mandatory sentencing, and improperly interfere with judicial discretion in sentencing. Of those who did provide comment on the structure of a SNPP scheme, should one be introduced, the majority favoured a standard percentage scheme.

The majority of comments made by these stakeholders emphasised a need to focus on rehabilitation and support programs for offenders both in and out of custody. Concerns were expressed that SNPPs will increase imprisonment costs. Many comments were made that there is no evidence that the introduction of a SNPP scheme will contribute to community safety, and concerns were raised that it may contribute to recidivism if the scheme reduces the amount of time offenders spend on parole because offenders will not have the same opportunity to be supervised and supported for an extended period prior to completing their sentence.

Some legal stakeholders did feel that a SNPP scheme could make sentences more consistent but also noted that it may create false expectations for victims when the SNPP is not applied, particularly if a defined term scheme is adopted.

During many of the regional area consultations, concern was expressed about the impact a SNPP scheme may have on Aboriginal and Torres Strait Islander offenders, and whether it would result in an increase in the use of imprisonment and in lengths of imprisonment. Comments were also made that a SNPP scheme would be contrary to the objectives of the draft *Aboriginal and Torres Strait Islander Justice Strategy 2011–14*.[7]

The key themes from consultations with Aboriginal and Torres Strait Islander groups were:

- if a SNPP scheme is to be introduced in Queensland, then the 'standard percentage' option would be preferable as it is closest to the current approach to sentencing in Queensland
- if a SNPP scheme is to be introduced then offenders and victims need to be able to fully understand how the new scheme is intended to operate
- if the scheme is to apply in the Magistrates Court jurisdiction, a role for Murri Courts or a similar body should be considered, especially considering the possible impact on Aboriginal and Torres Strait Islander individuals and families
- on the question of whether or not young offenders should be included in a SNPP scheme, participants were of the view that it was too difficult to provide a definite response, and
- (in regional areas, and reflecting comments made at other consultation sessions) there was insufficient consultation about the initial intention to introduce a SNPP scheme.

The Council's consultation at Lotus Glen Correction Facility focused mainly on the mechanics of the current sentencing and parole systems, together with the effects of imprisonment on prisoners. In relation to current parole practices, there were:

- strong feelings about the need for fairness and timeliness in decision-making
- concerns about what was perceived as being an overly risk-averse approach to the administration of orders and decisions made by parole boards, and
- concerns about the availability of relevant rehabilitation programs.

In developing its recommendations, the Council has taken into consideration the views expressed by the community during consultations, at roundtables and in the submission process.

1.4 SNPPs and parole

What is a SNPP?

A SNPP is a legislated non-parole period intended to provide guidance to the courts on the minimum length of time an offender should spend in prison if found guilty of an offence before being eligible to apply for release on parole.

SNPPs, if introduced, will change the current approach to setting non-parole periods in Queensland by requiring courts in sentencing offenders for an offence included in the scheme to set the SNPP as the non-parole period if certain eligibility criteria are met. SNPPs will therefore guide the courts in setting the minimum time an offender must spend in prison before being eligible to apply for release on parole.

What is parole?

Parole is the conditional release of a prisoner after serving part of their sentence of imprisonment. The offender is then supervised in the community until the expiration of their sentence. The 'non-parole period' is the time an offender must serve in prison before they are eligible for release on parole, or to apply for release on parole.

An offender who is 'on parole' is not free from serving the remainder of their sentence. Rather, offenders on parole serve the remainder of their sentence in the community under supervision so as 'to facilitate their reintegration back into the community'.[8] If an offender breaches any condition of their parole, they may be returned to prison to serve the remainder of their sentence.

The broader purpose of corrective services, as set out in s 3 of the *Corrective Services Act 2006* (Qld), is 'community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders'. Parole, in this context, serves the purpose of community protection and crime prevention through the

rehabilitation of offenders and their reintegration back into the community.

When will an offender be released on parole?

Under the *Corrective Services Act*, parole is the only form of early release available to all prisoners and it can be ordered by the court or by a parole board. Although parole results in release from prison, it is not a release from serving the remainder of the sentence. Offenders remain under Queensland Corrective Services' supervision until the end of their sentence.

For many offenders parole is not automatic. The court may set a parole eligibility date which allows the offender to apply for parole at this date. If the court has not set a parole eligibility date, the date will be determined by the period prescribed in the *Corrective Services Act*. An offender may be kept in prison beyond this period if a parole board considers it appropriate and, based on the Council's research, this is often the case.[9]

How do courts currently approach sentencing?

As discussed in the Consultation Paper, courts in Queensland are currently guided in setting sentences by legislation, sentencing principles from previous cases, actual sentences given in similar cases (comparative sentences) and sentencing principles and outcomes in appeal decisions handed down by the appellate courts.[10]

Legislation was introduced in Queensland in late 2010 enabling the Court of Appeal to issue a formal guideline judgment to guide the courts in sentencing. A guideline judgment is 'a general statement or judgment [of an appeal court], going beyond the facts of the case, which is intended to provide guidance to lower courts in future cases'.[11] A guideline judgment may identify aggravating and mitigating factors, and may also include numerical guidance – for example, in the form of a starting point or sentencing scale or range.

In Queensland, a 'guideline judgment' is defined in s 15AA of the *Penalties and Sentences Act* as containing guidelines to be taken into account by courts in sentencing offenders, being guidelines applying:

- generally
- to a particular court or class of court
- to a particular offence or class of offence
- to a particular penalty or class of penalty, or
- to a particular class of offender.

Given that this provision has only recently been introduced, no formal guideline judgments have yet been issued by the Queensland Court of Appeal.

CHAPTER 2
STANDARD NON-PAROLE PERIODS: AN OVERVIEW OF EXISTING SCHEMES

This chapter briefly reviews the operation of these schemes and some of the issues that have arisen in their application.

2.1 Introduction

There are two broad categories of SNPP schemes operating in Australia:

- defined term schemes, which define the SNPP as the non-parole period (in years) an offender sentenced to imprisonment for specified offence should serve in prison before being eligible to apply for release on parole (for example, seven years for rape), and
- standard percentage schemes, which define the SNPP as a set proportion of the sentence imposed by a court for a SNPP offence (for example, 75% of the sentence).

Although not formally termed 'standard non-parole periods', there are forms of minimum standard non-parole periods that already exist under Queensland legislation. For example, a minimum non-parole period of 80 per cent or 15 years (whichever is the lesser) applies to offenders declared by a court to be convicted of a 'serious violent offence' (SVO) pursuant to Part 9A of the *Penalties and Sentences Act 1992* (Qld).

Chapter 4 considers how a new SNPP scheme might operate within the current legislative framework in Queensland, as well as the merits of the different approaches to structuring a SNPP scheme.

In identifying an appropriate SNPP structure, the Terms of Reference require the Council to consider applying the approach to SNPPs prescribed in the *Crimes (Sentencing Procedure) Act 1999* (NSW), which is a defined term scheme. SNPP schemes also operate in South Australia and the Northern Territory. A minimum non-parole period also applies to some Commonwealth offences.

In its Consultation Paper, the Council also considered schemes operating in Canada and New Zealand.[12]

2.2 New South Wales

NSW has a defined term scheme that came into operation in February 2003 and is currently under review.[13] The NSW scheme applies to a broad range of serious violent offences (including drug offences) and sexual offences, and provides specific defined non-parole periods (in years) for individual offences. The offences to which the scheme applies and their corresponding SNPPs are set out in a table in the *Crimes (Sentencing Procedure) Act 1999* (NSW).[14]

In NSW, the SNPP has been defined as 'the non-parole period for an offence in the *middle of the range of objective seriousness*'[15] for the relevant offence. When applying the scheme, the court must first determine the non-parole period and then set the head sentence; the balance of the sentence must not exceed one-third of the non-parole period unless there are 'special circumstances'.[16]

The NSW legislation does not define what is meant by the 'middle of the range of objective seriousness', but its meaning has been considered at length by the NSW Court of Criminal Appeal. In the leading decision of *R v Way*, the NSW Court of Criminal Appeal noted that as a result of the new scheme there were now two reference points available when passing a sentence, being the maximum penalty for an offence and the SNPP, both prescribed by legislation.[17]

After considering the NSW provisions, the Court made a number of relevant conclusions, including:

- a reason for departing from the SNPP includes that the individual offence falls outside the mid-range of objective seriousness, and
- the SNPPs must be taken as having been intended for a middle-range case where the offender was convicted *after trial* (on the basis that a plea of guilty is a mitigating factor that might justify a departure from the SNPP).

However, the NSW Court of Criminal Appeal has determined even in cases that fall outside the mid-range of objective seriousness, that the SNPP is still relevant as a 'reference point, or benchmark, or sounding board, or guidepost'.[18]

Whether courts are permitted to use the SNPP in this way for offences falling outside the mid-range of objective seriousness, is the subject of a special leave application to the High Court.[19]

Even where there is a plea of guilty, placing the offender outside the strict application of the SNPP, the Court of Criminal Appeal has said that simply because an offender has pleaded guilty, this does not relieve the sentencing judge from indicating where in the range of offending the particular offence falls and the reasons for coming to that conclusion.[20]

The introduction of the NSW scheme was opposed by many criminal justice stakeholders, and has continued to attract criticism on a number of grounds, including:

- the lack of a transparent rationale for setting the SNPP levels
- the significant disparities in SNPP levels for offences included in the scheme by reference to their maximum penalties,[21] and
- the high SNPP levels for some offences relative to their maximum penalties.[22]

For example, the offence of aggravated indecent assault has a maximum penalty of 10 years imprisonment, yet carries a SNPP of eight years. Although the maximum penalty is intended to be reserved for the worst case examples of an offence, because of the combined operation of Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act* (the SNPP provisions) and the presumption in NSW that the non-parole period should represent a minimum of 75 per cent of the head sentence,[23] this theoretically could result in offenders convicted of mid-range examples of the offence, where there are no other factors operating to reduce the SNPP, being sentenced to the maximum penalty for the offence.

Some of the other problems that have arisen in the scheme's practical application relate to the way the scheme is structured and, in particular, the definition of a SNPP and how it has to be taken into account. There has been some confusion identifying what should be considered as part of the 'objective circumstances' of the offence and as relevant to assessing where an offence falls in

terms of objective seriousness. Examples are:

- sentencing judges inappropriately considering the fact that an offender was on conditional liberty at the time of committing the offence,[24] and
- a lack of clarity about where a subjective circumstance (such as a mental illness or a drug addiction) is relevant to objective seriousness because of it being causative of the offence.[25]

Other problems have arisen in terms of sentencing courts failing to adequately specify where, in terms of the range of objective seriousness, the specific example of the SNPP offence lies.[26] The NSW Court of Criminal Appeal has consistently said that, when sentencing for SNPP offences, it is necessary for judges at first instance to specify the extent or degree to which an offence departs from a notional offence in the mid-range of objective seriousness.[27] Although there have been some slight differences of interpretation about the degree of precision required,[28] it appears that some degree of specificity is required.

From a practitioner's perspective, there are problems determining where a particular offence lies in relation to the mid-range, despite claims when the scheme was first introduced, that '[t]he concept of a sentencing spectrum is well known to sentencing judges and criminal law practitioners'.[29] Some NSW practitioners with whom the Council Secretariat met commented that, although it is easy to consider a case representing the worst example, or one that is at the lower end, it is conceptually quite challenging to imagine an offence that falls in the mid-range.[30]

Another problem that has arisen in sentencing for non-SNPP offences is that sentencing courts have, in some cases, adopted a 'two-step' approach to sentencing, applying the same approach to sentencing required for a SNPP offence. This 'two-step' approach involves the court first considering where an offence falls in terms of objective seriousness (required only for SNPP offences), rather than determining the overall appropriate sentence based on the seriousness of the offence, taking into account both subjective and objective factors.[31] The NSW Court of Criminal Appeal has cautioned against this approach as being likely to give rise to 'confusion and misinterpretation'.[32]

In the Council Secretariat's discussions with NSW representatives in March 2011,[33] impacts of the NSW scheme identified included:

- concerns about overcharging practices by police, for both SNPP and non-SNPP offences, to support successful plea negotiations later in the process
- greater difficulty for defendants charged with SNPP offences being granted bail
- an increase in offenders pleading guilty to avoid the strict application of the scheme, with concerns that the pressure on offenders to plead guilty, particularly in the case of vulnerable offenders, may be overwhelming
- additional work for the Office of the Director of Public Prosecutions in preparing and prosecuting matters – for example, assessing prosecution briefs to determine whether SNPP offences should be dealt with on indictment or summarily, and preparing sentencing submissions
- concerns about an increase in matters being dealt with on indictment, increasing the cost of dealing with matters in the higher courts
- greater complexity and additional time required for the hearing of sentences, including increased prosecution and defence submissions and the time required for judges to draft their sentencing remarks; it was suggested that this has contributed to court backlogs as well as an increase in appeals because of errors made in applying the scheme, and
- to the extent that SNPPs contribute to longer sentences (particularly sentences of three years or more), increased costs to the NSW State Parole Authority for prisoner management.

One of the other concerns raised by NSW victims of crime support services and practitioners was that SNPPs raise the expectations of victims without delivering additional transparency. These stakeholders commented that some victims find it even more difficult to understand sentencing

as a result of the scheme. Other concerns related to delays in having matters finalised because of the complexity of the scheme and the greater likelihood of matters being appealed.

Some legal practitioners and victim support and advocacy groups suggested that SNPPs had failed to meet the scheme's objective of increasing transparency in sentencing on a number of counts. The comment was made that SNPPs have aided transparency in sentencing only insofar as any individual can look up the table of offences and determine the SNPP for a particular offence. In many cases the SNPP is not applied.

Sentencing remarks in relation to offences captured by the scheme were also reported as being 'obtuse' and 'full of legal concepts'. On the other hand, others consulted were of the view that the focus on the objective seriousness of the offence had encouraged greater transparency by encouraging judges to turn their mind to this before considering an offender's subjective case.

Evaluation of the NSW SNPP scheme

The NSW scheme was evaluated by the Judicial Commission of NSW in 2010.[34] The operation of SNPPs in NSW has been referred to the NSW Sentencing Advisory Council for review, including additional offences to which the scheme might apply and standardising SNPP levels.[35] Details of the NSW Council's review can be found on the NSW Sentencing Council's website.[36]

The evaluation by the Judicial Commission of NSW found that although the introduction of SNPPs in NSW had not resulted in any real change in the overall incarceration rate for offenders subject to the scheme, the imprisonment rate had grown significantly for some offences.[37] There was also evidence to suggest that the NSW scheme had increased the length of sentences and non-parole periods for SNPP offences, although this varied by offence and the plea status of offenders (with significant increases for offenders pleading not guilty).[38]

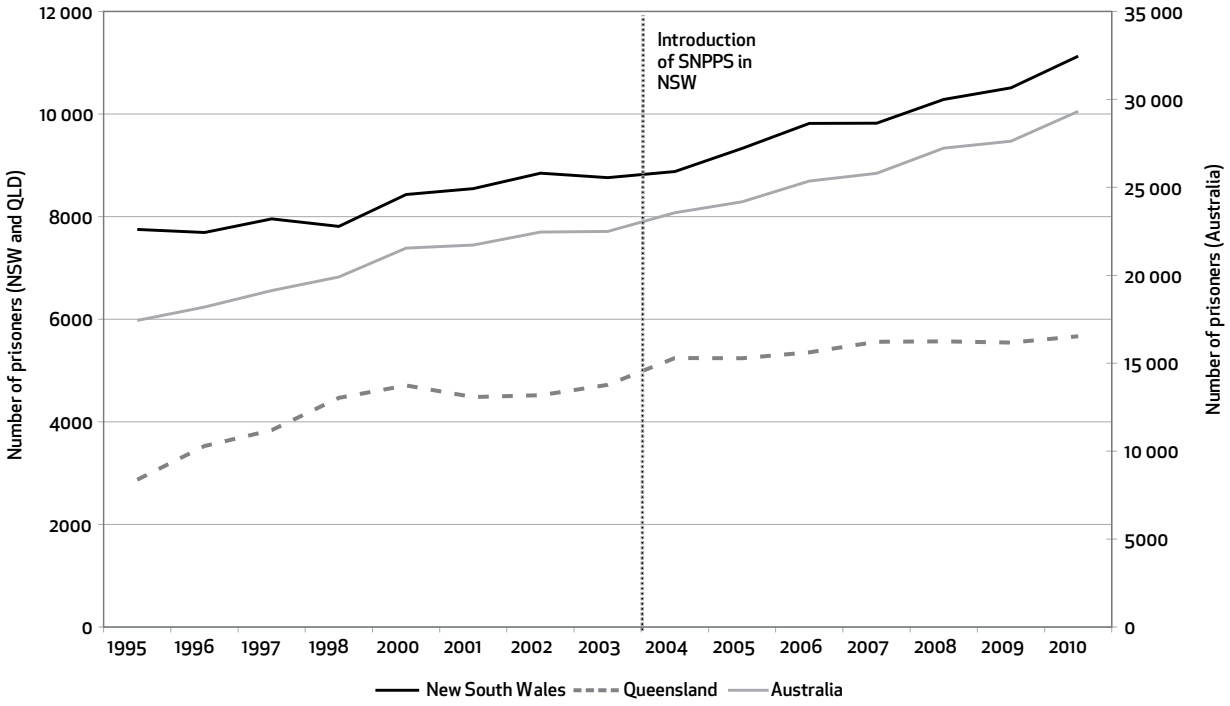
The finding by the Commission that there has been an increase in average sentence length and non-parole periods for offences subject to the scheme is consistent with information reported by the Australian Bureau of Statistics and the Australian Productivity Commission. These data show an increase in prisoner numbers and increases in associated prisoner management costs. Figure 1 shows the number of prisoners at 30 June between 1995 and 2009 for NSW, Queensland and Australia. The number of prisoners grew for each jurisdiction; however, the rate of prisoner growth varied between jurisdictions, as well as between the periods before and after the introduction of the sentencing scheme in NSW.

The growth in prisoner numbers in these jurisdictions coincided with increases in the cost of managing offenders. The Australian Productivity Commission reports that NSW expenditure on prisons was approximately $503 million in 2002–03,[39] increasing to more than $773 million in 2008–09 (an increase of 54%).[40] The comparative costs for Queensland were $270 million[41] and $369 million (an increase of 37%).[42]

In terms of appeals, evidence suggests that sentences in NSW for SNPP offences are slightly less likely to be appealed by offenders and slightly more likely to be appealed by the Crown following the introduction of the scheme. The Judicial Commission of NSW found that the rate of appeals by defendants (referred to as 'severity appeals') declined from 15.0 per cent in the pre-period to 12.6 per cent in the post-period, while the rate of Crown appeals rose from 2.8 per cent in the pre-period to 3.9 per cent in the post-period. The success rate of Crown appeals pre and post introduction was relatively stable (67.9% in the pre-period compared with 66.7% in the post-period), while severity appeals were more likely to be successful after the scheme's introduction (from 37.6% in the pre-period to 47.4% in the post-period).[43]

One of the positive aspects of the NSW scheme is said to be that, together with an increase in the severity of sentences imposed and the duration of sentences, the scheme appears to have resulted in greater uniformity of, and consistency in, sentencing outcomes. However, the report's authors caution that 'it is not possible [from the results of their evaluation] to conclude that the

Figure 1: Number of prisoners at 30 June 1995–2009, NSW, Queensland and Australia



Source: ABS, 4517.0 Prisoners in Australia, 2000 and 2009

statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently'.[44]

2.3 Northern Territory

The NT has different forms of SNPP schemes; one for certain sexual offences and certain offences committed against a child under 16 years of age, and a defined term minimum non-parole period scheme for murder. For murder, the court must set a SNPP of either 20 years or, in certain circumstances, 25 years.[45] For sexual offences involving sexual intercourse without consent pursuant to s 192(3) of the *Criminal Code* (NT)[46] and certain offences committed by adult offenders against children under the age of 16 years, including sexual offences and offences involving physical harm,[47] if the court sentences the offender to a term of imprisonment and does not wholly or partially suspend the sentence, the court is required to set a non-parole period of not less than 70 per cent of the head sentence.[48] The court can depart from this requirement if it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a non-parole period inappropriate.[49]

The impact of these SNPPs has not been formally evaluated.

2.4 South Australia

South Australia has a standard percentage mandatory minimum non-parole period scheme, which was introduced in November 2007, and a defined term minimum non-parole period for murder. The scheme applies when sentencing adult offenders for murder and serious offences against the person. For murder, the mandatory minimum non-parole period is 20 years.[50] For a serious offence against the person, the mandatory minimum non-parole period is expressed as a proportion of the head sentence (four-fifths or 80%).[51] The prescribed mandatory minimum non-parole period of 80 per cent represents the appropriate non-parole period for an offence at the 'lower end of the range of objective seriousness'.[52] When sentencing, the courts should determine the head sentence and then compare the offence before the court with the benchmark or yardstick provided by the minimum non-parole

period to decide if a longer or shorter non-parole period should be imposed.[53]

As in NSW, the introduction of the mandatory minimum non-parole period scheme was opposed by some legal stakeholders, including Supreme Court judges and the Law Society of SA, who raised concerns that the legislation might operate harshly in relation to some offenders.[54]

Since its introduction, there has been ongoing concern and differing judicial views about many aspects of the scheme, particularly:

- what is meant by the 'lower end of the range of objective seriousness' and how the question of where an offence falls in the range of objective seriousness should be approached
- when handing down a sentence, whether the court is required to make a specific finding about whether the offence is at the lower end of the range of objective seriousness
- how courts are to approach sentencing an offender for multiple offences that fall under the mandatory minimum non-parole period scheme, and
- the grounds on which the court can depart from the prescribed non-parole period.[55]

The impact of these SNPPs has not been formally evaluated.

2.5 Victoria

Victoria does not have a SNPP scheme, but the Victorian Government has recently committed to the introduction of a similar scheme of 'baseline sentences'. Terms of Reference have been issued to the Victorian Sentencing Advisory Council requesting its advice on the introduction of baseline sentences for 'serious offences' as defined in the *Sentencing Act 1991* (Vic)[56] and additional offences such as arson, recklessly causing serious injury, aggravated burglary and major drug trafficking.[57] The Council is to report by 29 February 2012. Details of the Victorian Council's review can be found on the Victorian Sentencing Advisory Council website.[58]

At the same time it issued these Terms of Reference, the Victorian Government announced it would publish an online survey on sentencing in July 2011 to seek the community's views about the levels at which the new 'baseline' minimum sentences should be set.[59] This was met with criticism by some sentencing experts and members of the legal profession, including on the basis that it was not scientific, and 'asks people to respond from the top of their head without due consideration of the context and facts of individual cases'.[60] This survey was published on the Victorian Department of Justice and Attorney General's website.[61]

2.6 Commonwealth

Standard minimum non-parole periods for Commonwealth offences take the forms of both a standard percentage and a defined term SNPP.

Under Part IB of the *Crimes Act 1914* (Cth), a minimum non-parole period of at least three-quarters (75%) applies to the offences of treachery, a 'terrorism offence', treason or espionage.[62] A sentence of life imprisonment is taken to be a sentence of 30 years for the purposes of these provisions, so the minimum non-parole period for a sentence of life imprisonment is 22½ years.[63]

The Commonwealth offence of people smuggling as defined in the *Migration Act 1958* (Cth), s 236B also carries a mandatory minimum term of imprisonment of up to eight years, with a mandatory minimum non-parole period of up to five years for certain types of offending under that Act – most particularly, offences involving aggravated forms of people smuggling.[64]

2.7 Canada and New Zealand

The Council has also considered the sentencing reforms in New Zealand and Canada. In June 2010, the New Zealand Government introduced a three-stage sentencing escalation regime for major violent offences and sexual offences, with defined terms tied to the maximum penalty for an offence.[65] This new sentencing regime is still in its infancy and to date no evaluation has been done on its impact or effectiveness.

Canada differs in its approach; it does not have a minimum non-parole period scheme but provides

a range of mandatory minimum sentences for certain *Criminal Code C-46* (Canada) offences. There is no discretion for a judge to reduce the sentence for any offence requiring a mandatory minimum sentence unless a constitutional exemption is made. In addition to murder, the offences requiring a mandatory minimum sentence fall into four categories:

- sexual offences involving children
- offences involving firearms and weapons
- impaired driving, and
- miscellaneous offences (high treason and illegal betting).

CHAPTER 3
THE INTRODUCTION AND OBJECTIVES OF A QUEENSLAND SNPP SCHEME

This chapter explores the Queensland Government's stated objectives in announcing the introduction of a SNPP scheme in Queensland and briefly discuss some of the responses to this proposal. It also presents the Council's view on what the purposes of a Queensland SNPP scheme should be, and the proposal to introduce a SNPP scheme in Queensland.

3.1 Views on the introduction of a SNPP scheme in Queensland

The Queensland Government announced its intention to introduce a SNPP scheme in Queensland in October 2010.[66] The government's position is that it is 'imperative that offenders who committed violent or sexual crimes spend appropriate periods in detention – and enabling the justice system to impose standard non-parole periods would achieve that'.[67]

In addition to this objective, the Terms of Reference refer to a number of other considerations in referring the issue to the Council, including the Queensland Government's concern that sentences for serious violent offences and sexual offences are 'not always commensurate with community expectations' and promoting community confidence in the criminal justice system.[68] The Attorney-General, at the time the Terms of Reference were issued, also spoke of the benefits of SNPPs in providing additional guidance to courts in sentencing to ensure that appropriate consideration is given to the actual minimum time an offender must spend in prison.[69]

In issuing Terms of Reference to the newly established Sentencing Advisory Council on 20 December 2010, the Queensland Government asked the Council to respond to a number of issues related to the structure of a Queensland SNPP scheme, but did not ask the Council to consider the question of whether or not such a scheme should be introduced. Consequently, the Council in releasing its Consultation Paper did not actively seek comment on the merits of introducing a SNPP scheme in Queensland.

The question of whether a SNPP scheme should be introduced in Queensland was continually raised in the Council's preliminary roundtables and subsequent consultations and submissions on the Consultation Paper, with a number of legal stakeholders suggesting this should have properly been an issue included in the Council's Terms of Reference.[70] Given the number of comments directed at this issue, the Council considers it appropriate to reflect these views in this report and to express its own views on this matter. There are some important differences between Queensland and other jurisdictions where SNPP schemes have been introduced. As an example, while lack of consistency in the sentences imposed and the low rates of offenders pleading guilty both appear to have been issues in NSW before the introduction of SNPPs, the same problems do not apply in Queensland. The rates of offenders pleading guilty in Queensland are comparable to, and in some cases higher than, those for similar offences in NSW post-introduction of SNPPs.[71] The Council has found little evidence of high levels of sentence length variability within most serious offence categories for matters dealt with in the higher courts.[72] In fact, some offences where a high degree of variability would be expected because of the nature of the offence, such as manslaughter, showed only slightly higher levels of variability than other serious offences.[73] If the objective of such a scheme is to improve sentencing consistency, there is little evidence that a SNPP scheme is needed to meet this objective.

Consultations and submissions

The proposed introduction of a SNPP scheme in Queensland has not been uncontroversial. Community members and legal stakeholders have expressed opposing views on the merits of a SNPP scheme for Queensland, the type of scheme that should be introduced, and how the SNPP levels should be set.

Many submissions received from members of the public, victims of crime, and some victim support and advocacy groups have expressed support for a SNPP scheme, and for tougher responses to offenders convicted of serious violent crimes and sexual offences. Several submissions support those convicted of serious offences being subject to some form of mandatory minimum sentences, fixed sentences and/or the abolition of parole, for reasons such as the need for offenders to receive just punishment for their actions, and the need to deter the offender and others from committing similar offences in future, thereby better protecting the community. The following comments reflect some of these views:

> If an offender is sentenced to 6 years imprisonment, then that is what said offender should serve.[74]

> [T]he words maximum, minimum should be removed and replaced with set penalties.[75]

> The community expects sentences to reflect the gravity of the crime and also to dignify the victim concerned.[76]

> [A]ll convicted persons must serve their full sentence with extra tacked on for bad behaviour.[77]

Many submissions made through the online response form and other submissions from members of the public direct criticism at the length of sentences imposed, not just the period of actual imprisonment offenders must serve in prison before being eligible to apply for release on parole. There was a sense from the comments received from these community members that sentences imposed by the courts in some cases are too lenient and do not reflect the seriousness of the harm caused. The views of these stakeholders are discussed in more detail later in this report.

Bravehearts, a victim support and advocacy association, was among those supporting the introduction of a SNPP scheme, on the basis that it allows for 'coherency in sentencing, promotes the proportionality principle and, as such, is consistent with one of the basic premises of our justice system – that the punishment must fit the crime'.[78]

The Queensland Police Union of Employees (QPUE) also supported the introduction of SNPPs, and suggested that the objectives of the scheme should include 'to ensure offenders who

are sentenced to imprisonment spend a minimum portion of that sentence in actual prison' and to 'provide direct guidance to the courts on the appropriate sentence range and length of non-parole period'.[79]

In contrast, the overwhelming majority of legal stakeholders and non-government support and service providers working with victims and offenders were strongly opposed to the introduction of a new SNPP scheme in Queensland. Several of these stakeholders expressed concern during consultations and in submissions that SNPP schemes are a form of mandatory sentencing that improperly interfere with judicial discretion in sentencing.

The consensus among legal stakeholders was that the premise for introducing such a scheme is flawed, there is no evidence supporting the need for its introduction and more research is needed to support a decision to introduce a SNPP scheme. Many also characterised SNPPs as a form of mandatory sentencing. Some of the comments received in submissions on this issue were:

> [T]he 'starting point' is to determine the purposes of the legislation. In this case the purpose is to remedy a flawed perception in the community. As such the laws themselves will ultimately fail to serve the community and should not be presented to the Parliament.[80]

> A policy which calls for the introduction of [minimum standard non-parole periods] appears to be driven by an assumption that sentences which are presently being imposed do not conform with 'community expectation'. Suggestions that 'community expectation' is not being met by sentences being imposed, is generally expressed by the media. Community expectation is also largely governed by the media, because it is the media who reports it (in a way they choose) sentencing outcomes in the courts.[81]

> Sanctions for serious offences should not be applied indiscriminately. Standard Minimum Non Parole Periods stop the courts from taking relevant matters into account and are thus bound to impose sentences disproportionate to the offence. They are likely to be reactive to popular political positions rather than reflective of an individual case.[82]

In opposing the introduction of a SNPP scheme, in a letter from the Chief Justice of Queensland on behalf of the Supreme Court of Queensland, it was submitted that:

> The proposed SNPP scheme will add to the complexity of sentencing in Queensland without any demonstrated, corresponding benefits. It will add to the responsibilities and workload of prosecutors and defence counsel in preparing for sentences. Additional time will be required for the hearing of sentences.[83]

In opposing the introduction of a new SNPP scheme, the Court also made reference to the objective of improving consistency in sentencing:

> [T]he Council's research indicates that there is already 'a good degree of sentence length consistency for offenders sentenced by the higher courts to an immediate term of imprisonment for serious violent offences or sexual offences', calling into question the need for such a scheme to address inconsistency in sentencing. (Supreme Court of Queensland)[84]

Legal Aid Queensland (LAQ) and Potts Lawyers were among those who provided detailed reasons in their submissions for opposing the introduction of a new SNPP scheme. LAQ's rationale for opposing its introduction included:

- Queensland already has the most severe sentencing regime in Australia which includes a SNPP scheme and a number of statutory and other legal mechanisms to guide courts in determining appropriate sentences.
- It will increase costs to the criminal justice system as it is likely to:
  - result in more trials because of the likelihood of more severe penalties and specific reductions for an early plea
  - increase the complexity of an already complex statutory sentencing regime, and
  - increase the number of appeals because of the increased complexity of the sentencing process and the potential for error by the courts.
- There is no evidence that the SNPP scheme in NSW had any effect on crime rates or community safety generally.

- The level of offending in Queensland has declined over the past 10 years making such a scheme unnecessary.
- It will result in arbitrary and unjust sentencing outcomes.[85]

LAQ also raised concerns that any delays or increase in costs associated with representing offenders in a matter involving a SNPP may detract from its ability to maintain service levels to clients.[86]

The potential of a SNPP to lead to court delays was also raised by many, including the Supreme Court of Queensland. The Court suggested that delays 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'.[87] The Court also expressed concerns that, because of the complexity of the sentencing process such a scheme would bring, it would be likely to generate an increased number of appeals.[88]

The ability of a SNPP scheme to deliver individualised justice was also questioned by many, including LAQ, which was also concerned about such a scheme's potential to interfere with the function of the parole boards which, it submitted, are 'in a better position to determine the appropriateness of releasing a prisoner on parole'.[89]

In addition to many of the reasons identified above, Potts Lawyers opposed the introduction of a SNPP scheme on the basis that:

- an informed public does not significantly disagree with the courts
- victims will find the system harder to understand
- victims will wait longer for results
- a system already exists for fixing adequate sentences if the Crown believes that a sentence imposed is inadequate, and
- the costs may outweigh any predicted benefits, it will increase the intake for 'institutes of higher criminal education' (prisons), and there are other ways to improve the system that should be considered.[90]

On the issue of sentencing consistency, Potts Lawyers commented:

> Every citizen is entitled to expect equal access to justice and to be treated fairly. This does not translate into equal penalties.[91]

In opposing the introduction of a SNPP scheme, the submission from the Bond University Centre for Law, Governance and Public Policy raised several concerns that:

- a SNPP can violate the principle of proportionality
- there is no evidence that public expectations warrant the introduction of a SNPP scheme
- increased incarceration requires more prison-related expenditure, and
- there is little research about whether incarceration in Queensland prisons actually reduces recidivism.[92]

A number of submissions also made specific reference to the purposes of parole and the benefits parole can provide to offenders. Specific concerns were raised that any increases in the non-parole period may decrease the parole period, which will deprive offenders of adequate time to be supported while reintegrating back into the community:

> [T]he proposed non-parole periods effectively deprive an offender of adequate time to re-integrate which will in turn result in increased levels of recidivism.[93]

There were also concerns that a SNPP scheme would contribute to an increase in the number and lengths of prison sentences without demonstrating that it would have any impact on, or result in less offending and re-offending.[94] Further concerns were raised that within specific offences there are considerable gradations of severity and all offences are not equal.[95]

The Anti-Discrimination Commission, while not directly opposing its introduction, suggested that the primary purpose of a SNPP scheme, if introduced, should be the greater protection and safety of the community. The Commission argued there should be clear evidence that the scheme will reduce recidivism at an acceptable cost; it suggested

that the Queensland Government should adopt a 'justice reinvestment'[96] approach and place a greater emphasis on rehabilitation through various measures such as a better parole system.[97]

The Commission for Children and Young People and Child Guardian supported the objective of achieving greater consistency and transparency in sentencing, but did not comment directly on the introduction of a SNPP scheme or what form it should take, instead focusing on the application of a SNPP to young people. The Commission suggested there should be a focus on rehabilitation opportunities, particularly long-term community-based rehabilitation rather than institution-based treatment alone.[98]

The possible impact of a SNPP scheme on Aboriginal and Torres Strait Islander people and parole eligibility was raised in the submission from the Coen Local Justice Group and during many of the regional consultations with representatives from Aboriginal and Torres Strait Islander justice groups. The Coen Local Justice Group and other regional justice groups also commented that the introduction of court-ordered parole resulted in major changes to how parole operates. Comments were made that justice groups frequently provide input into sentencing and questions of probation and parole, but they are not easily able to have input to the parole boards' decision-making processes; concerns were raised that the mandating of non-parole periods will result in Aboriginal or Torres Strait Islander people being imprisoned for longer periods of time without any associated benefits.[99]

Feedback from consultations with Aboriginal and Torres Strait Islander groups also questioned the need for the introduction of a SNPP scheme. Comments made at consultation sessions included:

- There is an apparent conflict or confusion within the Queensland Government on its objectives in responding to Aboriginal and Torres Strait Islander offenders, with the policy to introduce SNPPs in apparent conflict with the draft *Aboriginal and Torres Strait Islander Justice Strategy 2011–14*.[100]
- The introduction of a SNPP scheme seems to be politically motivated – to show the community that the government is being tough on crime.
- The NSW SNPP system has resulted in many appeals even after eight years of operation – so why introduce it in Queensland? The NSW SNPP scheme appears to be purely punitive because although it achieved better consistency in the sentencing decisions of judges, it has resulted in offenders serving longer periods of imprisonment.
- SNPP schemes are 'almost' a form of mandatory sentencing. If one of the aims of a SNPP scheme is to maintain judicial discretion then there is a contradiction, so why have such a scheme in the first place?
- A SNPP scheme could have a number of unintended consequences, including an increase in the number of partially or fully suspended prison sentences imposed by judges. The scheme could also result in more people going to prison, but for what benefit? What would be the victim's view?
- There needs to be consideration of cultural perspectives; input into the process by Aboriginal and Torres Strait Islander people, including community justice groups, should be considered.
- If Aboriginal people receive longer sentences as a result of the introduction of SNPPs then there is a risk that prisoners will become institutionalised and 'conditioned' to prison life. Some of those consulted gave examples of offenders released from prison who had become so conditioned by prison life that they could not cope with life back in the community. After a short time, they re-offended to return to prison.

Other views on the introduction of a SNPP scheme expressed in these consultations included:

- there are inaccurate opinions about offenders, which may change if all facts are known
- there is a need to humanise the system of sentencing
- a SNPP scheme will increase the need for more prisons
- there is a lack of understanding about what the real 'costs' and 'benefits' of a SNPP scheme are from a holistic perspective, and
- if a SNPP scheme results in longer periods of incarceration, then there needs to be an

increase in the number of, and access to social support programs such as mentoring and life and employment skills building.

3.2 The Council's view on the introduction of a SNPP scheme in Queensland

In the Council's view, the introduction of a SNPP scheme in Queensland raises a number of complex questions. One of the real challenges of such a scheme is that it is intended to apply a legislative non-parole period to a range of quite diverse cases which vary on the basis of offence seriousness. Although there may be a 'standard' period that can be identified, there is rarely a single 'standard' offence capable of being legislatively defined. The same problems do not arise in the case of setting a maximum penalty, as this is set with only the very worst examples of an offence in mind. Although this problem can to some extent be overcome by the type of scheme adopted (for example, a standard percentage rather than a defined term scheme), it is nevertheless an inherent difficulty with any form of 'standard' non-parole or 'standard' sentencing scheme.

All Council members recognise that the experience of being a victim of serious violence or a sexual offence often has a significant and ongoing impact on people's lives. It is important 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, while reflecting important differences in individual cases.

After closely examining the issues, a majority of the Council does not support the introduction of a SNPP scheme in Queensland. In particular, a majority of the Council is concerned there is limited evidence of the effectiveness of SNPP schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming. It also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.

The Council is further concerned that there are possible policy tensions between the objectives of a Queensland SNPP scheme and the policy objectives of other Queensland and Commonwealth government initiatives including the *National Indigenous Law and Justice Framework 2009–2015*,[101] the proposed Queensland *Aboriginal and Torres Strait Islander Justice Strategy 2011–2014*[102] and the *National Disability Strategy 2010 –2020*;[103] the potential of a SNPP to support the objectives of these strategies would appear to be limited. For example, one of the objectives of the *National Indigenous Law and Justice Framework 2009 –2015* developed by the Standing Committee of Attorneys-General Working Group on Indigenous Justice is to increase the use of effective diversionary options and other interventions for Aboriginal and Torres Strait Islander offenders; this includes a strategy to 'expand and implement the range of diversionary options and other interventions for Indigenous adults and youth: first-time offenders, offenders beginning to develop offending cycles, and habitual offenders'.[104]

A form of SNPP scheme that would have the result of increasing rates of Aboriginal and Torres Strait Islander imprisonment and time spent in prison, without a reduction in rates of re-offending, would also appear to be contrary to the objectives of the Queensland government's draft *Aboriginal and Torres Strait Islander Justice Strategy 2011–2014*. The aims of this draft strategy are to reduce offending, re-offending and the victimisation of Aboriginal and Torres Strait Islander people.[105] Since 2000, the Queensland Government's efforts under the *Aboriginal and Torres Strait Islander Justice Agreement* have 'focused on making the criminal justice system fairer and more responsive for Aboriginal and Torres Strait Islander people',[106] with an aim to reduce the Aboriginal and Torres Strait Islander imprisonment rate by 50 per cent by 2011.[107] In support of this is the recognition by the Queensland Government that 'traditional criminal justice system responses alone will not achieve equality in the level of Indigenous and non-Indigenous contact with the criminal justice system':[108] previous reform initiatives have included the extension of probation and parole

officers throughout Queensland to provide better access to supervised community-based orders as sentencing options.

Similarly, to the extent that a SNPP scheme has potential to further disadvantage offenders with a disability in their contact with the criminal justice system, it may also compromise the achievement of the objectives set out in the *National Disability Strategy 2010–2020*. One of the objectives of this strategy is 'more effective responses from the criminal justice system to people with disability who have complex needs or heightened vulnerabilities'.[109] The action items stemming from this objective include:

- to 'support people with disability with heightened vulnerabilities in any contacts with the criminal justice system, with an emphasis on early identification, diversion and support', and
- to 'ensure that people with disability leaving custodial facilities have improved access to support to reduce recidivism. This may include income and accommodation support and education, pre-employment, training and employment services'.[110]

Although not directly contrary to these objectives, the application of a SNPP scheme to offenders with a disability has the potential to encourage a more punitive rather than a rehabilitative response to these offenders, and to limit the time available for these offenders to be supported in the community while on parole.

At the same time, the Council acknowledges that many community members who made submissions in response to the Reference are significantly dissatisfied with current sentencing levels for some offences, with sentencing outcomes in some circumstances seen as failing to reflect the seriousness of these offences. The Council recognises these concerns and the importance of improving community confidence in sentencing, but a majority of the Council is unpersuaded that a SNPP scheme is the best means of addressing these issues.

A minority of the Council supports the introduction of a SNPP scheme in Queensland and the need to ensure that offenders sentenced to imprisonment for serious offences spend a substantial period of that sentence in prison, one of the aims being to appropriately acknowledge the harm caused by these offences. These Council members are of the view that a SNPP scheme can be of benefit in reflecting community expectations of the minimum period an offender convicted of such offences must spend in prison and suggest that, although the current evidence is limited, SNPPs have potential to improve community confidence by creating greater certainty, consistency and transparency in sentencing. In the form recommended in this report, they suggest, a Queensland SNPP scheme will avoid many of the pitfalls of other SNPP schemes, while contributing to building a valuable evidence base about 'what works' in responding to this type of offending and addressing issues of community confidence.

The Council's approach to responding to the Terms of Reference

The recommendations that follow on the Council's preferred structure for a SNPP scheme, if introduced, reflect the views of the full Council. Under the Council's proposals, the scheme will only apply to those offenders who commit the most serious offences, including offences involving violence and sexual offences, who are sentenced to a term of imprisonment of at least five years. The Council's recommendations are presented in the following chapters of this report.

All Council members agree that informing the Queensland community about sentencing – one of the Council's statutory functions – is essential for enhancing understanding of sentencing and to help the community to engage more actively in informed debates on matters of sentencing policy. The Council, with its diverse membership, is uniquely placed to undertake this task, being independent of government, the executive and the courts. This work will be an important ongoing focus for the Council in the years to come.

3.3 Meeting the Queensland Government's objectives

In announcing its intention to introduce SNPPs in Queensland, the Queensland Government referred to the benefits of SNPPs being to ensure 'jail time fits the crime'. The Premier and the former Attorney-General in a joint statement noted that '[c]urrently, the law only provides for a maximum sentence and what standard non-parole periods will deliver is a guide for the courts as to how much time a prisoner should spend behind bars'.[111]

In referring the matter of SNPPs to the Council, the former Attorney-General made reference to:

- the Queensland Government's view that the penalties being imposed for serious violent offences and sexual offences may not always meet community expectations
- the Queensland Government's expectation that offenders who commit serious violent offences and sexual offences serve an appropriate period of actual incarceration
- the need to promote public confidence in the criminal justice system
- the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases
- the impact of the introduction of the SNPP regime in NSW on its criminal justice system
- current Queensland sentencing practices for offenders 17 years and over, and
- the sentencing principles in the *Penalties and Sentences Act 1992* (Qld).[112]

The Council recognises that understanding the underlying purposes of introducing a SNPP scheme in Queensland is important in responding to the key questions raised in the Terms of Reference, and invited comments on these purposes as part of its consultations.

Some of the comments made in consultations and submissions included that the Government's objectives for the scheme were not clearly enough articulated, and a greater emphasis should be placed on the capacity of such a scheme to increase community safety and protect the community, including by preventing or reducing re-offending.

Common themes drawn from submissions and consultations were that the purposes of a SNPP scheme should be to:

- protect the community from offenders, in particular repeat offenders
- punish the offender and ensure that the punishment fits the crime
- provide better guidance to the courts when handing down sentences, and
- deter offenders and others from committing offences.

Of those who made submissions via the online form, 127 people provided feedback on what the aim of the scheme should be, with the most frequent responses being:

- to ensure sentences are appropriate (n=26)
- to deter offending (n=23),
- to make sure offenders spend more time in custody (n=20), and
- to support consistency in sentencing (n=15).

Comments on the proper aims of a SNPP scheme included:

> Consistency with other states, guide the courts in sentencing that reflects the community expectations. [The m]ain aim [should be] to reduce the incidence of re-offending.[113]

> Ensure that offenders are incarcerated for an adequate period of time that will give relevant authorities and professionals confidence the person will rehabilitate and not commit further crimes. Just as importantly, the time should be adequate to satisfy victims and the community that justice has been served.[114]

> The primary purpose of the SNPP scheme should be to provide a greater guidance to the Judiciary on community standards for sentencing therefore providing greater consistency, transparency and accountability.[115]

> Punishment, and removal from society to ensure that the offender doesn't re-offend and create more victims.[116]

> To set a standardised non parole period, make the time reflect the crime and give definitive closure to victims.[117]

> The main aim of the non-parole period should be used as a major deterrent to the offenders and to give the victim peace of mind that justice has been carried out and should reflect the severity of the crime.[118]

> The non-parole period scheme should aim to discourage criminal activity in the community by the public being aware of what the minimum requirements [are] if a crime is committed. Having a non-parole scheme should make any person think before they perform any illegal act in the knowledge that if they are caught and convicted, they will be imprisoned for a minimum period of time without the chance of parole.[119]

The following sections of this chapter explore the Queensland Government's objectives in more detail, and the Council's view on what the main objectives of a Queensland SNPP scheme should be.

Sentences that are 'commensurate with community expectations'

One of the Queensland Government's considerations in referring the development of a SNPP scheme to the Council is its concern that penalties imposed for serious violent offences and sexual offences are not always commensurate with community expectations.

A diverse range of views were expressed to the Council during the consultation process about current sentencing practices and the adequacy of existing penalties that are imposed for serious violent offences and sexual offences. These views highlight some of the challenges in identifying what penalties might be commensurate with community expectations for these offences.

The overwhelming majority of submissions received from the general public expressed dissatisfaction and frustration with existing sentencing practices, and particularly with sentences that were considered too lenient. The courts were criticised as being 'out of touch with the community' and a call was made for tougher sentences. A number of submissions made by community members also questioned the value of parole and suggested that parole should be abolished.[120] These comments were also reflected in submissions made in response to the online response form.

In contrast, the majority of legal stakeholders and non-government support and service providers working with victims and offenders were opposed to the introduction of SNPPs. These stakeholders were of the view that the money spent on a SNPP scheme would be better invested in addressing the underlying causes of offending and improving community safety through the rehabilitation of offenders and their reintegration into the community.

Concerns were raised, similar to those that have been voiced in Victoria in relation to a survey of public views on sentencing by legal stakeholders, that the opinions of members of the public are often misinformed, and that there should be greater emphasis placed on informing the community about sentencing, rather than spreading fear and focusing on rare and anomalous instances (for example, making it clear that most sex offences are committed by individuals who have a close relationship with the victim, rather than by strangers). Comment was made that there is a need for better sentencing options, rather than just 'more prison time'; there is a need to think 'outside the bars' rather than in terms of 'x offence equals x prison time'. Some individuals who were consulted suggested that the focus should be on specifying a minimum parole period rather than a minimum non-parole period; this would allow resources to be directed to supervising and supporting offenders after their release from prison to reintegrate them into the community.[121]

Comments made in submissions about 'community expectations' included that:

- if sentences should be consistent with 'community expectations', there is a need to understand exactly what those expectations are and ensure that they are well informed rather than media driven
- there are many myths and misconceptions in the community about sentencing and imprisonment, and
- many members of the community will react negatively if asked about the adequacy of current sentencing practices, but do not have a real understanding of the criminal justice system and sentencing practices.[122]

These submissions recognise that, although the opinions of community members on the Council's current reference may provide an invaluable insight into current views about sentencing, a scheme based on community expectations would need to have a more comprehensive view of what those opinions are and would have to ensure that these opinions are properly informed.

There was also a call for a survey to be carried out by the Council about community views 'that informs the person being surveyed about the full outcome of the issues involved and the outcomes of various actions taken, not a phone poll taken by some media organisation'.[123]

Some stakeholders, including the Queensland Law Society (QLS), referred to the need to make the media more accountable in its reporting of crime, and to present contextual information on sentencing, rather than just statistical averages:

> General criticisms from members of the community regarding the lengths of sentences are often misguided and are the product of media campaigns manufactured to stir emotion, rather than promote an understanding of proper processes undertaken in the criminal justice system. Average terms of imprisonment imposed for particular offences are also misleading as averages do not take into account the circumstances relevant to each individual case.[124]

A review of international and national sentencing research shows a number of consistent findings on public opinion about sentencing:

- there is no one 'community view' regarding sentencing practices
- people often base their opinions about sentencing on information reported by the media, which tend to focus on a small number of atypical cases
- when asked for their opinion in abstract terms, often people believe that sentences are too lenient[125]
- people are often thinking of violent and sexual offences or offenders when they give their opinions about the adequacy of current sentencing practices
- when research participants are put in judges' shoes (that is, they are provided with the same facts as those considered by judges) they generally hold similar sentencing views to those of judges[126]
- despite their apparent punitiveness, members of the public are more supportive of offender rehabilitation than criminal justice interventions as a way to reduce crime
- increasing the severity of sentencing does not necessarily result in greater public confidence in the criminal justice system, and
- existing views on sentencing may be difficult to change and those with more punitive views on sentencing are less likely to change their views than those with less punitive views.[127]

These results highlight the importance of distinguishing between 'public opinion' and 'public judgment' when trying to measure 'community expectation' regarding sentencing matters. Public opinion measures are sometimes criticised for evoking shallow, unconsidered views on an issue, while public judgment is 'the state of highly developed public opinion that exists once people have engaged an issue, considered it from all sides, understood the choices it leads to, and accepted the full consequences of the choices they make.'[128]

A small number of Australian studies include measures of community expectation specific to the sentencing of serious violent offences and sexual offences.[129] These studies do not demonstrate high inconsistency between general community expectation and judicial practice, although there is some evidence to suggest that sentencing relating to serious violent offences, sexual offences and drug offences is the least likely to meet community expectations.[130]

Key findings of international and interstate studies are that, when measured appropriately, and when respondents are provided with adequate information, community expectations are not dissimilar to the sentencing patterns of the courts. Research also provides evidence that increasing sentence severity will not necessarily lead to greater community confidence in the criminal justice system.[131]

The Council has an important role to play in better informing the community on sentencing issues. In conjunction with the release of the Consultation Paper, the Council released a research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland*, which provided baseline sentencing information on existing incarceration periods for serious violent offences and sexual offences.[132] The Council will also be publishing a series of sentencing profiles to better inform the public about current trends in sentencing.

Offenders serve an appropriate period of actual incarceration

A further consideration of the Queensland Government in referring the development of a SNPP scheme to the Council is the Government's expectation that offenders who commit serious violent offences and sexual offences should serve 'an appropriate period of actual incarceration'.[133]

Determining what is 'an appropriate period of actual incarceration' for an offender to serve is challenging. Relevant considerations are that:

- It is difficult to identify whose view should guide and determine what an appropriate period of actual incarceration is. There are a number of different stakeholders who hold different and sometimes opposing views. The SNPP consultation and submission process has demonstrated the diverse and often opposing views about the introduction of a SNPP scheme and what type of scheme should be introduced.
- The principle of parity in sentencing provides that co-offenders who commit similar offences in similar circumstances should, wherever possible, expect to receive similar sentences.[134] Similarly, the principle of consistency demands that like cases should be treated alike.[135]
- Existing sentencing practices provide case comparators and precedents in determining an appropriate sentence and period of incarceration.

The Council's research paper, *Sentencing of Serious Violent Offences and Sexual Offences in Queensland*, found that:

- The majority of offenders with a serious violent offence or sexual offence as their most serious offence are sentenced to a term of imprisonment (either full-time imprisonment or a partially suspended sentence). In terms of imprisonment, offenders with a sexual offence as their most serious offence are more likely to receive a partially suspended sentence than are offenders with a serious violent offence as their most serious offence.
- Longer head sentences are generally associated with longer non-parole periods, and the average non-parole period (expressed as a proportion of the head sentence) varies across different offence categories.
- Offenders with a most serious offence relating to a sexual offence tend to be characterised by higher non-parole periods set by the higher courts when compared with offenders with a most serious offence relating to a serious violent offence. Offenders with a most serious offence relating to a sexual offence are also less likely to be released on parole at their parole eligibility date.[136]

In 2009–10, Queensland had a prison population of 5,631 prisoners,[137] the cost of incarceration per prisoner being $181.10 per day.[138] Since 2005–06, the number of prisoners has increased three per cent from 5,449 prisoners in 2005–06 to 5,631 prisoners in 2009–10.[139]

The Council has current Terms of Reference asking it to explore sentencing practices for child sexual offences and armed robbery.[140]

Consultations and submissions

Many comments made by members of the public in submissions were to the effect that current sentences for serious violent offences and sexual offences are not adequate and do not act as a deterrent to other would-be offenders. These community members were of the view that sentences are too lenient and that, even when offenders are sentenced to imprisonment, they do not serve sufficient time in prison. Frustration was also voiced about the sentencing of persistent or repeat offenders who continue to offend. For example, one community member commented:

> [T]oo many 'career' criminals get off lightly even after three or four previous offences.[141]

In contrast, comments from legal stakeholders and some community members emphasised a need to focus on rehabilitation, supervision and reintegration into the community, not increased prison terms:

> The issue of a standard non-parole period for violent and/or sexual offenders should not be one of how long (fixed term or percentage) but more on an individual basis around completing relevant programs.[142]

> Standard minimum non-parole periods should be an expression of the legislative intention as to the minimum periods of actual imprisonment to be served. The aim of this type of legislation should be to ensure consistency and appropriateness in response to serious offending.[143]

The need to 'promote public confidence' in the criminal justice system

A further objective in introducing a Queensland SNPP scheme identified in the Terms of Reference is to promote public confidence in the criminal justice system, with the two related objectives of promoting consistency and transparency in sentencing.

Consistency

One of the current purposes of the *Penalties and Sentences Act* is to promote consistency of approach in the sentencing of offenders.[144] This is in line with existing jurisprudence which suggests that, in a sentencing context, the consistency which should be sought to be achieved is consistency in the *approach* to the sentencing process, rather than in the sentencing *outcomes* for individual cases – that is, a uniformity of approach rather than outcome, treating 'like cases alike, and different cases differently'.[145]

The *Penalties and Sentences Act* sets out the courts' power to sentence adult offenders, and also outlines those factors the court must take into consideration when deciding what sentence should be imposed for a specific offence, including any mitigating or aggravating factors that may increase or decrease a sentence respectively.

Section 9(1) of the Act provides that the only purposes for which sentences may be imposed on an offender are:

- to punish the offender to an extent or in a way that is just in all the circumstances; or
- to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- to deter the offender or other persons from committing the same or a similar offence; or
- to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
- to protect the Queensland community from the offender; or
- a combination of two or more of these purposes.

Section 9 of the Act also sets out the broad legislative guidelines relating to sentencing of offenders in Queensland. These guidelines include a non-exhaustive list of the subjective and objective principles and factors that the court must consider when sentencing an offender; these are specific to the type of offending.

In the case of offences involving the use, or attempted use, of violence against the person, or that resulted in physical harm to another person, offences of a sexual nature committed in relation to children, and offences involving child exploitation material, s 9 lists specific factors to which a court must have primary regard in sentencing. These factors vary by the type of offence concerned, and include the impact of the offence on the victim, the risks posed by the offender if a prison sentence is not imposed, the need for general deterrence and community protection, and the offender's prospects of rehabilitation.[146] The principles that imprisonment is a sentence of last resort, and that a sentence that allows the offender to stay in the community is preferable, do not apply in these circumstances.[147]

Transparency

Transparency is paramount in promoting the principle of consistency as '[t]he law strongly

favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public'.[148] The value of transparency is reflected as one of the purposes of the *Penalties and Sentences Act*, which is to promote public understanding of sentencing practices and procedures.[149]

Transparency and accessibility of sentencing 'provides a basis for confidence in the working of the justice system and also ensures individuals' rights of appeal are secured'.[150]

Consultations and submissions

Support for maintaining and promoting consistency and transparency was continually expressed in consultations and submissions. These were seen as important objectives of sentencing and of the criminal justice system.

The QLS suggested that, although the primary purposes of a SNPP scheme might reasonably be thought to include ensuring that penalties are commensurate with community expectations, promoting consistency and transparency in sentencing, and assisting courts by providing guidance in sentencing, it had genuine doubts that a SNPP could achieve these:

> The promotion of public confidence in sentencing can only be achieved through better education of members of the public of how courts sentence. Presently the community receives its information regarding sentences from the various forms of the media who are not concerned with educating the public regarding sentencing principles.[151]

Should a scheme be introduced, the QLS suggests that the primary purpose should be to promote consistency in procedure and approach, and transparency in sentencing.

Protect All Children Today Inc (PACT) commented that the purpose of the scheme should be:

> To reduce judicial discretion in relation to sentencing to enable consistency and the opportunity for victims and their families to understand the punishment imposed. Transparency and education is a large component in gaining community support and understanding.[152]

Responses to the online response form and other submissions suggest there was some lack of clarity as to how a SNPP scheme would achieve greater transparency and consistency. In responding to the questions posed in the Consultation Paper and in the online response form, many respondents commented on the difficulty of structuring a SNPP scheme.

Particularly among those opposed to the introduction of a scheme, concerns were raised during consultation sessions that the introduction of a SNPP scheme may make the sentencing process more complicated, less transparent and less understandable for members of the community – in particular, for victims of crime. Some comment was made that a SNPP scheme may not meet the expectations of victims of crime if the SNPP is not imposed by the courts in most cases.

The QLS, in its submission, further commented that the objectives of consistency and transparency are already met in Queensland through the appeal process:

> Consistency in sentence and guidance to sentencing courts is met adequately by the Court of Appeal. If either party is aggrieved by any sentence imposed then they have an opportunity to appeal and those appeal precedents then promote consistency in approach to sentencing.[153]

The Chief Justice of Queensland, in a letter submitted on behalf of the Supreme Court, was among those who questioned the ability of a SNPP scheme to achieve consistency or transparency, and suggested that resources would be better directed at other means of achieving these objectives:

> The significant resources that would be required to support a SNPP scheme, including additional court and judicial resources, could be directed to supporting the judiciary to achieve greater consistency. This would include additional resources to assist legal representatives in the formulation of informed submissions that include

> comparative sentences, improved sentencing bench books and continuing judicial education.
>
> …The aim of improved transparency in the sentencing process is unlikely to be achieved by a SNPP scheme, which is likely to be complex. Improved transparency in the sentencing process and public confidence in the criminal justice system may be enhanced by other means, including better information for the community about sentencing practices, improved access to sentencing statistics and ensuring that sentencing remarks are publicly available, where appropriate.[154]

Maintaining judicial discretion

The Terms of Reference specifically refer to the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases.[155]

One of the matters of concern expressed during consultations, and in particular by legal stakeholders, was that any legislation seeking to impose minimum sentencing requirements would limit a judge's ability to deliver individualised justice and therefore effectively become a form of mandatory sentencing. The Bar Association of Queensland (BAQ) submitted that '[s]entencing is exclusively a judicial function and legislative restraint is unlikely to advance the interests of justice'.[156] The submission from Sisters Inside Inc strongly opposed the introduction of a SNPP scheme on the basis that it was a form of mandatory minimum sentencing and such a scheme would have severe implications for women.[157] It further commented on the detrimental impact mandatory minimum sentencing regimes have had in Western Australia and the Northern Territory. The additional arguments raised by Sisters Inside Inc in opposing the introduction of SNPPs included that such a scheme would:

- violate the separation of powers: 'judges should sentence individuals in accordance with the unique circumstances of each case and each individual'
- as a form of mandatory minimum sentencing, it would be 'constitutionally repugnant to the principle of the rule of law'
- breach international law to which Australia is a signatory (the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child), and
- lead to increased human and fiscal costs of imprisonment.

The High Court considered the constitutionality of the NSW SNPP scheme, including whether it impermissibly interferes with judicial discretion, in a recent application for special leave to appeal in the matter of *Mahmud v The Queen*.[158] The Court rejected the application on the grounds that 'the characterisation of the impugned provisions [of the *Crimes (Sentencing Procedure) Act 1999* (NSW)] advanced by the applicant is not sustainable'. In reaching this conclusion, the Court noted that, although the NSW legislation did fix a SNPP for a number of specified offences, it allowed a court to set a non-parole period that was longer or shorter than the SNPP.[159]

Though such a scheme may still retain sufficient discretion to respond to the individual circumstances of a case, as the Supreme Court of Queensland acknowledged in its submission, there is an inevitable tension between retaining this discretion and meeting the intended objectives of a SNPP scheme:

> A SNPP scheme, by its nature, fetters judicial discretion. The extent to which it does so depends on the precise terms of legislation which permits a judge in certain circumstances to depart from the prescribed SNPP. Legislation that provides a broad discretion to depart from the prescribed SNPP might be said to undermine the purposes of the scheme. Legislation that provides a narrow discretion to depart from the prescribed SNPP, upon proof of limited and exceptional circumstances, will substantially fetter judicial discretion, and therefore the Court's ability to ensure that justice is done.[160]

One of the limitations of a 'standard' non-parole period scheme that has been raised by many legal stakeholders, including Potts Lawyers, is the diversity of case circumstances which requires an individualised rather than a 'standard' response:

> The implementation of standard non-parole periods is based on the presumption that there are

> 'standard' offences. No such things exist. Every single criminal case, defendant and victim that comes before the court has their own individual features.[161]

Though the Council has ultimately reached the view that a NSW style of defined term scheme should not be introduced in Queensland, it has been careful to ensure that recommended form of scheme it does propose retains judicial discretion to enable courts to continue to respond to the individual circumstances of the case and avoid the potential for injustice in its practical application.

Existing guidance to the courts in sentencing

Another of the objectives of the Queensland Government in introducing a Queensland SNPP scheme is to provide additional guidance to courts in sentencing to ensure that appropriate consideration is given to the actual minimum time an offender must spend in prison.[162]

As discussed in the Council's Consultation Paper, there is a broad range of sources that provide guidance to sentencing courts in Queensland.[163] The discretion of judges in sentencing while comparatively unfettered,[164] is guided by existing law and practice.Judges and magistrates must act in accordance with legislation (including maximum penalties and relevant sentencing factors), common law principles and appellate court guidance (including on acceptable sentencing ranges for particular types of offences and offending), as well as the outcomes of similar cases.

One of the more interesting recent developments in Queensland has been the power conferred on the Court of Appeal under the *Penalties and Sentences Act* to issue formal 'guideline judgments' as a way of guiding the discretion exercised by the lower courts when pronouncing a sentence.[165] Because this legislative power to issue guideline judgments has only recently been introduced in Queensland, it is as yet unclear how (if at all) guideline judgments will be used.

Other approaches

Non-legislative approaches to meeting the objectives of a SNPP scheme

Although introducing a SNPP scheme is one way of overcoming any perceived problems with the current approach to the sentencing of serious violent offences and sexual offences, there are other, non-legislative means that might achieve similar objectives and could be considered in place of, or in addition to, a Queensland SNPP scheme. The Council invited comments on this matter.

Legal stakeholders agreed that transparency and consistency in sentencing are important and that these could be improved by having readily available sentencing remarks, and prioritising better sentencing statistics. Comments also supported the need for judges to clearly and simply articulate how different factors determine the final sentence, including by identifying the impact of specific mitigating and aggravating factors.

Other options suggested in submissions and consultations that could be explored are additional resources for the courts to support consistency of approach (such as improved sentencing bench books) and specialist continuing professional development activities and education for practitioners and judicial officers.[166]

Meeting the purposes of sentencing

As discussed above, punishment is only one of a number of purposes of sentencing in Queensland.

A number of legal stakeholders in submissions and during consultations emphasised to the Council that sentencing is not just about punishment but also about rehabilitation, and pointed to the limited rehabilitative impact of imprisonment. The need for better access to appropriate programs in prison was a common theme, as well as the need for intensive post-release support for offenders to support their reintegration into the community. Many comments were made that, if a SNPP scheme was going to increase imprisonment numbers and the length of incarceration, then emphasis should be

placed on providing more programs in prisons to support offender rehabilitation.

A recent independent outcome evaluation of the Queensland Corrective Services prison-based sexual offender program by Smallbone and McHugh found that standard community supervision appears to have a stronger independent effect than treatment on reducing sexual and violent recidivism.[167] It also found that 'a higher assessed risk, not participating in a treatment program, identifying as Indigenous, and being discharged without supervision, are all associated in some way with sexual, nonsexual violent and any recidivism'.[168] The evaluation recommended that standard post-release supervision should be made more accessible for both treated and untreated sexual offenders as the combination of treatment and post-release supervision was the most favourable to reduce re-offending.

A 2005 meta-analysis of 69 studies involving more than 22,000 sexual offenders found that community-based treatment programs are generally more effective than programs delivered in prison settings.[169] This is consistent with findings about the effectiveness of offender treatment programs more generally.[170]

Queensland Corrective Services recently undertook an analysis of Queensland re-offending data in a research brief on whether community supervision is effective.[171] The research brief found that the answer was both yes and no, and that 'community supervision that emphasises the principles of rehabilitation, in combination with compliance, shows the most promising results.'[172] This is supported by the research of Schlager and Robbins, who found that:

> [O]ffenders who were released on parole demonstrated more successful outcomes than those who were not. Offenders who served their full sentence in prison were rearrested and reconvicted at statistically significant rates greater than parolees in the short term.[173]

The research brief found there was 'no definitive answer on how long an offender should be supervised after release, without consideration of the individual's circumstances' but that 'empirical evidence suggests that the first 12 months post-release remains the highest period of re-offending'.[174] To prevent re-offending and support rehabilitation, 'the effectiveness of post-prison supervision is partly determined by the length of time an offender is on supervision'.[175]

Alternatives to imprisonment

The Victorian Sentencing Advisory Council recently released a report on community views in Victoria about the use of alternatives to imprisonment.[176] This report showed that:

> Contrary to common myths and misconceptions about a punitive public, people are open to a policy of increasing the use of alternatives to prison such as supervision, treatment and community work. Victorians are especially accepting of appropriate alternatives for mentally ill, young or drug-addicted offenders, preferring a policy of treatment, rehabilitation, counselling and education programs to prison.[177]

The Victorian report noted that studies consistently found that, when provided with visible alternatives to imprisonment, people are likely to prefer alternatives to building more prisons.[178] Currently there is limited published research regarding Queensland community views on the use of alternatives to imprisonment.[179]

Consultations and submissions

Those who commented on other approaches that could be taken expressed a diverse range of views. These varied from those who saw a need for more severe sentences, to those who emphasised a need to focus on rehabilitation.

Most of the comments made during consultations supported the need for increased funding and accessibility of rehabilitation programs both in and out of prison.

Of those submissions received in response to the online response form, there was division between the need to focus on rehabilitation and the view that the current system was not harsh enough. Another common response was a call to abolish parole, with offenders being required to serve their full sentence.

Views of legal stakeholders also varied. Some advocated a more holistic response to offending behaviour:

> As an ATSI legal service, anecdotally, we do not see imprisonment making the community safer. It fractures families and communities and returns damaged people to an already small community. The community seeks crime prevention and protection, effective healing – self-determined. More restorative justice both in prison and out, may reduce crime.[180]

The Catholic Prison Ministry supported the use of alternatives to imprisonment and saw a role for a restorative justice model in meeting the purposes of sentencing, commenting that it:

> … believes in a restorative justice model where the needs of the 'victim', the 'offender' and the community are considered. We believe that the focus should be on individual responsibility, accountability and the use of alternative, community-based orders as punishment.[181]

Bravehearts, a support and advocacy association for victims of child sexual abuse and their families, proposed an alternative to SNPPs in the form of a sentencing grid for judges that 'provides concrete parameters for sentencing specific offences and objective seriousness ranges', as well as a 'two-strike' legislative scheme for dealing with repeat sexual offenders.[182]

3.4 The Council's view on the objectives of a Queensland SNPP scheme

The Council is of the view that if a SNPP scheme is introduced in Queensland it is appropriate that its purposes should reflect the broader principles and purposes of sentencing as set out in the *Penalties and Sentences Act*.

Where serious offences of violence and sexual offences are concerned, it is the Council's view that the community has a legitimate expectation that offenders will receive the punishment they deserve for inflicting harm, and that communicates the wrongfulness of their actions. Ensuring that offenders are punished to an extent, and in a way, that is justified in all the circumstances is an important aspect of promoting community confidence in sentencing.

Community protection is also a key consideration where serious offences against the person are involved. The community expects that the criminal justice system will operate, where possible, to reduce the risks of re-offending, including through the appropriate use of imprisonment and maintaining a focus on longer-term rehabilitation.

At the same time, the Council recognises that some offenders are vulnerable and many come from backgrounds of extreme disadvantage. People with a mental illness,[183] intellectual or cognitive impairment,[184] low levels of education[185] and substance misuse problems[186] are significantly over-represented in the criminal justice system both as victims and as offenders. Care must therefore be taken to ensure that a SNPP scheme does not further disadvantage these and other vulnerable offenders such as women and people from culturally and linguistically diverse backgrounds. The Council acknowledges, in particular, the systemic disadvantage experienced by Aboriginal and Torres Strait Islander people and the effect this has in relation to their over-representation in the criminal justice system.

The challenge of structuring a SNPP scheme is to respond to the need for appropriate punishment and community protection, while ensuring that the underlying causes of offending are acknowledged and dealt with. A consistent theme of the Council's consultations has been the need for any form of SNPP scheme introduced in Queensland to be accompanied by a commitment and appropriate funding to ensure that those prisoners who will serve longer periods of imprisonment have access to appropriate programs while in prison.

The Council also recognises that transparency and consistency are important and valid objectives, and should be a feature of any modern sentencing system. The Council has been mindful of these objectives in formulating its recommendations. As Mason J recognised in the High Court case

of *Lowe v The Queen*, 'consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice', and inconsistency of punishment, which is 'regarded as a badge of unfairness and unequal treatment under the law', can lead to an erosion of public confidence in the administration of justice.[187]

To achieve proper consistency in sentencing, it is necessary for the courts and legal system to not only treat like cases alike, but also different cases differently; this is best achieved by retaining the discretion of the courts to deliver individualised justice. Just as no case represents a 'standard' example of an offence, it is unlikely that any one 'standard' period can represent the non-parole period that is appropriate in all cases. Acknowledgment of the diversity of individual case circumstances and offence seriousness captured by many offences has strongly influenced the Council in developing its final advice.

The hallmarks of transparency in a broad sentencing context include the provision of reasons that are accessible and understandable not only to the victim and offender, but also to the broader community. Such reasons must be amenable to review, and be made within a sentencing framework that is coherent, avoids unnecessary ambiguity, and provides clear guidance to the courts (for example, in the form of sentencing principles and sentencing options) to support a consistent approach.

A SNPP scheme most likely to promote transparency is one that is honest in its operation and intent and that is easy for offenders, victims and the community to understand and for the courts to interpret and apply.

One of the criticisms of the NSW SNPP scheme raised in the Council Secretariat's discussions with NSW practitioners and service providers, is that the transparency the NSW scheme claims to deliver is illusory. Although the NSW legislation sets out in a table what the SNPP is in years on an offence-by-offence basis, in fact the scheme is so complex and has such broad grounds for departure that the SNPP is rarely, if ever, applied. At the same time, substantial court time is taken dealing with submissions about where an individual offence lies in relation to the type of offence to which the scheme is intended to apply (an offence in the middle of the range of objective seriousness), and this hypothetical offence carries no legislative definition.

In formulating its recommendations, the Council has been conscious of the need to develop a scheme that is more genuinely transparent than the NSW scheme, while avoiding its ambiguities, problems and complexities. The Council has aimed to achieve this by a number of means, including recommending a form of SNPP scheme that will apply to all scheme offences without the need for a court to separately consider whether the offence meets the criteria of a 'standard' offence. The form of scheme recommended – a standard percentage scheme – is discussed in Chapter 4.

The introduction of a SNPP scheme may lead to calls from some sectors of the community for a scheme to take the form of a mandatory sentencing regime.

Although Queensland already has mandatory sentencing for the offence of murder, the Council is of the view that mandatory sentencing for the offences in the proposed SNPP scheme would be counterproductive to the scheme's stated aims, as outlined above.

The Council notes that research indicates that mandatory sentencing, contrary to those aims, fails to:

- promote judicial discretion
- result in sentences that are fair to both victims and offenders in all the circumstances surrounding specific offending
- deter offenders and others from committing offences, and
- ensure that the punishment 'fits the crime'.[188]

Mandatory sentencing also runs the very real risk of further marginalising vulnerable offenders; this has been the experience in the NT, where mandatory sentencing laws have been shown to disproportionately affect Aboriginal young offenders from isolated communities.[189]

3.5 Conclusion

This chapter has reviewed the intended purposes of a Queensland SNPP scheme, as well as the merits of introducing such a scheme, and presented the Council's views on these issues.

In the following chapters of this report, the Council presents its recommendations in response to the Terms of Reference on the structure of a Queensland SNPP scheme taking into account its views on the scheme's proper objectives.

CHAPTER 4
A QUEENSLAND SNPP SCHEME

This chapter presents the Council's recommendations on how a Queensland SNPP scheme should be structured, including:

- the Council's preferred model for a SNPP scheme
- suggested eligibility criteria and exemptions
- what level the SNPP should be set at for offences to which the scheme is to apply, and
- grounds for departure from the SNPP, to allow courts to set a non-parole period that is either shorter or longer than the SNPP.

4.1 The Council's preferred model for a SNPP scheme: guiding principles and broad approach

In identifying the type of scheme Queensland might adopt and how it might apply, the Council has had regard to the overarching interests of:

- meeting the Queensland Government's objectives, as set out in the Terms of Reference, of ensuring that penalties imposed for serious violent offences and sexual offences in Queensland are 'commensurate with community expectations' and that 'offenders who commit serious violent offences and sexual offences serve an appropriate period of actual incarceration'
- providing a useful benchmark for courts on the non-parole period offenders convicted of certain serious offences should serve in prison relative to the sentence imposed, while preserving judicial discretion to impose a just and appropriate sentence in individual cases
- targeting the scheme at the most serious forms of offending, and offences of mid to high level seriousness that ordinarily warrant an offender serving a substantial term of actual imprisonment, including 'to punish the offender to an extent or in a way that is just in all the circumstances'[190]
- minimising the risks that the scheme will disproportionately affect Aboriginal and Torres Strait Islander offenders and other vulnerable groups, such as offenders with an intellectual impairment or mental illness, taking into account their over-representation

in the criminal justice system and high levels of disadvantage
- acting consistently with existing Queensland government strategies and commitments made at a national level, including the Queensland *Aboriginal and Torres Strait Islander Justice Strategy 2011–14* (in draft),[191] the *National Indigenous Law and Justice Framework 2009 –2015*[192] and the *National Disability Strategy 2010–2020*[193]
- achieving a coherent and transparent sentencing framework for the sentencing of serious offences that promotes public confidence
- preserving, as far as possible, the current sentencing procedures of the courts and ensuring the scheme operates in a complementary way with provisions in the *Penalties and Sentences Act 1992* (Qld) and *Corrective Services Act 2006* (Qld) that govern parole eligibility
- ensuring consistency with statutory and common law principles and purposes of sentencing, including those which apply to the sentencing of young offenders, and
- introducing a SNPP scheme that is relatively unambiguous, simple to understand and apply, and that does not overcomplicate what is an already complex sentencing process.

The Council has also considered how SNPP schemes operate in other jurisdictions, with particular regard to the approach in NSW, as requested in the Terms of Reference. In developing its recommendations on the best form of SNPP scheme for Queensland, the Council has considered the functionality of these schemes and how elements of them might apply in a Queensland context.

Although not formally termed 'standard non-parole periods', there are already in effect three forms of specified mnimum non-parole periods similar to SNPPs under Queensland legislation:
- Pursuant to s 181 of the *Corrective Services Act*, a minimum non-parole period of 15 years that applies to offenders sentenced to life imprisonment (including for murder which carries a mandatory life sentence in Queensland), or 20 years for murder in some circumstances, such as where the offender has previously been sentenced for that offence.[194]
- A minimum non-parole period of 80 per cent or 15 years (whichever is the lesser) that applies to offenders declared by a court to be convicted of a 'serious violent offence' (SVO) pursuant to Part 9A of the *Penalties and Sentences Act*.
- A minimum non-parole period of 50 per cent of the sentence imposed by a court, as provided for under s 184 of the *Corrective Services Act* if:
  - the offender is sentenced to imprisonment for more than three years and the court has not set a parole eligibility date, or
  - the offender is serving a period of imprisonment of not more than three years for a sexual offence and the court has not set a parole eligibility date, or
  - the offender is serving a period of imprisonment ordered to be served by a court on breach of a suspended sentence under s 147(1)(b) or (c) of the *Penalties and Sentences Act*, and
  - the offender is not subject to an indefinite sentence, has not been declared convicted of a SVO under the *Penalties and Sentences Act,* and is not being detained in an institution for a period fixed by a judge under Part 3 of the *Criminal Law Amendment Act 1945* (Qld) (relating to the detention of offenders for sexual offences who are found to be incapable of exercising proper control over their sexual instincts).

The 50 per cent non-parole period is activated by the length of the imprisonment term imposed, and the circumstances in which it is imposed or activated. The 80 per cent minimum non-parole period is primarily offence-based and its activation is mandatory if a court imposes a sentence of imprisonment of 10 years or more for a qualifying offence, or in other cases where imprisonment has been imposed and the court declares the offender convicted of a SVO.

The Terms of Reference request the Council to consider how a new minimum SNPP regime is to operate in the context of the existing SVO scheme; this includes what reforms, if any, are recommended to ensure the continued operation of the SVO provisions and their complementary operation with the new SNPP scheme. This is explored below.

The Serious Offences Standard Non-Parole Period Scheme

The Council's preferred model for a SNPP scheme is a fusion of the existing SVO scheme under Part 9A of the *Penalties and Sentences Act* and the current parole provisions that provide forms of standard percentage non-parole periods. Further elements of the scheme have been drawn from Part 2 of the *Penalties and Sentences Act* and SNPP schemes in NSW, SA and the NT.

Under the Council's proposals, the existing SVO scheme would be replaced with a new scheme – the Serious Offences Standard Non-Parole Period Scheme – which would provide for two forms of non-parole periods:

- a SNPP of 65 per cent of the period of imprisonment for prescribed offences, including offences of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, which applies if an offender is sentenced for these offences to five years or more, but less than 10 years imprisonment
- in accordance with the existing SVO scheme under Part 9A of the *Penalties and Sentences Act*, a minimum non-parole period of 15 years or 80 per cent of the period of imprisonment (whichever is the lesser) in the following circumstances:
  - where the offender is sentenced for a Schedule 1 offence, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, to 10 or more years imprisonment and the court must declare the offender convicted of a 'serious offence' (SO)
  - where the offender is sentenced for a Schedule 1 offence, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, to five years or more, but less than 10 years and the court has a discretion to declare the offender convicted of a SO, or
  - where the offender is convicted on indictment of an offence of counselling or procuring the use, or conspiring or attempting to use, violence against another person, or that resulted in serious harm to another person, and the offender is sentenced to a term of imprisonment of any length, the court has a discretion to declare the offender convicted of a SO.

A prescribed offence for the purposes of the new SNPP of 65 per cent will be an offence listed in Schedule 1 of the *Penalties and Sentences Act*, an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, as well as a number of sexual offences in the *Criminal Code* that are not currently listed in Schedule 1.

Consistent with the current SVO scheme, the proposed scheme would apply only to offenders convicted on indictment of an offence, and would exclude matters dealt with summarily in the Magistrates Court.

By integrating the new SNPP with the existing SVO provisions to form the Serious Offences SNPP Scheme, the Council intends to reduce the complexity associated with courts applying the schemes, and ensure they operate in a complementary and relatively seamless way.

The effect of this is that, for sentences imposed for a prescribed offence for the purposes of the new SNPP where the total period of imprisonment imposed for those offences is five years or more, but less than 10 years, a court may either:

- declare the offender convicted of a serious offence (a SO declaration, which is discretionary for this group of offenders), in which case the offender will have to serve a minimum of 80 per cent of the sentence in prison, or
- set the non-parole period at 65 per cent of the sentence unless it is of the opinion that it would be 'unjust to do so' (in which case the court will be able to set a shorter or longer non-parole period provided it gives reasons for doing so and identifies the factors taken into account in reaching its decision).

The power would also remain in the case of offences of counselling or procuring the use,

or conspiring or attempting to use, violence against another person, or that resulted in serious harm to another person, where the offender is convicted on indictment and sentenced to a term of imprisonment of any length, for the court to declare the offender convicted of a SO.

The Council's reasons for recommending this approach are discussed later in this chapter.

The proposed approach would extend the presumptive application of a SNPP to offenders whose offences do not attract an automatic SO declaration, and are found by the courts to be not serious enough to warrant the making of a SO declaration, but justify a significant period of actual imprisonment because of the seriousness of the offence committed or the harm caused.

The proposed application of the new SNPP scheme is summarised in Table 1 and in Figure 2.

The Council's proposed model will largely retain the current 'top down' approach to sentencing, whereby the court sets the head sentence before setting the non-parole period. This should substantially overcome any complexities associated with sentencing an offender for multiple offences. The non-parole period will apply to the overall sentence imposed for prescribed offences, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, a prescribed offence. This is in contrast to the NSW approach under which a court must set the non-parole period first and the head sentence by reference to this on an offence-by-offence basis or, if imposing an aggregate sentence of

Table 1: Overview of the application of the new Serious Offences SNPP Scheme

Eligibility	Parole eligibility
• Offenders sentenced to 10 years imprisonment or more for a Schedule 1 offence, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit a Schedule 1 offence (mandatory declaration that the offender is convicted of a SO) • Offenders sentenced to five years or more and less than 10 years for: - a Schedule 1 offence, or - an offence of counselling or procuring the commission of, or attempting or conspiring to commit a Schedule 1 offence who are declared convicted of a SO (discretionary) • Offenders sentenced to a term of imprisonment of any length that involved: - the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person, or - that resulted in serious harm to another person who are declared convicted of a SO (discretionary)	Minimum of 80% of the period of imprisonment, or 15 years (whichever is the lesser) A court can also set a later parole eligibility date
Offenders sentenced to five years imprisonment or more and less than 10 years for a prescribed offence (as defined, including Schedule 1 offences), or an offence of counselling or procuring the commission of, or attempting or conspiring to commit a prescribed offence, and not declared convicted of a serious offence	65% of the period of imprisonment unless a court is of the opinion it would be 'unjust to do so' (in which case a court could set either a shorter or longer non-parole period)
All other offences	Current parole practices remain: • courts set a parole release date or parole eligibility date as required or permitted under Part 9 of the *Penalties and Sentences Act*, or • if no parole eligibility date is set, a non-parole period of 50% of the sentence applies

imprisonment, indicate what the non-parole period would have been for each SNPP offence had the court not imposed an aggregate sentence.[195]

In most cases where an offender is being sentenced for multiple offences, the most serious offence will be a prescribed offence under the scheme that will attract the longest period of imprisonment, and sentences imposed for related offences will generally be ordered to run concurrently with that sentence.[196] If an offender is sentenced for more than one prescribed offence, the application of the SNPP in most cases will be determined by the offence attracting the highest penalty.

In circumstances where the term of imprisonment is ordered to be served cumulatively (for example, as required by s 156A of the *Penalties and Sentences Act*, where the offender is convicted of an offence listed in Schedule 1, and is already serving a term of imprisonment for another offence, has been released on parole or some other form of correctional services release, or committed the offence after escaping from lawful custody under a sentence of imprisonment), the SNPP would only apply to that part of the sentence ordered to be served for a prescribed offence.

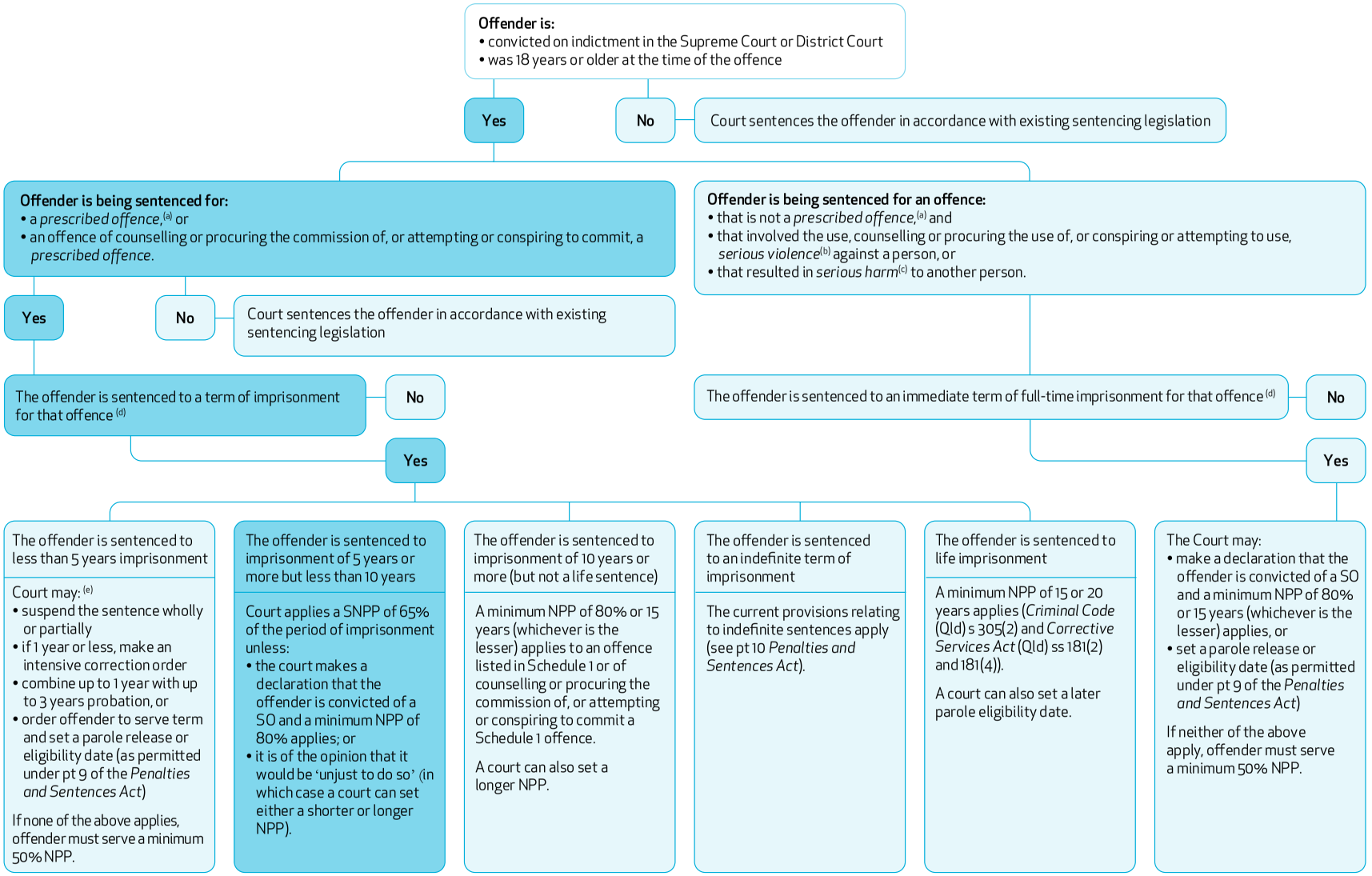
All issues considered by the Council in developing this model, as well as the more detailed application of the scheme, are considered below.

The Council's recommendations about offences to which the scheme should apply are set out in Chapter 5.

If adopted, this scheme will have a significant impact on the parole eligibility for offenders convicted of serious violent offences and sexual offences in Queensland. The Council's research shows that offenders sentenced for offences that trigger eligibility for a SVO declaration are eligible to apply for release on parole, on average, after serving between 33 and 50 per cent of their sentence.[197] After the Council's proposed changes, those offenders sentenced to five years or more, and less than 10 years will have to serve a minimum of 65 per cent of their sentence before being eligible to apply for release on parole. This is likely to result in a significant deferral of parole eligibility for those offenders subject to the new SNPP. The Council's estimate of the number of offenders likely to be affected per year by the new SNPP is discussed in Chapter 6.

The following sections of this chapter explore the Council's recommendations and its reasons for recommending this approach.

Figure 2: Overview of the application of the proposed new Serious Offences SNPP Schme*



Notes:

[a] A prescribed offence under the Council's proposals includes offences listed in Schedule 1 of the *Penalties and Sentences Act* (Qld) and sexual offences in the *Criminal Code* (Qld).

[b] There is no current definition of serious violence in the *Penalties and Sentences Act* (Qld).

[c] Serious harm means any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent (*Penalties and Sentences Act* (Qld) s 4) .

[d] In the case of offences involving violence against another person or that resulted in physical harm to another person, sexual offences committed in relation to a child under 16 years, and child exploitation material offences, the principle that a sentence of imprisonment should only be imposed as a last resort does not apply (*Penalties and Sentences Act* (Qld) ss 9(3), 9(5)(a), 9(6A)).

[e] If the offence is a sexual offence committed in relation to a child under 16 years, the offender must serve an actual term of imprisonment unless there are exceptional circumstances (*Penalties and Sentences Act* (Qld) s 9(5)(b)). In addition to the options listed, a court may declare the offender convicted of a SO, in which case a minimum SNPP of 80% applies in certain circumstances (see *Penalties and Sentences Act* (Qld) s 161B(4)).

* Shaded boxes represent the conditions for application of the proposed new SNPP of 65 per cent of the term of imprisonment imposed for a prescribed offence

4.2 Should a Queensland SNPP scheme be a defined term or a standard percentage scheme?

In its Consultation Paper, the Council put forward for consultation two approaches to structuring a Queensland SNPP scheme:

- Option 1 was a defined term scheme, where the length of time in years and months would be set in legislation as the minimum period that an offender must be ordered to serve in prison before being eligible to apply for parole if convicted of a scheme offence. Under this model, each offence would carry its own SNPP. This scheme is based on that operating in NSW.
- Option 2 was a standard percentage scheme, which would specify a set percentage of the prison sentence that an offender convicted of an offence must serve before being eligible to apply for parole. This option is similar in approach to the current SVO scheme that operates under Part 9A of the *Penalties and Sentences Act* and the 50 per cent non-parole period that applies in certain circumstances.

The advantages of Option 1 (a defined term scheme) identified in the Consultation Paper include the potential for greater transparency in sentencing for those offences subject to the scheme, as the legislation would clearly set out how long (in years) the offender must spend in custody. It would also provide clear guidance to the court in setting the non-parole period for individual offences.

The challenges of this approach include deciding how long the non-parole period should be for each offence, the need to define what type of offence the SNPP is intended to apply to, and requiring well-defined grounds on which a court can depart from the scheme to set either a shorter or longer non-parole period. The Council also noted in the Consultation Paper that setting defined terms on an offence-by-offence basis would be likely to have a marked impact on the current approach to sentencing in Queensland, making the process more complex. Consequently, the Council acknowledged that this option would be likely to increase the time taken by courts to sentence offenders.

The Council suggested that Option 2 (a standard percentage scheme) may overcome some of the disadvantages of a defined term scheme, but would not provide the same level of guidance to courts on appropriate sentences (in years and months) in a given case.

In assessing the merits of the two options, the Council has considered :

- the objectives of the scheme and its ability to meet these objectives, including providing guidance to courts, increasing transparency and ensuring that offenders convicted of serious violent offences and sexual offences serve an appropriate period of actual imprisonment
- the intention that a SNPP scheme provides a 'standard' non-parole period that is to apply in most cases, and the ability of the two different forms of scheme to deliver this
- the possible impact of these options on the current approach to sentencing in Queensland and the criminal justice system, including:
  - the current 'top down' approach to sentencing, under which courts set individual sentences for each offence and make orders for concurrency or cumulation before setting a single non-parole period
  - the willingness of offenders to plead guilty
  - possible delays and increased costs in resolving matters, caused by the additional time required for prosecutors and defence counsel to prepare for sentencing hearings and make submissions, the drafting of sentencing remarks and the potential for appeals against sentence
  - how the scheme can be structured to operate in a complementary way with existing provisions for parole in Queensland, such as court-ordered parole and the SVO provisions under Part 9A of the *Penalties and Sentences Act*.

Consultations and submissions

Members of the public and legal stakeholders expressed a variety of views about what type of SNPP scheme should be introduced.

Most of the respondents to the online response form question on what type of scheme should be introduced preferred a defined term scheme over a standard percentage scheme (n=107). The reasons were generally related to the view that a defined term would provide greater certainty of sentencing outcomes. A standard percentage scheme was supported by 53 respondents to the online response form.

In addition to the two options presented, the Council invited feedback through the online response form on alternative schemes that might meet the objectives of a SNPP. The 33 respondents to this question who supported another form of scheme suggested a number of options including:

- introducing minimum sentences rather than a minimum non-parole period scheme
- abolishing parole and requiring those convicted of serious violent offences and sexual offences to serve their full sentence in prison
- placing greater emphasis on post-release supervision programs, and
- retaining the courts' full discretion to nominate a non-parole period.

In contrast, the Council's targeted statewide consultations with key stakeholders found that while many opposed the introduction of any form of SNPP scheme, the majority of those who expressed a view on this issue preferred a standard percentage scheme. A defined term scheme was supported at a small number of consultations.[198] These targeted consultations were attended primarily by legal and criminal justice stakeholders.

The majority of written submissions from legal stakeholders and advocacy and support agencies working with victims and offenders opposed the introduction of any form of SNPP scheme. For this reason, limited feedback was provided on the preferred form of scheme. Of those who did express a view on this issue, the majority preferred a standard percentage scheme. Protect All Children Today (PACT), who was among those who favoured this form of scheme, suggested that the standard percentage be set at 75 per cent of the head sentence.[199] PACT further commented that should such a scheme be adopted, 'evidence of the sentence imposed must be clearly articulated and communicated to victims'.[200]

The Queensland Law Society (QLS), which is opposed to the introduction of SNPPs, also favoured a standard percentage scheme of 50 per cent of the sentence to apply to adults (people 18 years or over)[201] sentenced to imprisonment after having been found guilty on indictment of a serious offence punishable by imprisonment of 10 years or more and sentenced to full-time imprisonment.[202] The QLS suggested that, ideally, if a scheme is introduced it should be limited to repeat offenders and should not apply to matters dealt with in the Magistrates Court.

Although representatives of key legal bodies who attended a legal issues roundtable were also opposed to the introduction of a SNPP scheme, they preferred a standard percentage scheme to a defined term scheme, should a SNPP scheme be introduced. It was suggested that such a scheme would be more consistent with the current approach to sentencing in Queensland than a defined term scheme, and would allow greater flexibility for courts to respond to the individual circumstances of a case.[203] The case for a standard percentage scheme was seen as particularly compelling should offences such as manslaughter, which captures such a broad range of conduct and is committed in such a wide range of circumstances, be included in the scheme.

Both Bravehearts and the Queensland Police Union of Employees (QPUE) favoured a defined term scheme on the basis of the additional guidance such a scheme would provide to courts. Bravehearts stated that this form of scheme would provide guidance to the courts on the actual period of imprisonment to be served which is appropriate for an offence.[204]

In arguing for the adoption of such a scheme, the QPUE specifically rejected criticisms that it would introduce a form of mandatory sentencing, suggesting that SNPPs should 'act as starting points for the courts; being terms of real guidance as to sentencing'.[205] The QPUE supported the scheme applying to all indictable serious violent offences and sexual offences dealt with either summarily or on indictment.

Comments made in some consultation sessions with Aboriginal and Torres Strait Islander community groups indicated that, should a scheme be introduced, a standard percentage scheme would be the preferred option.[206] There was also some support for any SNPP scheme being limited to repeat offenders.

The Council's view

The Council's recommendations have been strongly influenced by what type of SNPP scheme is most likely to complement, and operate effectively in, the current Queensland sentencing environment, while meeting the Queensland Government's objectives. Taking all matters into consideration, the Council has determined that a standard percentage scheme is the preferred model. This would deliver a number of the intended outcomes of a defined term scheme, including the minimum term an offender must spend in prison for a given offence, while preserving the current approach to sentencing in Queensland. It would also avoid many problems that have arisen in NSW, which the Council considers could not easily be overcome in the process of modifying the scheme to apply in a Queensland context.

Specific benefits of a standard percentage scheme over a defined term scheme are that it would:

- be consistent with other forms of non-parole percentage schemes operating in Queensland in the form of the SVO scheme, and the minimum non-parole period of 50 per cent for offences where no parole release or eligibility date is set
- retain the current approach to sentencing in Queensland under which courts impose individual sentences for each offence of which an offender is found guilty, and then determine the total sentence to be imposed, before considering parole eligibility (referred to as the 'top down' approach to sentencing). The SNPP would apply to the sentence imposed for all scheme offences, rather than needing to be set, or considered, on an offence-by-offence basis
- provide greater guidance to courts on the minimum period an offender must serve in prison, while still preserving the courts' discretion to set a just and appropriate sentence, taking into account the individual circumstances of the case; this approach would also more easily accommodate differences in offence seriousness than a defined term scheme, and
- operate more transparently than a defined term scheme as the minimum term would not need to be defined to apply only to offences at a particular level of seriousness; once the sentence was imposed, the standard percentage would apply as the minimum non-parole period (with some limited exceptions).

In addition to the ability of a standard percentage scheme to be easily integrated into the existing approach to sentencing in Queensland, one of the most compelling arguments in favour of this type of scheme, as opposed to a defined term scheme, is its ability to accommodate differences within categories of offence seriousness by retaining the courts' power to set an appropriate head sentence. Offences such as manslaughter cover a broad range of offending, from cases just falling short of murder, to those involving criminal negligence where there is no intention by the offender to cause harm to the victim. Defining an appropriate 'standard' non-parole period for an offence where the circumstances of its commission and the conduct captured are so varied would be difficult and, in many respects, artificial. Although this problem may be less pronounced in the case of other, more narrowly defined offences, it would nevertheless present challenges for the courts.

In rejecting a defined term scheme, the Council was concerned that a NSW-style scheme would result in significant additional complexity in the sentencing process without necessarily delivering

the transparency that such a scheme is intended to achieve. The real risk is that while such a scheme is intuitively attractive and appears to offer some certainty about the minimum prison sentence an offender will receive for a scheme offence, because of the need to define what that period represents (for example, a non-parole period for an offence falling into the middle of the range of objective seriousness) there is a risk that courts applying it will often have grounds to set a non-parole period that is below and, in some cases, substantially below the SNPP. On the available evidence, the NSW scheme appears to have failed to meet a number of its objectives.

RECOMMENDATION 1
A Queensland minimum standard non-parole period scheme should take the form of a standard percentage scheme.

4.3 How should a standard percentage SNPP scheme operate with Part 9A of the *Penalties and Sentences Act*?

The Terms of Reference request the Council's advice on how the Queensland SNPP scheme is to operate in the context of the existing SVO provisions, including any reforms required to ensure the complementary operation of the SVO provisions with the new SNPP regime.

As discussed above, the Council's view is that a Queensland SNPP scheme should include a new form of standard percentage SNPP set at 65 per cent of the head sentence for a SNPP offence. The Council also recommends the retention of the 80 per cent minimum non-parole period currently provided for by the SVO scheme.

Because the SVO scheme is, in effect, an existing form of SNPP scheme operating in Queensland; ensuring the new scheme operates in a complementary and coherent way with the SVO provisions is more straightforward than if the Council had recommended the SNPP scheme be structured as a defined term scheme.

The current SVO scheme

In Queensland, under Part 9A of the *Penalties and Sentences Act*, an offender sentenced to a term of imprisonment of 10 years or more for an offence listed in Schedule 1 of the Act, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in Schedule 1, must be declared convicted of a SVO. The consequence is that the offender must serve a minimum of 80 per cent of their sentence in prison or 15 years, whichever is the lesser. The court may also set a later parole eligibility date.

In the leading case on the application of the SVO scheme, *R v McDougall and Collas*,[207] the Queensland Court of Appeal identified a number of principles to guide sentencing courts in determining the appropriate sentence to be imposed where a SVO declaration might apply. The Court found that when sentencing, courts cannot ignore the consequences that follow on a sentence of 10 years or more, rather than one of less than 10 years. The making of a declaration if the sentence is 10 years or more is relevant to the sentencing court in determining what sentence is 'just in all the circumstances', to meet the purposes of sentencing set out in s 9(1) of the Act.

The Court in *R v McDougall and Collas* also affirmed that sentencing courts should not attempt to subvert the intention of Part 9A of the Act in applying the scheme by reducing what would otherwise be regarded as an appropriate sentence. Consistent with the earlier decision of Fryberg J in *R v Eveleigh*,[208] the Court found, although the consequences of exercising any of the powers conferred by Part 9A should be taken into account, 'adjustments may be made to a head sentence which are otherwise within the "range" of appropriate penalties for that offence.[209]

Where a sentence for a SVO offence is five years or more, but less than 10 years (s 161B(3) of the *Penalties and Sentences Act*), or the sentence is of any length and imposed for an offence involving the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person or which has resulted in

serious harm to another person (s 161B(4) of the Act) the court has discretion to make a declaration that the offender is being convicted of a SVO. As with sentences of 10 years or more, the making of a SVO declaration has the effect of setting the offender's minimum parole eligibility at 80 per cent of the head sentence imposed by the court and is taken to be an indication by the court of the seriousness of the offence.

In deciding whether to make such a declaration under s 161B(3) and (4), if the offence involves violence against a child under 12 years or caused the death of a child under 12 years, the court must treat the age of the child as an aggravating factor when deciding whether to declare the offender convicted of a SVO.[210]

The Court of Appeal in *R v McDougall and Collas* notes that, although there has been a divergence in views at various times on how this discretionary power to make a declaration should be exercised, there is support in previous authorities for the following propositions:

- the discretionary powers granted by s 161B(3) and (4) are to be exercised judicially and so with regard to the consequences of making a declaration;
- a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole.[211] By definition, some of the offences in the Schedule to the Act will not necessarily – but may – involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child;
- the discrete discretion granted by s 161B(3) and (4) requires the existence of factors which warrant its exercise, but the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;
- the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;
- the law strongly favours transparency and accessible reasoning, and accordingly sentencing courts should give reasons for making a declaration, and only after giving the defendant an opportunity to be heard on the point;
- for the reasons to show that the declaration is fully warranted in the circumstances, it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them;
- without that last feature, it may be difficult for the reasons to show that the declaration was warranted;
- where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly the just sentence which is the result of a balancing exercise may require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences;
- where the circumstances of the offence do not take it out of the 'norm' for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion.[212]

These propositions have been endorsed by the Court of Appeal on a number of subsequent occasions, including in the recent decision of *R v Richardson*.[213]

In the past, one of the aspects of uncertainty about the scheme's operation has been the relevance of an offender's prior criminal history or their prospects of rehabilitation to the making of a SVO declaration. The accepted position of the Court of Appeal now appears to be that the critical issue is the nature of the offence, and that unrelated considerations, such as previous criminal history or prospects of rehabilitation, should be of limited relevance.[214]

Because of limitations in the way the data are recorded, the Council has not been able to access information on how often declarations are being made by courts for qualifying offences attracting a sentence of less than 10 years imprisonment, where the making of such a declaration is discretionary. However, based on the principles set down by the Court of Appeal, it could be expected that these declarations are being made only in the case of the most serious examples of offending involving an element of actual violence and/or serious harm to a victim.

Some recent examples of SVO applications and their outcomes are:

- *R v MJH*[215] – Application for a SVO declaration refused. The offender was sentenced to nine years imprisonment with parole eligibility after two and a half years (taking into account just under two years already spent in custody, which could not be formally declared as time served because of some minor charges outstanding). The offender was sentenced for a number of offences committed against three sex workers, including targeting the complainants with a view to raping and otherwise assaulting them and threatening violence while armed with a knife. In two separate incidents, the offender raped two of the complainants by forcing them to perform unprotected oral sex on him. The offender pleaded guilty and there were suggestions in a psychiatrist's report that he committed the offences while under the influence of drugs. The judge concluded it was unnecessary to make a declaration as he considered 'the imposition of the head sentence of nine years as imposed for the major offences to be adequate to reflect the gravamen of the offences before the Court'.
- *R v ASB*[216] – Application for a SVO declaration granted. The offender was sentenced to eight years imprisonment for a brutal attack on two backpackers who were mistakenly dropped at the offender's caravan park in the early hours of the morning and knocked on the offender's door to ask for directions. The offender's sister and mother and the offender brutally attacked the two women. The offender was convicted of two counts of assault occasioning bodily harm in company, one count of rape involving a digital rape and one count of sexual assault.
- *R v GGR*[217] – Application for a SVO declaration refused. The offender was sentenced to nine years imprisonment with a non-parole period of three years and six months. The offender was sentenced for a number of offences committed over a five-month period including eight counts of armed robbery and seven counts of breaking and entering and stealing. Four of the armed robberies were committed with a gun, four with a knife or screwdriver, five were in company and there was some low level of personal violence in some of them. Three locations robbed were bottle shops, three were video stores, one was an adult store and one was a pharmacy. About $30,000 was stolen. The offender had a drug problem at the time the offences were committed. The sentencing judge concluded: 'as serious as I consider these armed robberies, [this is] a situation where there are no specific aspects of the armed robberies which, in my view, ultimately call for a serious violent [offence] declaration'.

Consultations and submissions

The Council sought community and stakeholder views on whether a SNPP scheme should apply to offenders declared as being convicted of a SVO. Of those who commented on the issue, most supported the application of the scheme to offenders sentenced under the SVO scheme:

> This would reduce confusion across the legal fraternity and provide a level of consistency and transparency. If the SVO scheme is working effectively, why replace it or implement another scheme that has the potential to devalue or negatively impact upon the current scheme?[218]

> There would be little need to include declared SVOs within any SNPP scheme, as it currently operates satisfactorily as its own SNPP scheme.[219]

The QPUE submitted that the SVO non-parole period should be set at 90 per cent 'to fall in line with community expectations'.[220]

Although this was a complex issue, of the community members who made submissions using the online response form, 94 supported the new SNPP scheme applying to offenders captured by the SVO scheme, while 71 were of the view that the two schemes should operate independently of each other.

A number of respondents provided additional comments on this issue. One comment related to a call for one scheme to cover all offences, including to reduce complexity:

> Let's just make one scheme to cover all offences.[221]

> I don't see a problem with them operating together, as long as the scheme does not make it possible for an offender to receive a lesser sentence than is possible under the serious violent offence provisions. Both schemes have the same goal – to give less independence to judicial officers who do not perform their job to community expectations and who do not discharge their duties faithfully.[222]

Some online submissions supported the abolition of parole.[223] In one case it was proposed that a post-release period should be applied to the end of the prison sentence:

> But serving only 80% of a sentence is not enough. If a sentence is given according to the facts & standards applied then that sentence should be carried out in full, allowing for a reintroduction into society by the six month parole period at the end of a full term.[224]

Some submissions also suggested the eligibility criteria should be careful to ensure that 'serious violent offences' and 'serious violent offenders' were appropriately defined:

> I think that there needs to be a review of the term 'serious violent offence'. To me, I think that a serious violent offender is someone who has caused serious direct harm to another person through violence. I find this question hard to answer given this. If we are talking a serious violent offence being murder then I think that the two schemes could work along side each other however if we [are] looking at a serious violent offence being a drug trafficker th[e]n I think the schemes should operate separately from each other as there are two very different intentions of the offenders in these scenarios.[225]

At the legal issues roundtable, representatives of key legal bodies were of the view that, if a new SNPP scheme is introduced, consideration should be given to subsuming it within the existing SVO scheme, which already provides for a form of minimum standard non-parole period.[226] Participants suggested that there is a general lack of awareness in the community about the SVO scheme and its operation, and that more could be done to promote it in the community.

The Council's view: a new Serious Offences SNPP Scheme for Queensland

As discussed earlier in this chapter, the Council's view is that the existing SVO scheme under Part 9A of the *Penalties and Sentences Act* should be recast as a new form of SNPP scheme – the Serious Offences SNPP Scheme – which would provide for two forms of non-parole period:

- a SNPP of 65 per cent of the period of imprisonment for prescribed offences, including offences of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, which applies if an offender is sentenced for these offences to five years or more, but less than 10 years imprisonment
- in accordance with the existing SVO scheme under Part 9A of the *Penalties and Sentences Act*, a minimum non-parole period of 15 years or 80 per cent of the period of imprisonment (whichever is the lesser) in the following circumstances:
  - where the offender is sentenced for a Schedule 1 offence, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, to 10 or more years imprisonment and the court must declare the offender convicted of a 'serious offence' (SO)
  - where the offender is sentenced for a Schedule 1 offence, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, to five years or more, but less than 10 years and the court has a discretion to declare the offender convicted of a SO, or
  - where the offender is convicted on indictment of an offence of counselling or procuring the use, or conspiring or attempting to use, violence against another person, or that resulted in serious harm to another person, and the offender is sentenced to a term of imprisonment of any length, the court has a discretion to declare the offender convicted of a SO.

Consistent with the current SVO scheme, the proposed scheme would apply only to offenders convicted on indictment of an offence and would exclude matters dealt with summarily in the Magistrates Court.

By integrating the new SNPP with the existing SVO provisions to form the Serious Offences SNPP Scheme, the Council intends to reduce the complexity associated with courts applying the schemes, and ensure they operate in a complementary and relatively seamless way.

In cases where an offender is sentenced to 10 years or more for an offence listed in Schedule 1 of the *Penalties and Sentences Act*, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, one of these offences, the court will be required to make a declaration that the offender has been convicted of a SO, and that the offender must serve a minimum of 80 per cent of the sentence or 15 years (whichever is the lesser) in prison, as is currently the case.

For sentences where the total term of imprisonment is five years or more, but less than 10 years, courts will continue to have the option to declare the offender convicted of a serious offence (a SO declaration), and the offender will have to serve a minimum of 80 per cent of the sentence in prison. However, where a court decides that a declaration is not warranted, and the offence is a prescribed offence for the purposes of the new SNPP, it will have to set the non-parole period at 65 per cent of the sentence unless it is of the opinion it would be 'unjust to do so' (in which case the court will be able to set either a shorter or longer non-parole period).

The new SNPP scheme will ensure that in cases that fall just short of the criteria justifying the making of a 'SO declaration', but that are nevertheless serious (as evidenced by the length of the term of imprisonment imposed), offenders will have to serve almost two-thirds of their sentence (ie 65%) in prison before being eligible to apply for release on parole.

The power would also remain in the case of offences of counselling or procuring the use, or conspiring or attempting to use, violence against another person, or that resulted in serious harm to another person, where the offender is convicted on indictment and sentenced to a term of imprisonment of any length, for the court to declare the offender convicted of a SO.

The Council estimates that about 200 offenders per year will be affected by the introduction of this new SNPP if recent offending and sentencing patterns continue. This estimate is based on the number of offenders sentenced in the period 2005–06 to 2009–10 in the higher courts for serious offences that, under the Council's recommendations, would have qualified for the new SNPP of 65 per cent. For offenders affected by the scheme, this is likely to have a significant impact on parole eligibility, particularly given the Council's finding that offenders sentenced for these offences are eligible to apply for release on parole, on average, after serving 33 to 50 per cent of their sentence.[227] The Council's analysis of the likely impacts of the new SNPP is presented in Chapter 6.

RECOMMENDATION 2

A Queensland minimum standard non-parole period scheme should be integrated with the existing Serious Violent Offences scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld), which should be recast as the 'Serious Offences Standard Non-Parole Period Scheme'.

RECOMMENDATION 3

3.1 Part 9A of the *Penalties and Sentences Act 1992* (Qld) should be retitled 'Convictions of Serious Offences'.

3.2 Part 9A of the *Penalties and Sentences Act* should be amended to state that a court may (or, in the case of sentences of 10 years or more for a qualifying offence, must) declare an offender convicted of a 'serious offence' in all circumstances in which a court can currently declare an offender convicted of 'a serious violent offence'.

3.3 In the case of sentences of imprisonment of five years or more, but less than 10 years, imposed for prescribed offences for the purposes of the new

minimum standard non-parole period (see Recommendation 16), and that are also offences in relation to which a court may make a serious offence declaration pursuant to Part 9A of the *Penalties and Sentences Act* (as amended), courts should retain the power to make a declaration under Part 9A of the Act that the offender is convicted of a serious offence, with the result that the offender must serve a minimum of 80 per cent of the sentence in prison before being eligible to apply for release on parole.

4.4 Limiting the scheme to serious offending

The Council's Consultation Paper suggested that one way of confining a Queensland SNPP scheme to more serious offending might be to target repeat offenders – that is, offenders convicted of a serious violent offence or sexual offence on more than one occasion.

However, a difficulty of this approach is that some serious offences that might be seen as deserving of substantial time in prison would not be included within the scope of the scheme, even if these offenders appeared to pose an ongoing risk of committing other serious offences.

Consultations and submissions

A consistent theme in early consultations among key stakeholders who did not think the scheme should be one of general application, was that it should be targeted at offenders convicted of more serious offences and repeat offenders assessed as posing an ongoing risk to the community.

Differing views were expressed on this issue during consultations, ranging from those who supported limiting the scheme in this way, to others concerned this might automatically exclude some offenders to whom the SNPP should apply because of the seriousness of the offence committed.

The QLS, which opposed the introduction of a SNPP scheme, expressed some support for these proposals.[228]

Both the QPUE and Bravehearts supported the scheme applying to offenders regardless of their prior criminal history. The QPUE commented that:

> Indictable offences are very serious in nature and therefore there is no reason to give a person a 'free pass' in the sentencing category just because it is their first offence.[229]

Bravehearts was concerned that to limit the scheme in this way 'defies the purposes and objectives of a Queensland standard non-parole period scheme'.[230]

The Council's view

The Council considered a number of approaches that would achieve the outcome of targeting more serious forms of offending and offenders posing a higher risk of re-offending, including limiting the scheme to offenders with a previous conviction for a serious or violent offence listed in Schedule 1.

Taking into account the current operation of the SVO scheme and the possible advantages of integrating the new SNPP scheme with this existing scheme, and consistent with the focus of the Terms of Reference on sentencing for serious violent offending and sexual offending, the Council recommends that the new standard non-parole period should be limited to longer-term sentences, with a period of five years adopted as the lower limit. In the experience of Council members, offences attracting a sentence of this length are generally those falling at the higher end of offence seriousness justifying a longer term of imprisonment being served to meet the purposes of punishment. This approach also preserves the availability of court-ordered parole and other parole arrangements for offenders serving sentences of less than five years, and aligns with the discretionary power of the court to make a SVO declaration under s 161B(3) of the *Penalties and Sentences Act*.

The Council's concern with the alternative approach is that targeting offenders who have a previous conviction for a serious violent offence and/or are assessed as posing an ongoing risk to the community would fail to capture offenders

convicted of a first offence that is nevertheless very serious. These cases may warrant the offender serving a substantial period of actual imprisonment before being released on parole, even if the offender has no prior offending history. For this reason, the Council has concluded that adopting a lower limit based on court sentencing practices provides the better approach.

Consistent with the current operation of the SVO scheme pursuant to s 161C of the *Penalties and Sentences Act*, the Council recommends that the specified years of imprisonment for the purposes of the application of the proposed new SNPP should be calculated by reference to all sentences of imprisonment imposed for a prescribed offence (as well as an offence of counselling or procuring the commission of, or attempting or conspiring to commit, a prescribed offence). Offences that do not meet this definition will not be included in calculating the number of years of imprisonment for these purposes.

The Council notes there has previously been a lack of clarity concerning how s 161C is to be applied. In this regard, the Council notes the comments by McPherson JA in *R v Powderham* regarding the ambiguity of s 161C that:

> ...it is not possible to arrive with any real confidence at a firm conclusion about the scope and meaning of s 161C except perhaps in the case of the examples mentioned in para [8] of these reasons and possibly some others that can be conceived of.[231]

Although the Court of Appeal was able to resolve the issue for the purposes of sentencing in *R v Powderham*, the Council suggests that consideration could be given to reviewing s 161C to remove the ambiguities highlighted by the Court.

Based on the Council's analysis, a scheme with this eligibility criterion may minimise the impact on Aboriginal and Torres Strait Islander offenders. These offenders are more likely than non-Indigenous offenders to be imprisoned for a violent offence at the less serious end of offending (such as assault occasioning bodily harm and wounding) and to be sentenced to a short term of imprisonment for that offence.

Under the Council's proposal, offenders sentenced to short terms of imprisonment for an offence of violence not declared as being a conviction of a SO will remain eligible for court-ordered parole and will not be affected by the scheme.

In reaching the view that the scheme should be limited to longer-term sentences, the Council has also considered the generally high rate of guilty pleas in Queensland for the offences under consideration.[232] Depending on how the scheme is structured, there is a real risk that, if it is extended to all offenders convicted of a scheme offence irrespective of the length of their prison sentence, it may have the unintended effect of discouraging offenders from pleading guilty. This could lead to lower rates of conviction, increased court workloads, delays and additional trauma to victims as a result of the trial process.

RECOMMENDATION 4
The new minimum standard non-parole period should apply to sentences of immediate full-time imprisonment of five years or more, but less than 10 years, in circumstances where the court has not made a declaration that the offender is convicted of a 'serious offence'.

RECOMMENDATION 5
The calculation of the specified years of imprisonment for eligibility for the new minimum standard non-parole period should be consistent with the approach under s 161C of the *Penalties and Sentences Act 1992* (Qld).

4.5 Eligibility criteria and exclusions

In developing a SNPP scheme, the Council has considered how it would apply and possible exclusions.

Approaches in other jurisdictions were reviewed, providing useful background information and highlighting advantages and disadvantages of the various schemes already in operation.

The Consultation Paper examined the eligibility criteria and exclusions for a SNPP scheme in

detail, including the interaction of such a scheme with other sentencing and detention orders, the application of such a scheme to matters heard in the Magistrates Court and the effect a SNPP could have on young offenders.

The Council invited community views on what the SNPP eligibility criteria and exclusions should be. Specific matters for consideration were highlighted in the Consultation Paper, in the online response form and during consultations. Perhaps because of the complexity of the issue, few specific comments were made about the individual elements of a SNPP structure.

Application to offences attracting a sentence of life imprisonment and indefinite sentences

Several offences being considered for inclusion in a Queensland SNPP scheme carry a maximum penalty of life imprisonment. In the case of offenders convicted of murder, the court must impose a mandatory life sentence, or an indefinite sentence under Part 10 of the *Penalties and Sentences Act*.[233]

A different non-parole period regime already applies to offenders sentenced to life imprisonment in Queensland. Under s 181 of the *Corrective Services Act*, offenders sentenced for an offence under s 305(2) of the *Criminal Code* (which includes offenders sentenced for more than one conviction of murder) must serve a minimum period of 20 years in prison before being eligible for parole. For all other offenders sentenced to life imprisonment, the minimum non-parole period is 15 years. In both cases, the court has the power to set a later parole eligibility date.

The Council was not asked to review whether this period is appropriate, although the Terms of Reference referred to the Queensland Government's intention that the scheme would extend to the offence of murder which carries a mandatory life sentence.

The approach in other Australian jurisdictions

The NSW SNPP scheme does not apply to offenders sentenced to life imprisonment.[234] Unlike the NSW SNPP scheme, the NT, SA and Commonwealth schemes do not provide a specific exemption from their SNPP schemes for matters attracting a sentence of life imprisonment.

The NT legislation specifically directs that where a court sentences an offender to life imprisonment, a non-parole period must be set.[235] However, with the exception of murder which carries a SNPP of 20 years, or 25 in some cases,[236] there is no legislative guidance on how this should be approached.

Separate mandatory minimum non-parole period provisions apply in SA to the offence of murder which, as in Queensland and the NT, carries a mandatory life sentence.

Under the Commonwealth *Crimes Act 1914* (Cth), the minimum non-parole period of 75 per cent of the sentence imposed for a minimum non-parole offence applies irrespective of whether a sentence of life imprisonment is imposed. In these circumstances, courts are directed that a sentence of life imprisonment is taken to be a sentence of imprisonment of 30 years, meaning that the non-parole period for such an offence is 22½ years.[237]

The NSW, SA and NT SNPP schemes do not apply if an offender has been sentenced to an indefinite or an indeterminate sentence.

Consultations and submissions

Very limited feedback was provided on this issue during consultations, although 141 of the submissions received through the online response form supported the inclusion of murder in a SNPP scheme. These responses were submitted despite the response form indicating that murder already carries a mandatory minimum non-parole period of 15 years imprisonment, or 20 years in some cases.

In its submission, the QLS commented that, as there is a current non-parole period regime that applies to offenders sentenced to life imprisonment, 'there seems little need to alter that current position'.[238] The same view was expressed by Bravehearts.[239]

The Catholic Prison Ministry, which opposed the introduction of a SNPP scheme, took this issue further, commenting that 'the minimum sentence of life imprisonment for murder should be abolished'.[240]

The Council's view

As discussed above, Queensland already has specific provisions governing parole eligibility for offenders serving a life sentence. There have been few suggestions made to the Council during consultations on the Reference that these current arrangements are inappropriate or in need of reform.

The Council was not asked to review the current minimum non-parole period that applies to life sentences and, for this reason, has found it unnecessary to consider this matter further.

Because the Council recommends that a standard percentage scheme should be adopted in Queensland, its view is that any offence for which a life sentence or an indefinite sentence is imposed (including for murder) should automatically be excluded from the operation of the scheme. In the Council's view, there is no logical way in which to approach calculating a standard percentage of a sentence that the offender must serve for the remainder of their natural life or a sentence that is, by definition, indefinite.

RECOMMENDATION 6
The new Serious Offences Standard Non-Parole Period Scheme should not apply to offences for which an offender is sentenced to life imprisonment or an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Qld), including for murder.

Detention under mental health legislation

The *Mental Health Act 2000* (Qld) governs the detention of people in Queensland with a mental illness. A person who becomes a classified patient pursuant to the *Mental Health Act* while serving a sentence of imprisonment or detention may still be eligible for parole.[241] Parole boards accept applications for parole by classified mental health patients, and offenders can be granted parole while classified under the *Mental Health Act*.[242]

In the case of a person found to have been unsound of mind at the time of the alleged offence, or who is unfit for trial, there are provisions under the *Criminal Code*[243] and the *Mental Health Act* that allow a court to order that they be detained under a forensic order. Decisions to terminate a forensic order are made by the Mental Health Review Tribunal (or, on appeal, by the Mental Health Court or the Court of Appeal). These people are not under sentence, so are not subject to a non-parole period.

In contrast, in NSW a court can make a qualified finding of guilt as part of a special hearing in certain circumstances (such as where an offender is found to be unfit for trial for an extended period). On doing so, the court is required to indicate if it would have imposed a term of imprisonment had the offender been found guilty of the offence as part of a normal trial, and what term of imprisonment it would have considered appropriate.[244] Because of this, there is a specific legislative exclusion in NSW for offenders sentenced to detention under mental health legislation, which is unnecessary in a Queensland scheme.

Suspended sentences, intensive correction orders and probation orders

Queensland sentencing legislation allows a court that imposes a sentence of five years or less to wholly or partially suspend that sentence for a period of up to five years.[245] Courts can also order a term of imprisonment of up to 12 months to be served by way of intensive correction in the community under an intensive correction order (ICO),[246] and combine a short term of imprisonment of up to 12 months with a probation order of not less than nine months or more than three years.[247]

A non-parole period in Queensland can only attach to a sentence of imprisonment that is not suspended in whole or in part, ordered to be served by way of intensive correction in the community under an ICO, or combined with a probation order.[248] Therfore it

follows that a SNPP scheme would not apply to these forms of sentencing orders.

The approach in other jurisdictions

Like Queensland, the NT provides for the whole or partial suspension of a term of imprisonment where the offender is sentenced to five years or less.[249] If a court does not suspend the sentence, then it must fix a non-parole period (depending on the offence, this will be either 50% or 70%).

In SA, the court can only wholly suspend a sentence on the condition that the offender enters a good behaviour bond and agrees to comply with the conditions of the bond.[250] The suspension of a prison sentence can be imposed in addition to a non-parole period. For example, in the recent decision of *R v Narayan*,[251] the court sentenced the offender to six years imprisonment with a non-parole period of three years for the manslaughter of her husband. The judge suspended the whole sentence on the condition that the offender enter a bond of $1000, be of good behaviour for two years, and be under the supervision of a community corrections officer.

As is the case in SA, in NSW the court can only wholly suspend a prison sentence.[252] The term of imprisonment that can be suspended in NSW is limited to a term of not more than two years.[253] Because the requirement for a court to set the SNPP as the non-parole period for a scheme offence applies only to sentences of full-time imprisonment, suspended sentences fall outside the operation of the scheme; however, if a court imposes a suspended sentence or other non-custodial penalty for a SNPP offence the court must record its reasons for doing so, including each mitigating factor it took into account.[254]

The Commonwealth *Crimes Act* specifically excludes minimum non-parole period offences from being eligible for a recognizance release order made under s 20(1)(b) (the equivalent of a wholly or partially suspended sentence in Queensland). Section 20(6) of the Act states that the power to make a recognizance release order does not apply to a minimum non-parole offence mentioned in s 19AG, or offences that include one or more such minimum non-parole offences. Because these provisions also take away the discretion to fix a non-parole period, they also effectively exclude the use of state-based options to serve a term of imprisonment by other means, such as by way of an ICO in the community.[255]

Consultations and submissions

During roundtable discussions concerns were expressed, particularly by legal practitioners, about how a SNPP scheme would interact with suspended sentences, ICOs and probation orders, and it was noted that any proposed SNPP scheme has to work alongside suspended sentences, which have an important role to play in the current sentencing regime.[256] Concerns were also expressed about the potential of a SNPP to remove the availability of ICOs, given they are a period of imprisonment served in the community.

During consultations, some participants noted that a possible outcome of introducing SNPPs for shorter term sentences of less than five years might be a greater use of suspended sentences. Unlike parole, suspended sentences carry no requirement for the offender to be supervised in the community during the operational period of the order. In the case of offenders sentenced for serious violent offences and sexual offences, this outcome could be counterproductive.

Bravehearts' submission suggested that a SNPP scheme must take precedence over the power to wholly or partially suspend a sentence of imprisonment, and also noted recent amendments to s 9 of the *Penalties and Sentences Act* that require a court to impose an actual term of imprisonment when sentencing an offender for an offence of a sexual nature committed against a child, unless there are exceptional circumstances.[257]

The Council's view

Because the Council recommends that the new SNPP of 65 per cent should apply only to immediate terms of full-time imprisonment of five years or more, there will be no impact of the recommended scheme on the courts' ability to partially or wholly suspend a sentence of imprisonment. Under current legislation, courts

can suspend a term of imprisonment of up to five years, although it is more usual for shorter terms of imprisonment to be suspended. As the setting of a non-parole period applies only to sentences of imprisonment that are not suspended, by extension a SNPP would apply only where the sentence was one of full-time imprisonment.

Similarly, as a non-parole period can only attach to sentences of immediate full-time imprisonment, the new scheme will not affect the power of courts to make other forms of orders, such as an ICO or to combine a short term of imprisonment with a probation order.

The Council suggests that all impacts of the new SNPP scheme, including on other forms of sentencing orders, should be considered as part of the formal evaluation of the scheme.

Court-ordered parole for sentences of imprisonment of three years or less

Currently in Queensland, if an offender is sentenced to imprisonment for three years or less for an offence that is not a sexual offence or an offence for which he or she has been declared convicted of a SVO, the court must fix a date for the offender to be released on parole. This type of parole is referred to as 'court-ordered parole'. There are some exclusions, such as where the offender has had a court-ordered parole order cancelled during the period of imprisonment.[258]

There is no suggestion in the Terms of Reference that current arrangements for court-ordered parole are intended to change under a new Queensland SNPP scheme.

Some submissions commented on the continued availability of court-ordered parole after the introduction of a new SNPP scheme. For example, Bravehearts suggested that court-ordered parole be replaced with a SNPP scheme for offences attracting a maximum penalty of 10 years or more, but should still be available for offences with a lower maximum penalty.[259]

The QPUE suggested that the SNPP scheme could work alongside court-ordered parole by requiring a court to state at the time of sentencing what the consequences will be, by referring to the SNPP, if the offender breaches the parole order.[260] This could be taken into account on breach, with the prosecutor and defendant able to apply to the court to have this increased or decreased if circumstances had changed.

Because, under the Council's proposals, the SNPP will apply only to longer terms of imprisonment of five years or more, the power of courts to fix a parole release date in some circumstances will be unaffected. For this reason, it has not been necessary for the Council to consider this issue further.

Offences dealt with by the Magistrates Court

Under the Terms of Reference, a number of the offences proposed to fall within a SNPP scheme can be dealt with summarily by the Magistrates Court (in certain situations). Appendix 4 identifies whether offences currently defined as serious violent offences and sexual offences can be dealt with summarily.

The jurisdiction of the Magistrates Court when dealing with indictable offences summarily is limited to imposing a maximum penalty of three years imprisonment or 100 penalty units;[261] in the case of drug court matters, the maximum penalty is four years imprisonment or 100 penalty units.[262] A magistrate retains discretion to abstain from dealing with a matter summarily.[263]

The approach in other jurisdictions

The NSW SNPP scheme specifically excludes offences dealt with summarily from the scheme.[264]

Under the NT scheme, some of the offences captured by s 55A of the *Sentencing Act 1995* (NT), which requires the court to set a non-parole period of 70 per cent for certain offences committed against a child under the age of 16 years, can be dealt with summarily,[265] and there is no legislative exception for offences dealt with in this way.

Because the SA SNPP of four-fifths of the head sentence applies to major indictable offences

(other than an offence of murder, which has its own non-parole period) resulting in the death of or total incapacity of the victim, as well as a conspiracy to commit such an offence, or aiding, abetting, counselling or procuring the commission of such an offence,[266] it is effectively confined to offences dealt with in the higher courts. However, as in the NT, there is no specific legislative provision limiting the operation of the scheme in this way.

Consultations and submissions

Only limited feedback was provided on this issue during the consultation and submission process. Some submissions, including those made by the QLS and Prison Fellowship Qld, supported confining a Queensland SNPP scheme to offences dealt with on indictment.[267] This position was also supported at a legal issues roundtable, with comments made that the application of SNPPs in the Magistrates Court would possibly have considerable negative consequences, including substantially increasing the time required to sentence offenders, leading to court backlogs and delays.[268] At the same time, it was acknowledged by some that there could be risks in confining the scheme to matters dealt with on indictment, including placing considerable power with prosecutors in cases where they can elect, under s 552A of the *Criminal Code*, to have matters dealt with in the Magistrates Court rather than to proceed by way of indictment in the higher courts where a SNPP would apply.[269]

The QPUE took a contrary view, arguing that the Moynihan reforms had significantly increased the number of serious offences dealt with by magistrates.[270] These reforms have expanded the range of matters that can be dealt with summarily in the Magistrates Court and removed the ability for the prosecution or defence to have a number of offences dealt with on indictment.[271]

Bravehearts also supported the scheme applying in the Magistrates Court on the basis that any offence that has a maximum penalty of 10 years or more should be included in the scheme, irrespective of the court in which the offender is sentenced.[272]

The Council's view

Because the Council has recommended that the new SNPP be limited to sentences of imprisonment of five years or more, it will not apply to offences dealt with in the Magistrates Court given its jurisdictional limit. Therefore, in introducing the new Serious Offences SNPP Scheme, no changes are recommended to the current position under ss 161A and 161B of Part 9A of the *Penalties and Sentences Act* which provides that the SVO provisions apply only to offenders convicted on indictment of a relevant offence.

The Council was mindful that recent reforms to the jurisdiction of the Magistrates Court mean that it is now dealing with some more serious offences. However, the Council is of the view that a SNPP is best targeted at the most serious offences that would attract a significant term of imprisonment. Under s 552D of the *Criminal Code*, where a magistrate is satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction, they must abstain from dealing summarily with the charge. Because of the jurisdictional limit of the Magistrates Court, it is unlikely an offence warranting five years imprisonment or more would be dealt with in that court.

RECOMMENDATION 7

The new Serious Offences Standard Non-Parole Period Scheme, including the new minimum standard non-parole period, should apply only to offenders convicted on indictment and should not apply to indictable offences dealt with summarily in the Magistrates Court.

Application of the scheme to young offenders

One of the issues referred to in the Terms of Reference was the current Queensland sentencing practices for offenders aged 17 years or over. Some SNPP schemes expressly exclude young offenders from being subject to these schemes, even if these young offenders are sentenced as adults.

In Queensland, a 'child' is defined in the *Youth Justice Act 1992* (Qld) as a person who is under the age of 17 and, on this basis, 17-year-old offenders are in most cases treated as adults for the purposes of sentencing.[273] This is in contrast to all other Australian jurisdictions which define a 'child' for the purposes of youth justice sentencing, as a young person under the age of 18 years.[274]

In some circumstances offences committed by a child under 17 years can also be sentenced as if the offences were committed as an adult, including if one year has passed after an offender has become an adult when the proceedings for the offence commence or are completed. The sentencing of offenders for these offences is, however, subject to additional requirements that take into account the fact that the offences were committed while the offender was a child.[275]

The treatment of 17-year-old offenders as adults in the Queensland criminal justice system has been the subject of comment by the United Nations Committee on the Rights of the Child. The Committee has raised concerns that Queensland law is contrary to the UN Convention on the Rights of the Child, and has recommended that 17-year-olds be removed from the adult justice system in Queensland in line with the Convention and other related UN standards.[276]

The approach in other jurisdictions

The NSW SNPP scheme specifically excludes offenders under the age of 18 years at the time the offence was committed from the operation of the scheme.[277]

The SA scheme does not apply to a person under the age of 18 years unless the person is sentenced as an adult, is sentenced to detention to be served in a prison, or is otherwise transferred to, or ordered to serve a period of detention in, a prison.[278]

In the NT, the *Youth Justice Act 2006* (NT) provides that when sentencing a person under the age of 18 years to a term of detention for 12 months or longer that is not wholly or partially suspended, the court must fix a non-parole period.[279] This Act does not include provision for SNPPs or other fixed non-parole periods.

As noted above, all three jurisdictions treat a young person as being a child, and they are sentenced in most cases under youth justice legislation until the age of 18 years.

Consultations and submissions

There was some support for young people to be included in the scope of a new SNPP scheme by community members who made submissions on this issue through the online response form. Of those who responded to this question, 132 respondents supported the scheme applying to young offenders, while 41 were of the view it should not. Of those supporting the exclusion of young people, 20 favoured defining a young person as a person under 18 years of age, while 13 supported the current approach of treating 17-year-old offenders as adults for the purposes of sentencing. Those who supported some other form of definition for a young person nominated 13 years, 16 years, 21 years and up to 25 years of age.

A number of legal stakeholders and those working with victims and offenders opposed the application of the scheme to young people under 17 years, including the Department of Communities,[280] PACT[281] and Prison Fellowship Qld.[282] This position was also supported by the QLS which argued that: 'To do otherwise would be to run counter to the very principles of youth justice in Queensland's *Youth Justice Act 1992*'.[283]

In opposing the inclusion of young people under 17 years in a Queensland SNPP scheme, the Department of Communities referred to the Youth Justice Principles set out in Schedule 1 of the *Youth Justice Act* and, in particular, principle 17, which 'reflects the position that custodial sentencing is not the preferred option when dealing with young people'.[284] The Department further commented that 'there is a general lack of evidence that custodial sentencing has a specific deterrent effect for juvenile offending which suggests that it should be used sparingly'.[285]

A number of submissions, including those by the Commission for Children and Young People and Child Guardian (CCYPCG),[286] PACT[287] and the QLS,[288] also supported adopting a higher age limit of 18 years, with offenders aged 17 years at the time of the offence to be excluded from its operation. This was also supported at some consultations.[289]

Of those submissions supporting the exclusion of young people from a SNPP scheme, many referred to the need for a strong focus on rehabilitation when dealing with young offenders.

Bravehearts submitted that, although the focus in most cases should be on a young person's rehabilitation, the scheme should apply to offenders aged under 17 years in some circumstances, such as where the offence concerned was a particularly serious example, or the young person was a repeat offender:

> [Y]oung offenders (under the age of 18), particularly in relation to child sex offences, should mandatorily participate in rehabilitation programs. As such, in most cases, they should be excluded from the operation of a standard non-parole period scheme. However, we do believe where the offence is of a serious nature (an offence in the mid to high-range [of] objective seriousness) or where the offender is a repeat offender, they should be subject to a standard non-parole period.[290]

The QPUE supported the inclusion of young offenders on the basis of the seriousness of the offences concerned and their prevalence, arguing that the scheme should apply to young offenders aged 14 years and older:

> Young offenders in this day and age are committing very serious property and violent crimes. There is absolutely no appropriate reason to exclude young offenders from the scheme. Young offending is more prevalent than ever and on many occasions the crimes committed by young people are no less serious than those committed by adults.[291]

In a number of consultation sessions, serious concerns were raised by Aboriginal and Torres Strait Islander community members about including young people in a SNPP scheme.[292] Some of the issues raised were:

- If a SNPP scheme is applied to young offenders, there is a danger that they will get caught in the cycle of re-offending and reimprisonment. A SNPP scheme risks contributing to the absence of male role models in Aboriginal and Torres Strait Islander communities because of their over-representation in prison.[293]
- Extending a SNPP to young offenders might capture offences such as consensual sexual relationships between teenagers involving one partner who is underage. Concerns were raised about whether young people would be registered as child sexual offenders because of the new SNPP scheme.

The Council's view

Consistent with the current operation of the SVO scheme, the new Serious Offences SNPP Scheme will apply only to offenders sentenced under the *Penalties and Sentences Act*.

By a majority, the Council recommends that the new SNPP should apply only to offenders who are aged 18 years or over at the time of the commission of the offence. Although offenders who are aged 17 years are currently dealt with as adults in Queensland for the purposes of sentencing, the Council considers it important that a scheme targeted at the most serious forms of offending should recognise the very different position of young people who, for most other purposes, are not recognised as adults until they reach the age of 18.

The Council notes that the UN Convention on the Rights of the Child, which Australia ratified on 17 December 1990, treats young people who are 17 as coming within its scope and states that the best interest of the child must be a primary consideration in all actions taken concerning them, including dealings for criminal offences.[294] In this context, and while acknowledging the very serious nature of offences for which young offenders can be convicted, the Council is of the view that the interests of the young person,

including imposing imprisonment or detention as a last resort and for the shortest appropriate period, must take precedence over the objectives of sentencing adult offenders under a SNPP scheme.

It should also be noted that adopting this approach will not affect the court's ability to order a young person to a longer non-parole period than would usually be the case in circumstances where the seriousness of the offence warrants this. However, the Council is of the view that it is inappropriate to have the SNPP apply as a presumptive minimum to all cases involving young people rather than requiring this to be considered on a case-by-case basis.

In making this recommendation, the Council notes that, although there is a strengthened focus on community protection as a sentencing factor for offences involving the use of violence against the person following the 1997 reforms to s 9 of the *Penalties and Sentences Act*,[295] with youth not carrying the same weight it once had for these offences as a mitigating factor, the Court of Appeal has also acknowledged that 'youth remains a material consideration; for the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community'.[296] The Council considers it important that this principle continues to apply.

The Council accepts that this aspect of the scheme is anomalous with the current operation of the SVO scheme, although in practice it would be a very unusual case in which a young person is sentenced to 10 years or more imprisonment, and consequently subject to the mandatory operation of the scheme. The Council has not been able to access any data on the number of SVO declarations made on a discretionary basis for sentences of less than 10 years since the scheme's introduction, although it may be assumed that these declarations are rarely made in the case of 17-year-old offenders on the basis of the principles that usually apply to the sentencing of young people.

A minority of the Council supports the scheme applying in a consistent way to the existing SVO scheme and the current approach in Queensland to the sentencing of young offenders. These Council members are of the view that the scheme should apply to 17-year-old offenders sentenced as adults until such time as Queensland changes its current approach to the sentencing of these offenders.

RECOMMENDATION 8

The new minimum standard non-parole period should apply only to offenders aged 18 years or over at the time of the commission of the offence.

4.6 Defining what a SNPP represents

One of the issues raised in the Consultation Paper was how a SNPP should be defined and whether the SNPP should represent a certain type or level of offending.

The Council suggested that defining what the SNPP represents may be important to provide clarity and to:

- allow courts to act in accordance with the principles and purposes of sentencing, particularly the principle of proportionality, and to impose a sentence that is appropriate in the individual circumstances of the case
- provide sufficient guidance to courts in determining whether the SNPP is intended by Parliament to apply in a given case, and grounds for setting a higher or lower non-parole period than the SNPP, and
- minimise the risk of appeals based on sentencing errors.

The need for a definition would particularly apply in the case of a defined term SNPP scheme as it would be necessary to provide guidance to a sentencing court to determine how the offence before the court compares with an offence for which the defined term SNPP is intended to apply.

The Consultation Paper discussed in detail different approaches that might be taken to define what a SNPP represents and the limitations of these approaches.

The Council further acknowledged that the option of a standard percentage model could possibly overcome many of the definitional problems that would arise with a defined term scheme. This is because the standard percentage would not need to be representative of a particular level or type of offending, and could be applied to sentences imposed for SNPP offences only, or to the overall head sentence.

The approach in other jurisdictions

The NSW SNPP scheme provides that the SNPP (for example, seven years for sexual assault) represents a non-parole period for an offence in the 'middle of the range of objective seriousness'.[297] The NSW scheme does not define what is meant by the 'middle of the range of objective seriousness', or what factors a court must take into account when determining where a particular offence lies in relation to this range; this has been left to judicial interpretation.[298]

As discussed in Chapter 2, NSW courts have faced a number of problems in applying the SNPP scheme, in particular in determining where on the range of objective seriousness a particular case lies. From the analysis of the current NSW scheme and the criticism it has attracted, the development of a defined term scheme based on a similar definition to that used in NSW would be likely to be difficult and complex for Queensland courts to apply.

An alternative approach would be to adopt a definition that defines a SNPP as a non-parole period for offences at the lower end of the range of objective seriousness, as has been adopted in SA. In the SA scheme, the SNPP scheme of four-fifths of the head sentence represents the mandatory minimum non-parole period for an offence 'at the lower end of the range of objective seriousness'.[299] The starting point for judges is then to consider where the particular offence lies by reference to lower-level examples of offending.

The problem with any definition based on objective seriousness is that it is difficult for courts to assess 'objective seriousness', and how an individual offence is to be measured against this standard. Substantial court time can be taken addressing this in submissions. Like courts in NSW, SA courts have faced significant problems in the interpretation and application of this definition.

Any scheme that relies on a classification of the seriousness of the offence would require detailed clarification to avoid ambiguity and inconsistency. However, based on the NSW experience it is likely that by adopting this approach, the complexity of the sentencing process will be increased, particularly if the SNPP must be determined in accordance with a list of factors.

Consultations and submissions

Feedback from members of the community, particularly during consultations, indicated that this issue was complex and difficult to resolve. There were few comments made directly about the definition of a SNPP during the consultation process.

The QPUE in its submission suggested that, to avoid some of the problems that have arisen in NSW, there should be a table of SNPPs developed for offences falling into the low, mid and high range of objective seriousness, with further levels set depending on whether an offender has pleaded guilty or been convicted following a trial.[300] The QPUE further suggested that distinctions could be made for specific types of offending behaviour (such as assaults on police, emergency services and health staff, which could be designated as falling in the high range of objective seriousness), as could discounts for factors such as cooperation with authorities, remorse and making restitution or providing compensation. The QPUE submitted that:

> Such a position recognises the common law sentencing principles, and encourages the quick resolution of matters; something in the interests of the community and particularly victims.[301]

In its submission, Bravehearts also supported setting the SNPP at different levels for offences falling within the low, mid and high range of seriousness.[302]

The QLS submitted that:

> [W]e see great difficulties with the notion of having to define, for the purposes of a defined term scheme, where within the range of objective seriousness a particular SNPP penalty is thought to sit.[303]

The QLS agreed with comments in the Consultation Paper that a defined term scheme based on a similar definition to that adopted in NSW would be difficult and complex for the courts to apply.[304] Further, the QLS suggested that regardless of whether the SNPP is used and defined as a starting point for sentencing, or to represent a lower level of offending, it would expect similar difficulties to arise.

In the event that a SNPP scheme takes the form of a standard percentage scheme, the QLS submitted that there would be no need to indicate that the SNPP applies to a particular level of offending as:

> The flexibility that one gains from a standard percentage scheme is that the objective seriousness of the offending can be best reflected in the head term imposed.[305]

The Council's view

Because the Council has recommended that the minimum non-parole period should be a standard percentage of the total sentence imposed for prescribed offences, the Council has determined that it is not appropriate to define the level of offending to which the SNPP would apply. Rather, differences in the objective seriousness of individual offences can be taken into account by sentencing courts in setting an appropriate head sentence.

In the Council's view, this approach has the benefit of the SNPP scheme applying automatically to all offences that meet the eligibility criteria, and will also promote transparency as there will be no need for broad and detailed grounds for departure. This approach is consistent with the scheme being a 'standard non-parole period' scheme, and will minimise its complexity and the time required by the court to determine how it is to be applied.

RECOMMENDATION 9

A 'standard non-parole period' should not be defined under the *Penalties and Sentences Act 1992* (Qld). The minimum standard non-parole period should apply to any offence or offences that meet the eligibility criteria.

4.7 Setting SNPP levels

One of the key issues referred to the Council for advice by the Attorney-General is the appropriate length of the minimum SNPP for each of the offences to be included in the scheme.

The Consultation Paper noted that, depending on what SNPPs are designed to achieve and what type of scheme is selected, guidance in setting SNPP levels could be obtained from:

- the maximum penalty for the offence
- the seriousness of the offence based on the type of offence
- existing Court of Appeal decisions
- current sentencing levels
- current parole eligibility dates and the actual time offenders spend in prison
- the availability and length of rehabilitation programs run in prison (to allow offenders to complete programs to deal with the factors contributing to their offending behaviour and support aspects of rehabilitation), and/or
- community expectations of the minimum time offenders sentenced to imprisonment should spend in prison for a given offence.

Although each approach has its own challenges, the Council suggested that setting SNPP levels by reference to community expectations (for example, obtained through a public perceptions survey) would be particularly challenging. To obtain a truly informed and representative view, a general population survey would need to be conducted, any possible misconceptions by participants about crime and sentencing rectified and information provided to participants about the factors that judges must take into account in sentencing. It is also unlikely that community members would hold a uniform view on what an appropriate non-parole period for a particular offence should be. These types of concerns have been raised in relation to the Victorian Government's recent

online survey on sentencing, which invited the community's views about the levels at which sentences and non-parole periods should be set for specific offences.[306] The intention of the Victorian Government is that the findings of the survey be used to inform the current proposal to introduce 'baseline sentences' (that is, a form of standard non-parole period) in that state.[307] The initial proposal to run this survey was met with criticism by some sentencing experts and members of the legal profession including the comment that 'it's not scientific' and 'asks people to respond from the top of their head without due consideration of the context and facts of individual cases'.[308]

In its Consultation Paper, the Council suggested that setting SNPP levels under a standard percentage scheme would be more straightforward, because a fixed percentage would apply irrespective of differences in maximum penalties. However, deciding what percentage should apply would have its own challenges.

Current approach to setting non-parole periods in Queensland

As discussed earlier, in addition to the minimum non-parole periods that apply to sentences of life imprisonment, Queensland currently has two forms of minimum non-parole periods expressed as a percentage of the sentence:

- under s 184 of the *Corrective Services Act*, an offender must serve a minimum of 50 per cent of his or her sentence in custody before being eligible to apply for parole if:
  - the offender is sentenced to imprisonment for more than three years and the court has not fixed a parole eligibility date, or
  - the offender is serving a period of imprisonment of not more than three years for a sexual offence and the court has not fixed a parole eligibility date, or
  - the offender is serving a period of imprisonment ordered to be served on breach of a suspended sentence, and
  - the offender is not subject to an indefinite sentence, has not been declared convicted of a SVO, and is not being detained in an institution for a period fixed by a judge under Part 3 of the *Criminal Law Amendment Act* (which relates to the detention of offenders for sexual offences who are found to be incapable of exercising proper control over their sexual instincts).
- if a court makes a declaration under Part 9A of the *Penalties and Sentences Act* that the offender is convicted of a serious violent offence, an offender must serve a minimum of 80 per cent (or 15 years, whichever is the lesser) of the sentence before being eligible to apply for parole. The 80 per cent minimum non-parole period is partly offence-based (eg offences listed in Schedule 1 of the Act) and its activation by the making of a declaration is mandatory if a sentence of imprisonment of 10 years or more has been imposed, or in other cases where imprisonment has been imposed and the court makes a declaration that the offender is convicted of a SVO.

In the Consultation Paper, the Council noted that in Queensland courts have a broad discretion to set an appropriate non-parole period when sentencing offenders for serious violent offences and sexual offences to a term of less than 10 years imprisonment. However, courts must act consistently with existing legislation, including Part 9, Division 3 of the *Penalties and Sentences Act* which governs powers and responsibilities of courts in relation to parole when imposing a term of imprisonment, as well as appellate court guidance.

In matters where the court does not make a declaration that the offender is convicted of a SVO, the courts have discretion to set the non-parole period or, in the case of offenders sentenced to imprisonment for three years or less who are not being sentenced for a SVO[309] or a sexual offence,[310] the parole release date (referred to as 'court-ordered parole').[311] In these cases, the court can look to the facts of an individual case to determine whether a longer or shorter period should be served in prison prior to parole eligibility. In approaching this task, courts must take into account not just the interests of rehabilitation, but also the broader purposes of sentencing, including the just punishment of the

offender, deterrence and community protection.[312] This was acknowledged by the High Court in *Deakin v The Queen*, which observed, repeating comments made in the earlier decision of *Power v The Queen*:[313]

> The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum term that a judge determines justice requires that he must serve having regard to the circumstances of the offence.[314]

However, there are mitigating factors the courts must take into account when sentencing that can extend to the setting of non-parole periods. The most important is where an offender pleads guilty or, more particularly, enters a timely or early plea of guilty. It has been recognised that fixing a shorter non-parole period in relation to a substantial head sentence 'may be an important way of properly recognising the significance of pleas of guilty and other mitigating circumstances'.[315]

The discount that applies for a guilty plea was discussed in the case of *R v Blanch*, where it was noted that the common practice of Queensland sentencing courts:

> …is to recognise the value of an early plea of guilty and other circumstances in mitigation by ordering that the offender be eligible for parole after serving one-third of the term of imprisonment imposed as the head sentence.[316]

Similarly, the Queensland Court of Appeal has found that there must be 'good reason' for postponing an offender's parole eligibility date beyond the halfway point of the sentence provided for by s 160C(5) of the *Penalties and Sentences Act* and s 184(3) of the *Corrective Services Act* where no parole eligibility date is set.[317] For example, in *R v Assurson*, a drug trafficking case, the fact that more than one Schedule 1 drug was involved in the offence, that the offender was prepared to resort to the use of personal violence and committed the offence while on bail were all pointed to as reasons for delaying parole eligibility.[318] The offender in that case had originally been sentenced to nine years imprisonment, with a SVO declaration (resulting in a non-parole period of 7.2 years). On appeal, the declaration was removed, and the offender's parole eligibility was fixed after five years and six months (representing just over 60% of the head sentence).

In *Assurson*, the Court made reference to the earlier decision of the Court in *McDougall and Collas* which found:

> The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence. (footnotes omitted)[319]

The Court of Appeal has further suggested that in cases where an offender has a claim to be released after serving less than half of the head sentence in view of a guilty plea and personal mitigating circumstances, a parole release date that is significantly beyond the midpoint of the head sentence is 'very unusual' and, in these circumstances, a court has a duty to provide reasons.[320]

The approach in other jurisdictions

In the Consultation Paper, it was noted that limited guidance can be taken from the way the NSW SNPP levels were determined, as it is not clear how those levels were arrived at and what weight was given to the considerations said to have influenced their development, namely:

- the seriousness of the offence
- statutory maximum penalties
- current sentencing trends for scheme offences

as evidenced by sentencing statistics compiled by the Judicial Commission of NSW, and
- community expectations.[321]

In particular, there is no consistent relationship between SNPP levels in NSW and maximum penalties, with SNPPs ranging from 21.4 per cent (for possession and use of firearms or prohibited weapons) to 80 per cent of the maximum penalty (for aggravated indecent assault). The high levels at which SNPPs for some offences have been set in NSW has been the subject of judicial comment,[322] and has also been criticised by some legal commentators.[323] The NSW Sentencing Council has a current reference from the Attorney-General asking it to provide advice on standardising SNPPs for sexual and other offences within a band of 40–60 per cent of the available maximum penalty.[324]

Similarly, there is no publicly available information on how the SA Government arrived at its minimum non-parole period of four-fifths (80%) of the head sentence for an offence at the 'lower end of the range of objective seriousness'. The broader stated intention of these amendments at the time this new scheme was introduced was to require 'sentencing courts to give primary consideration to the need to protect the community from an offender's criminal acts'.[325]

Standard minimum non-parole periods for Commonwealth offences take the forms of both a standard percentage and a defined term SNPP. Under Part IB of the *Crimes Act*, the 'minimum non-parole offences' of treachery, a terrorism offence, treason or espionage carry a minimum non-parole period of at least three-quarters of the sentence of imprisonment imposed by the court (that is, 75%).[326] A sentence of life imprisonment is taken to be a sentence of imprisonment for 30 years for the purposes of these provisions, so the minimum non-parole period for a sentence of life imprisonment for a 'minimum non-parole offence' is 22½ years. In contrast, the Commonwealth offence of people smuggling as defined in the *Migration Act 1958* (Cth), carries a mandatory minimum term of imprisonment of five years, or eight years for an aggravated form of the offence under s 233B or a repeat offence, with a non-parole period of three years, or five years respectively.[327]

The Australian Law Reform Commission (ALRC) has examined non-parole periods for Commonwealth offences as part of two separate sentencing reviews. In its 1988 report on sentencing, the ALRC suggested that, in the interests of certainty, consistency and 'truth in sentencing', a significant proportion of a custodial order should be spent in prison.[328] It recommended that this proportion be specified in legislation, and that in general it should be 70 per cent (and not less than 50%) of the head sentence. The Commission recommended that this proportion should be able to be reduced by a court if exceptional circumstances exist, but that 'in no case' should a court be permitted to reduce the proportion below half of the total sentence.[329] In making this recommendation the Commission observed:

> The normal condition, supervision, tends to cease to be a useful condition over time – after, at the most, two years, supervision of offenders is seen to be of limited value.[330]

A more recent review by the ALRC of federal sentencing finalised in 2006 recommended a slightly more flexible approach, with a legislative non-parole period of two-thirds to be set for federal offences to serve as a 'reference point' in sentencing. The Commission recommended that a court should retain its discretion to impose a different non-parole period:

> whenever it is warranted in the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system. [331]

The Commission suggested that this approach would 'strike an appropriate balance between promoting consistency in sentencing and allowing individualisation of sentencing in particular cases'.[332]

The Australian Government has yet to implement this recommendation, and there is no requirement under Commonwealth legislation that the non-

parole period should bear any set relationship to the head sentence.[333] In the 2010 High Court decision of *Hili v The Queen*, the Court further affirmed that:

> [T]here neither is, nor should be, a judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period of imprisonment that a federal offender should actually serve in prison before release …[334]

Consultations and submissions

Perhaps because of the complexity of this issue, many people in consultations did not provide specific feedback on how the SNPP levels should be set. Some suggestions included that there should be an increase in the length of rehabilitation programs in prison for offences classified as serious violent offences to reduce the incidence of re-offending.

Submissions received from the general public largely called for increased penalties for serious violent offences and sexual offences and for maximum penalties to be imposed. In some cases there was a call to abolish parole altogether.[335] Specific comments made about possible SNPP levels were generally directed at the appropriate SNPP for specific offences such as forms of violent crime, in particular armed robbery and child sexual offences. For example, one submission called for a minimum SNPP of five years, including on the basis of certainty for the community about the time repeat offenders would spend in custody and the reduced risks of re-offending:

> At a minimum all major offences that are in Chapter 6 [of the Consultation Paper] should have a minimum SNPP of 5 years. Harsher penalties will give greater peace of mind to the community knowing that repeat offenders will be away for 5 years and may be less likely to re-offend when they get out.[336]

Although limited feedback on this issue was submitted through the online response form, those who responded in this way expressed greatest support for a defined term scheme under which SNPP levels should be set by reference to:

- the maximum penalty for the offence (n=28)
- the seriousness of the offence, including the effect on the victim (n=20), and
- community views and expectations concerning the appropriate minimum sentence (n=19).

Others who responded to this question suggested that SNPP levels might be set by reference to the range of factors identified in the response form (n=3), or that they might be a period shown to have the most benefit in terms of reducing risks of re-offending or necessary for offenders to complete programs in prison (n=2), or that they should be selected by 'legal experts' (n=1). A number supported offenders convicted of serious offences serving their full term in prison without the possibility of parole (n=28).

Four respondents nominated what SNPPs should apply under a standard percentage scheme, with support for serious offences carrying a minimum non-parole period of 95 per cent of the sentence, with less serious offences attracting a 75 per cent non-parole period; a SNPP set at 'at least 90 per cent' of the head sentence; and SNPPs of 65 per cent and 'at least 60 per cent' of the head sentence.

There were also comments made on this issue in submissions by some criminal justice stakeholders. For example:

> The seriousness of the crime must be taken into consideration. Concern is expressed for guidelines to be open to interpretation; the ambit of serious crimes should be identified and clearly documented so that it is clear what punishment will be attributed.[337]

PACT suggested that a standard percentage scheme of 75 per cent of the head sentence might be appropriate, while the QLS, which was opposed to the introduction of a new SNPP scheme for Queensland, favoured a standard percentage of 50 per cent should such a scheme be introduced.[338]

The QPUE, which supported a NSW-style defined term scheme, suggested that 'any offence of mid-range seriousness would logically have

a head sentence of half the maximum penalty' – a defined term default non-parole period should then be 75 per cent of the relevant head sentence.[339] If a standard percentage is elected, the QPUE supported there being no option for parole if a term of imprisonment is ordered for a period of 12 months or less and, in all other cases, the non-parole period should be set at 75 per cent of the head sentence.[340] The QPUE submitted that courts should only be permitted to depart from this percentage if there are extenuating circumstances.

Bravehearts, which also supported a defined term scheme, proposed that a percentage of the maximum penalty be applied based on the level of objective seriousness and suggested that these could be set at:

- 30 per cent of the prescribed maximum sentence for low-range offences
- 50 per cent of the prescribed maximum sentence for mid-range offences, and
- 80 per cent of the prescribed maximum sentence for high-range offences.

For an offence for which the maximum penalty is 14 years, this would translate to a non-parole period of:

- 4.2 years for a low-range offence
- 7 years for a mid-range offence, and
- 11.2 years for a high-range offence.

The Council's view

Setting an appropriate SNPP for the offences included in a SNPP scheme is one of the most challenging aspects of structuring such a scheme. Even under the Council's proposals to introduce a standard percentage form of scheme, the selection of an 'appropriate' percentage involves some degree of subjective judgment (although this criticism could equally apply to a defined term scheme).

There is limited evidence of what 'works' in terms of the quantum of imprisonment that meets the purposes of punishment, deterrence, community protection or rehabilitation, although there is some evidence of the minimum parole period required to enhance community safety for more serious offences after an offender's release from custody. In a research brief on the effectiveness of community supervision, Queensland Corrective Services concludes there is 'no definitive answer on how long an offender should be supervised after release, without consideration of the individual's circumstances' but that 'empirical evidence suggests that the first 12 months post-release remains the highest period of re-offending'.[341] On this basis, it suggests that, for higher-risk offenders, 'community safety would most likely be enhanced by a minimum offender supervision period of one year post release'.[342]

In light of the current evidence base, the setting of an 'appropriate' SNPP level for serious violent offences and sexual offences must rely to an extent on normative considerations – that is, the minimum time the Council considers an offender sentenced for a serious violent offence or sexual offence to a period of at least five years imprisonment ought to spend in prison relative to the sentence imposed.

Any new SNPP also needs to fit with existing forms of minimum non-parole periods in Queensland, including the 50 per cent non-parole period that applies where the court does not set a parole eligibility date, and the 80 per cent non-parole period that applies to offenders declared convicted of a SVO.

After taking these considerations into account, the Council has concluded that a new SNPP of 65 per cent should apply to those offenders to whom a discretionary SVO declaration for offences listed in Schedule 1 applies (that is, sentences of five years or more, and less than 10 years for a prescribed offence). The Council further recommends that, in accordance with the approach taken under s 182 of the *Corrective Services Act*, an offender should be eligible to apply for release on parole after serving 65 per cent of the term, or terms, of imprisonment imposed for prescribed serious offences, or after serving such other period as fixed by the court.

The application of the new SNPP will retain the possibility of offenders serving a minimum parole period of at least 12 months, which is consistent

with the findings of Queensland Corrective Services that community safety is most likely to be enhanced by a period of supervision in the community of at least this length. The application of the new SNPP will mean that those offenders convicted under the scheme and sentenced to five years full-time imprisonment will be subject to a minimum non-parole period of three years and three months, which will allow for the possibility of them spending up to one year and nine months being supervised in the community on parole. In the case of offenders sentenced to just under 10 years, it means the minimum non-parole period will be six and a half years, with provision for them to spend up to three and a half years being supervised in the community. Under these proposals, the actual period of time an offender spends on parole, assuming parole is granted, would remain a decision for the parole boards.

At 65 per cent, the new SNPP will fall below the pre-existing form of minimum non-parole period of 80 per cent that applies to offences for which an offender is declared convicted of a serious violent offence. This recognises that for offences falling just short of this level of seriousness, it is appropriate to provide slightly greater flexibility in the period available for release on parole.

The Council's approach, if adopted, will have a significant impact on the time offenders subject to the scheme must spend in prison before being eligible to apply for parole. The current parole eligibility date for offenders sentenced for Schedule 1 offences is set by the courts, on average, at between 33 per cent and 50 per cent of the head sentence.[343] After the introduction of the SNPP scheme, all offenders sentenced for a qualifying offence will be liable to serve 65 per cent of the sentence imposed.

The Council also considers it important to acknowledge the number of comments received from community members questioning the benefits of parole. In the Council's view, parole serves an important purpose even for offenders convicted of quite serious offences. The majority of offenders, including those who commit serious offences of violence, will be released back into the community at some point once their sentence has been served. In the Council's view, the supported period of transition from prison back into the community that parole provides is crucial for ensuring that offenders are linked in with services and actively monitored and supervised to reduce the longer-term risks of re-offending, thereby meeting the aim of community protection. This position is supported by recent research which has confirmed that offenders released on parole achieve better outcomes (in terms of lower rates of re-arrest and reconviction) than those who serve their full sentence in prison.[344]

RECOMMENDATION 10

The new minimum standard non-parole period should be set at 65 per cent of the term of full-time imprisonment imposed for a scheme offence or offences where the total period of imprisonment imposed for those offences is five years or more, but less than 10 years.

RECOMMENDATION 11

In accordance with the approach taken with offenders declared convicted of a serious violent offence under Part 9A of the *Penalties and Sentences Act 1992* (Qld) pursuant to s 182 of the *Corrective Services Act 2006* (Qld), an offender to whom the new standard minimum non-parole period applies should be eligible to apply for release on parole after serving 65 per cent of the term, or terms, of imprisonment imposed for a prescribed offence, or after serving such other period as fixed by the court.

4.8 Grounds for departure

The Terms of Reference request the Council's advice on the grounds on which a court should be permitted to depart from the SNPP. They also refer to the need to maintain judicial discretion to impose a just and appropriate sentence, and to have regard to the sentencing principles set out in the *Penalties and Sentences Act*. The Terms of Reference also request the Council's advice with regard to the offence of unlawful carnal knowledge and on how a SNPP scheme might accommodate the scenario of a young offender engaged in a consensual but unlawful sexual relationship with an underage partner.

An important part of retaining judicial discretion and supporting the principle of individualised justice is allowing courts to depart from the SNPP to increase or decrease that period as appropriate.

At the same time, it needs to be acknowledged that the scheme is intended to be a 'standard' non-parole period scheme that applies in most cases to ensure a reasonable level of transparency; departures need to be limited in some way and the reasons for departure need to be clearly articulated by sentencing judges when applying the scheme.

The approach in other jurisdictions

In NSW, s 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows a court to depart from the SNPP if it determines there are reasons for setting a non-parole period that is longer or shorter than the SNPP. A court must record its reasons for increasing or reducing the SNPP, and identify each factor it took into account.

The reasons a NSW court may set a longer or shorter non-parole period are those set out in s 21A of the Act.[345] This section includes a broad, non-exhaustive list of aggravating and mitigating factors to be taken into account by a court in sentencing. Some of these factors are similar to those set out in s 9 of the Queensland *Penalties and Sentences Act*. The NSW factors are categorised into aggravating and mitigating factors, as well as other general factors, and are more specific in nature than the factors in the Queensland legislation. Under s 21A, the court is also permitted to take into account 'any other objective or subjective factor that affects the relative seriousness of the offence', as well as 'any other matters that are required or permitted to be taken into account by the court under any Act or rule of law'.

Importantly, under a number of schemes based on a representative level of offending (for example, the mid-range of objective seriousness in NSW, and the 'lower range of objective seriousness' in SA), a plea of guilty is identified either in the legislation[346] or by the courts in interpreting its application[347] as a ground for possible departure from the SNPP. This is because:

- a plea of guilty is recognised, at law, as a basis on which a court may reduce the sentence that would have been imposed had the offender been convicted after trial (see, for example, s 22 of the *Crimes (Sentencing Procedure) Act*), and
- an offender's decision to plead guilty is unrelated to the objective seriousness of the offence and is relevant only to determining the penalty to be imposed.

Both the NT and SA schemes are based on a representation of a range of objective seriousness. They also provide a range of different grounds for departure from the SNPP which include:

- specified grounds to increase the SNPP in murder cases (NT only)[348]
- in imposing a longer SNPP period – any objective or subjective factors affecting the relative seriousness of the offence (both NT and SA)[349]
- in imposing a shorter SNPP period – the identification and particularisation of exceptional or special reasons to depart (both NT and SA); these reasons include:
  - that the victim's conduct or condition substantially mitigated the offender's conduct
  - a guilty plea and the circumstances of the plea
  - the cooperation of the offender with law enforcement authorities
  - any previous criminal history,[350] and
- in declining to impose a non-parole period – the reasons, including the level of culpability for the offence, community interests (retribution, punishment, deterrence, protection), the criminal history of the offender and the behaviour of the person during any previous period of release on parole or conditional release.[351]

A possible advantage of the SA and NT approach of permitting courts to depart from the SNPP in a more closely circumscribed range of circumstances is the more transparent operation of the scheme. However, equally this could have a number of negative consequences, including reducing the willingness of offenders to plead guilty, resulting in victims having to go through the possibly traumatic experience of a trial, and

restricting courts' ability to ensure the sentencing outcome is just.

Adopting a more rigid application of the SNPP with very limited grounds for departure may also require the exclusion of some offences that might otherwise be included in a SNPP scheme. For example, if the SNPP was to apply to all cases of manslaughter, some manslaughters that involve a lower level of culpability but nevertheless have resulted in the death of the victim would be captured; and it may not be appropriate for the offender to serve a minimum period of 65 per cent of the prison sentence as the non-parole period if there are particular extenuating circumstances. For example, in a 2006 case, a mother who failed to seek medical assistance for her three-year-old daughter who died after slipping in the shower and hitting her head was sentenced to five years imprisonment with a non-parole period of 18 months, taking into account her plea of guilty and remorse, her struggles as a lone parent in charge of four young children under nine years and her attempts to seek assistance from her neighbours.[352] Under a mandatory regime, she would have had to serve a minimum of three years and three months in prison before being eligible to apply for release on parole.

Consultations and submissions

Of the online response form respondents who commented on when a court should be able to set a longer or shorter non-parole period than the SNPP, the most common responses were 'never' (n=50) and that judges should only be able to lengthen the non-parole period (n=33). Other common responses were that cases should be judged on the individual circumstances of the case (n=26) and left to the courts' discretion (n=13), or should be based on the characteristics of the offence (n=10) or the offender (n=9).

Some written submissions also commented on this issue, with a range of views expressed. Some were of the view that enabling a court to set a longer or shorter non-parole period is inherently linked to the need to maintain judicial discretion in sentencing, while others were concerned to limit the ability of courts to set a shorter non-parole period.

Bravehearts, while acknowledging a need for some discretion to be retained by courts in setting the non-parole period, supported the grounds for departure from the SNPP being limited and clearly defined.[353] Their submission also suggested that 'good character' should be excluded as a basis to depart from the SNPP and that, if a person pleads not guilty, there should be an increase of 10 per cent to the SNPP.

The QPUE presented a detailed model for structuring a SNPP scheme, and suggested that a table be included in legislation outlining corresponding minimum SNPPs for offenders convicted of offences of:

- low-range objective seriousness via a plea of guilty
- low-range objective seriousness convicted after trial
- mid-range objective seriousness via a plea of guilty
- mid-range objective seriousness convicted after trial
- high-range objective seriousness via a plea of guilty, and
- high-range objective seriousness convicted after trial.[354]

The QPUE suggested that 'specific types of offending behaviour could also be incorporated into the table, as could discounts for cooperation through full confession, remorse and making restitution/compensation'.[355] The QPUE further suggested that a plea of guilty could be grounds of mitigation, with the court then required to state what sentence it would have imposed if a plea of guilty had not been made.

On the basis of this model, and to promote transparency, the QPUE submitted that:

> [A] departure from the SNPP must only occur in exceptional circumstances. If the court is to depart from the SNPP the court must place on record all of its reasons for doing so.[356]

The QPUE noted that, under their proposals, the defence would need to prove on the balance of probabilities the extenuating circumstances supporting a reduction and the prosecution would similarly need to establish the circumstances requiring an increase.

The QPUE also referred to the grounds in s 9 of the *Penalties and Sentences Act* as providing a possible starting point for factors supporting a departure from the SNPP, with some modifications to the current wording, which refers to the nature of the offence and offence seriousness, requiring a court to consider:

- the physical actions of the offender
- the involvement of weapons
- the cost the offending behaviour has had on the community/victim
- the harm caused to the victim, and
- the effect the specific offending behaviour has had on the community at large.

The QLS was among those who supported retaining a broad discretion, commenting that:

> [F]or justice to be achieved in every case, any scheme must be sufficiently flexible to allow, for defined reasons, a longer or shorter non-parole period. The starting point for any such departure can probably be found in the principles located in s 9 of the *Penalties and Sentences Act*.[357]

The QLS submitted that a plea of guilty should be an immediate basis for possible departure from the scheme.

The BAQ also supported the need to maintain the 'widest possible judicial discretion to depart from the minimum period set', and submitted that identifying a limited list of factors set out in legislation that can be taken into account (such as under the NT and SA legislation) 'ought [to], we suggest, be avoided'.[358]

Maintaining judicial discretion in sentencing under a SNPP scheme was also supported by the Department of Communities on the basis of allowing a court to take into account the particular characteristics of the offence and of the offender, including those relating to vulnerable offenders.[359]

PACT similarly supported the retention of judicial discretion allowing departure from the SNPP and suggested that the court could consider issues such as whether the offender is a repeat offender and whether the offender poses a significant risk to the community.[360]

The need to retain broad discretion for courts to depart from the SNPP was also supported at a legal issues roundtable attended by key legal stakeholders.[361] Although the majority of participants were opposed to the introduction of a SNPP scheme, it was suggested that, should such a scheme be introduced, it should allow for broad grounds for departure. Participants were particularly concerned that if the SNPP applies to all offenders, regardless of whether they had pleaded guilty or the matter proceeded to trial, Queensland could expect a dramatic decrease in the willingness of offenders to offer to plead guilty. On this basis, some argued that the scheme should apply only to those convicted after trial, as in NSW.

The Council's view

After considering a range of options, the Council has concluded that courts should be required to set the SNPP as the non-parole period for the offence unless of the opinion that it is 'unjust to do so'. This form of words will create a clear presumption that the SNPP is to apply, while ensuring that judicial discretion is maintained. The court will be permitted to depart only where it is of the opinion it would be 'unjust to do so'. It also accords with grounds of departure for other requirements under the *Penalties and Sentences Act*, such as s 147(2), which provides, on breach of a suspended sentence, that a court must activate the whole of the term suspended unless it finds it would be 'unjust to do so'. To support a court's decision to set a shorter non-parole period than the SNPP, the onus will be on the offender to establish that the application of the SNPP is unjust in the circumstances.

The Council has considered, but ultimately rejected, the option of including a definition of what characteristics and factors might be relevant to the court in making this assessment. Such a list could never be exhaustive and by singling

out specific factors it may unintentionally limit the court's consideration of other factors that should properly be taken into account. It is also likely to make the sentencing process more time consuming and complex and give rise to errors in the scheme's application.

The Council has also rejected a more restrictive formulation, such as the use of 'exceptional circumstances' or 'special circumstances' on the basis that the court's primary concern should be whether the application of the SNPP may be unjust in the circumstances rather than whether the character of the case qualifies it as being 'exceptional' or 'special'.

The Council considers that the recommended form of words should also respond to the issue raised in the Terms of Reference of how the scheme, with regard to the offence of unlawful carnal knowledge, might accommodate a young offender engaged in a consensual, but unlawful, sexual relationship with an underage partner. Although it is unlikely that such an offender will receive a term of imprisonment of five years or more, in the unlikely event that this occurs, the Council is of the view that the recommended grounds for departure will provide courts with sufficient flexibility to respond to these circumstances by setting a shorter non-parole period than the SNPP.

As an additional requirement, where a court departs from the SNPP by setting either a higher or lower non-parole period, the Council recommends that the court should be required to state and record its reasons for doing so. As was recognised in the joint judgment of the High Court in *Markarian v The Queen*, '[a]ccessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public'.[362]

A requirement to provide reasons for departure is also consistent with the current position of the Queensland Court of Appeal that, in cases where courts set a higher non-parole period than is provided for by legislation, and where an offender might otherwise have a claim to be released, in this case, after serving less than half of the sentence (for example because of a plea of guilty and other personal mitigating circumstances) a non-parole period that is significantly beyond this point would be considered 'unusual' and a court has a duty in these circumstances to provide reasons.[363]

In the case of the most serious forms of offending, under the Council's proposals the court will also retain the power to make a declaration that the offender is convicted of a SO, which will trigger an 80 per cent minimum non-parole period.

RECOMMENDATION 12

A court should be required to set the minimum standard non-parole period as the non-parole period for a prescribed offence otherwise meeting the eligibility criteria, unless it is of the opinion that it would be 'unjust to do so'. In such circumstances, a court should have the power to set either a shorter or longer non-parole period than the minimum standard non-parole period.

RECOMMENDATION 13

The new Serious Offences Standard Non-Parole Period Scheme should not include specific grounds for departure for the offence of unlawful carnal knowledge based on the offender being in an unlawful, but consensual, sexual relationship with the victim. The closeness in age between the victim and the offender will be a circumstance the court can take into account in determining whether it is unjust to order the offender to serve 65 per cent of their sentence before being eligible to apply for release on parole.

RECOMMENDATION 14

In circumstances where a court departs from the minimum standard non-parole period, it should be required to state and record its reasons for doing so.

CHAPTER 5
THE OFFENCES TO WHICH A QUEENSLAND SNPP SCHEME SHOULD APPLY

This chapter discusses the offences to which a Queensland SNPP scheme should apply. In the Terms of Reference, the Queensland Government has expressed an intention that a SNPP scheme is to apply to serious violent offences and sexual offences and, at a minimum, the offences of:

- murder
- manslaughter
- rape, and
- child sexual offences (such as maintaining a sexual relationship with a child, indecent treatment of children, sodomy and unlawful carnal knowledge).

5.1 What offences are currently defined as 'serious violent offences' and 'sexual offences'?

The *Penalties and Sentences Act 1992* (Qld) defines what are considered to be qualifying 'serious violent offences' and 'sexual offences' for the purposes of legislative provisions relating to parole.[364] There are over 50 qualifying 'serious violent offences' and 'sexual offences' listed and there is a high degree of overlap between these offences. Murder, which carries a mandatory life sentence, is not included in Schedule1 which lists qualifying 'serious violent offences'; manslaughter, rape and most child sexual offences are however included. A list of serious violent offences and sexual offences under the Act, along with their maximum penalties and the ability for them to be dealt with summarily (that is, by the Magistrates Court), is provided in Appendix 4.

Those offences that can qualify as a 'serious violent offence' or 'sexual offence' under the Act do not necessarily need to be adopted for the purposes of a SNPP scheme. The question the Council has been asked to consider is which of these offences are appropriate for inclusion in a Queensland SNPP scheme.

Serious violent offences

Schedule 1 of the *Penalties and Sentences Act* currently lists the offences that are qualifying

offences for a court to make a 'serious violent offence' declaration under Part 9A of the Act. They range from offences carrying a life sentence (such as manslaughter, rape, maintaining a sexual relationship with a child and armed robbery), down to offences with a maximum penalty of two years imprisonment (the offences of preparing to escape from lawful custody and threatening violence). This list also includes some drug offences (trafficking in dangerous drugs, supplying dangerous drugs if the offence is an aggravated supply, and producing dangerous drugs if certain circumstances apply).

To be considered as a 'serious violent offence' it is not enough for the offence to simply be listed as such in Schedule 1 of the *Penalties and Sentences Act* or to be an offence of counselling or procuring the commission of, or attempting or conspiring to commit, a Schedule 1 offence, which are also captured within the scope of the scheme. For an offence to qualify as a 'serious violent offence' the court must make a declaration under s 161B of the Act that the offender has been convicted of a serious violent offence. In the case of sentences of 10 years or more imposed for a qualifying offence, the making of this declaration is mandatory, whereas a court has discretion to do so if the sentence imposed is for five years or more, but less than 10 years.

A court may also make a declaration when imposing a sentence of any length for offences not listed in Schedule 1 but that:

- involved the use of, counselling or procuring the use of, or conspiring or attempting to use, serious violence against another person, or
- resulted in serious harm to another person.[365]

Sexual offences

The definition of 'sexual offences' in s 160 of the *Penalties and Sentences Act* guides how a court must approach the task of setting a non-parole period. The offences that are included in the definition of 'sexual offences' are found in Schedule 1 of the *Corrective Services Act 2006* (Qld);[366] this Act governs the management of prisoners convicted of these offences, which includes the grounds on which they can be granted leave and prohibiting them from being transferred to a work camp. In the case of an offender convicted of a 'sexual offence', the court cannot set a parole release date even when the sentence is a prison sentence of three years or less, although a parole eligibility date may (or, if the offender had a current parole eligibility date or release date, must) be set.[367]

The offences classified as 'sexual offences' cover a wider range of sexual offences than those that can qualify as 'serious violent offences'. For example, child pornography offences are not included in the list of qualifying serious violent offences, but fall within the definition of a 'sexual offence'.[368] (See further Appendix 4). There is a high degree of overlap between the offences captured within these definitions.

In addition to the sexual offences included in the *Criminal Code* (Qld), Schedule 1 of the *Corrective Services Act* includes offences under the *Classification of Computer Games and Images Act 1995* (Qld), the *Classification of Films Act 1991* (Qld) and the *Classification of Publications Act 1991* (Qld), as well as some Commonwealth offences.[369]

5.2 What offences do other similar schemes apply to?

New South Wales

The offences initially included in the NSW SNPP scheme were:

- murder, conspiracy to murder and attempted murder
- wounding or grievous bodily harm with intent to do bodily harm or resist arrest
- certain assault offences involving injury to police officers
- certain sexual offences, including sexual intercourse with a child under 10 years
- certain robbery and break and enter offences
- car-jacking
- certain offences involving commercial quantities of prohibited drugs, including manufacture and production
- unauthorised possession or use of firearms, and
- intentionally causing a bushfire.[370]

Over time, the offences to which the NSW SNPP scheme applies have been expanded to include new offences and subcategories of:

- murder, where the victim was a child under 18 years
- reckless causing of grievous bodily harm in company
- reckless causing of grievous bodily harm
- reckless wounding in company
- reckless wounding
- knowingly facilitating a car or boat rebirthing activity
- cultivation, supply or possession of prohibited plants involving not less than the large commercial quantity (if any) specified
- unauthorised sale of prohibited firearm or pistol
- unauthorised sale of firearms on an ongoing basis
- unauthorised possession of more than three firearms any one of which is a prohibited firearm or pistol, and
- unauthorised possession or use of a prohibited weapon – where the offence is prosecuted on indictment.[371]

Further amendments introduced a new aggravated offence of sexual intercourse with a child under the age of 10 years.[372]

Three categories of murder are included in the NSW SNPP scheme:

- murder – where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work (SNPP of 25 years)
- murder – where the victim was a child under 18 years of age (SNPP of 25 years)
- murder – in other cases (SNPP of 20 years).[373]

Unlike the situation in Queensland, murder in NSW does not carry a mandatory life sentence, with the exception, following recent amendments to the *Crimes Act 1900* (NSW),[374] of the murder of a police officer.[375] NSW courts are also required to sentence an offender to life for murder 'if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence'.[376]

The NSW SNPP scheme excludes offenders sentenced to imprisonment for life or for any other indeterminate period;[377] consistent with this approach, in the Consultation Paper the Council suggested that it may be logical to exclude murder from any Queensland SNPP scheme.

There is limited information about the grounds on which the original offences included in the NSW scheme were selected, although, in the Second Reading Speech for the Bill introducing the scheme, the Attorney-General made a number of references to 'community expectations' as a relevant concern.[378]

Later changes to the SNPP scheme to include other serious offences involving personal violence and drug and firearm offences were intended to 'send a clear message to the community that the Government will not tolerate crimes of personal violence', to 'strike at organised crime and crimes committed for profit', and to apply 'where there is a strong need for general deterrence and consistency in sentencing'.[379]

South Australia

The South Australian scheme does not identify specific offences that fall within its scope, but provides that the scheme is to apply to 'serious offences against the person'. A 'serious offence against the person' is defined as a major indictable offence (other than murder) that results in the death of the victim or the victim suffering total incapacity.[380] The definition includes conspiracy to commit such an offence, or aiding, abetting, counselling or procuring the commission of such an offence.

In SA, offenders sentenced to life imprisonment for murder fall outside the scope of the SNPP scheme; under separate provisions, the minimum

non-parole period for these offenders is expressed as a defined term of 20 years.[381]

There is little information on how the offences in the SA schemes were selected.

Northern Territory

In the Northern Territory, the scheme applies to the offence of murder, certain sexual offences and certain offences committed against children under 16 years of age. The offence of murder carries a SNPP of 20 years, which must be increased to 25 years in certain cases (including the murder of officers performing a public function, such as police officers and community services workers, the murder of children, or where the offender has previously been convicted of an unlawful homicide).[382] Fixed non-parole periods of 70 per cent of the head sentence apply to sexual offences involving sexual intercourse without consent where a prison sentence is imposed that is not suspended in whole or in part.[383] Similar provisions apply to sexual offences and offences involving physical harm committed against children under 16 years.[384] The court also has the residual power to decline to fix a non-parole period in such cases;[385] if no non-parole period is set, the offender must serve the whole of his or her sentence.

As in the case of NSW and SA, it is not clear on what basis the offences included in the NT scheme were selected.

Commonwealth offences

Under Part IB of the *Crimes Act 1914* (Cth), a minimum non-parole period applies to the offences of treachery, a 'terrorism offence', treason or espionage.[386] The Commonwealth offence of people smuggling as defined in the *Migration Act 1958* (Cth), s 236B, also carries a mandatory minimum term of imprisonment of up to eight years, with a mandatory minimum non-parole period of up to five years for certain types of offending under that Act – most particularly, offences surrounding aggravated people smuggling.[387]

Canada and New Zealand

In Canada, a number of offences carry a mandatory minimum sentence, including murder, sexual offences involving children, offences involving firearms and weapons, impaired driving, and other miscellaneous offences (high treason and illegal betting).

The New Zealand sentencing escalation regime applies to a broad range of offences defined as 'serious violent offences', including sexual offences and child sexual offences, murder, manslaughter, offences involving personal violence, firearm offences and robbery.[388] The objective of these reforms is 'to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences'.[389] Most offences to which the scheme applies carry a maximum penalty of at least seven years imprisonment.

5.3 How might offences be selected?

In the Consultation Paper, the following factors were suggested (also in accordance with the Terms of Reference) as providing possible guidance on the question of what offences might be included in a SNPP scheme:

- offences already defined by the *Penalties and Sentences Act* as 'serious violent offences' and 'sexual offences'
- offences included in SNPP-style schemes elsewhere
- the current maximum penalties for offences
- current sentencing practices
- community views on the seriousness of certain offences and whether current non-parole periods are appropriate
- current appeal rates
- information about the time offenders actually spend in custody
- the degree of case variability and sentence variability within an offence category
- selecting offences where the guidance provided to courts (for example, by the maximum penalty, similar cases and appeal court decisions) could be enhanced, and
- selecting offences based on the potential of a SNPP to deter offending.

The Council also considered a range of factors that might affect the application of the scheme, such as:

- whether offenders charged with the offence can only be dealt with by the higher courts (where a SNPP is likely to apply), or also by the Magistrates Court (which might limit the usefulness of a SNPP scheme, unless the SNPP is to apply to matters dealt with in that court)
- guilty plea rates, and the potential for SNPPs to affect these rates (for example, to encourage a guilty plea in appropriate cases), and
- whether the offence covers a narrow or relatively broad range of conduct (which would suggest that a NSW-style defined term scheme, which sets a specific year value for offences falling into the mid-range of objective seriousness, may not be appropriate).

The Council examined a number of serious violent offences and sexual offences and considered how these criteria might apply to each of these offences. It noted a number of challenges with including some of these offences in a SNPP scheme, and in particular a defined term scheme, because of the range of conduct captured and individual case differences in offender culpability.

As an example of how offences might be selected based on offence seriousness, the Council suggested that the scheme could be limited to offences involving serious harm to the person, based on criteria such as:

- the maximum penalty for the offence (for example, offences carrying a maximum penalty of 10 years imprisonment or more)
- current sentencing practices (for example, offences for which a high proportion of offenders are sentenced to significant terms of imprisonment), and
- community views on relative offence seriousness.

The Council noted that an alternative approach might be to target specific types of high-risk offenders, rather than simply particular types of offences. Along these lines, the scheme could either specify the offenders to which it applies, or provide grounds of departure that screen out lower-risk offenders.

To avoid the scheme having a disproportionate impact on Aboriginal and Torres Strait Islander people and other vulnerable groups, who are already significantly over-represented in the criminal justice system, the Council also suggested that certain offences might be excluded, or that these factors might constitute grounds for departure. For example, research by the Council confirms that although Aboriginal and Torres Strait Islander offenders represent a smaller proportion of offenders sentenced to full-time imprisonment in the Queensland higher courts than non-Indigenous offenders, among offenders who are sentenced to imprisonment, they are much more likely than non-Indigenous offenders to have been convicted of a serious violent offence or sexual offence (71%, compared with 53% of non-Indigenous offenders).[390] Reducing the possible differential impacts of a SNPP scheme on these offenders could be achieved, for example, by excluding less serious forms of violent offending for which Aboriginal and Torres Strait Islander people are significantly over-represented in prison (such as wounding and assault occasioning bodily harm),[391] and by allowing for the subjective circumstances of these offenders[392] to be properly taken into account in determining if a SNPP should apply.

Consultations and submissions

The Council sought feedback on how offences may be selected to fall under the scheme and identified a range of offences to which a SNPP scheme could apply.

In submissions made in response to the online response form, one of the most common answers to the question of what offences should be included in a SNPP scheme was that the selection should be based on the level of harm involved and offence seriousness. The most common response was that the scheme should apply to all serious violent offences and sexual offences.

Of the online response form submissions that commented on this issue, support for inclusion of specific offences or categories of offences listed was as follows:

- rape (n=151)
- all sexual offences against children (n=145)
- maintaining a sexual relationship with a child (n=144)
- indecent treatment of children under 16 years (n=143)
- murder (n=141)
- all sexual offences against adults and children (n=138)
- serious drug offences (n=134)
- acts intended to cause grievous bodily harm and other malicious acts (n=132)
- unlawful sodomy (n=125)
- grievous bodily harm (n=124)
- manslaughter (n=113)
- unlawful carnal knowledge (n=110)
- assault occasioning bodily harm (n=110)
- unlawful wounding (n=95).

Respondents could select multiple offences and offence categories.

Sixty-five respondents also listed other offences, or categories of offences, that should be included. Common responses were assaults against police, emergency services and health workers, armed robbery, burglary involving an element of violence, and repeat drink and drug driving.

Submissions from members of the public made by means other than the online response form supported a range of offences and offence categories being included in the scheme, and broadly reflected the views of those who responded using the online form. For example, one submission suggested that the scheme should apply to 'all incidents where people get physically and/or mentally permanently disabled',[393] with another submission suggesting that there should be mandatory prison sentences for:

> [P]eople convicted of going armed, with whatever weapon, with the intention of committing a crime, people belonging to paedophile rings, crimes of robbery, and physical assaults with more severe sentences for assaults on police.[394]

Protect All Children Today Inc suggested in its submission the inclusion of all sexual offences, including child sexual offences, and the exclusion of the offences of wounding, assault occasioning bodily harm, manslaughter and serious drug offences:

> Through a review of the serious crimes already committed, taking into consideration the severity associated with a specific crime in cases of manslaughter, rape, etc.[395]

Bravehearts supported a SNPP scheme applying to all offences that have a maximum penalty of 10 years or more.[396]

The Queensland Law Society (QLS), while opposing the introduction of a SNPP scheme, suggested that a SNPP scheme should only apply to the offences currently listed as 'serious violent offences' pursuant to s 9A of the *Penalties and Sentences Act* attracting a maximum penalty of 10 years or more.[397]

The Queensland Police Union of Employees (QPUE) supports the scheme applying to all indictable offences provided the sentence is one of imprisonment of 12 months or more.[398]

The Commission for Children and Young People and Child Guardian limited its comments to child sexual offences, and supported the inclusion of these offences in a scheme, including maintaining a sexual relationship with a child, indecent treatment of a child, sodomy and unlawful carnal knowledge.[399]

As in the submissions, during consultations on the Reference, a range of views were expressed about what types of offences should be targeted, should a SNPP scheme be introduced. Comments ranged from those who opposed the scheme and suggested that 'as few offences as possible' be included to limit the scheme's impact, to those who thought it should operate consistently with the current SVO scheme and apply to the same list of offences.

At a number of the consultation sessions, there was discussion about whether drug offences properly fell

within the definition of a 'serious violent offence', with a number of participants suggesting they did not.[400] Comment was also made about whether offences such as manslaughter, rape, and even some forms of child sexual offending, should be included, given the broad range of conduct these offences capture. Some participants supported specifically excluding less serious forms of violence, such as assault occasioning bodily harm, which is a qualifying offence for a SVO declaration under Part 9A of the *Penalties and Sentences Act*, as well as less serious forms of sexual offences against adults, such as sexual assault. Although many participants were opposed to the introduction of a SNPP scheme, some were of the view that, should such a scheme be introduced, it was appropriate that it be targeted at serious sexual offences against children, such as maintaining a sexual relationship with a child, as well as serious sexual offences committed against other vulnerable groups.

At the final legal issues roundtable hosted by the Council attended by representatives of key legal bodies, participants were generally opposed to the introduction of SNPPs but suggested that, if introduced, it would be logical for the scheme to operate consistently with the existing forms of SNPP schemes in Queensland, such as the SVO scheme, and to apply to a similar list of offences.[401]

5.4 The Council's view

The Council recommends that the new Serious Offences SNPP Scheme should be integrated with the existing SVO scheme under Part 9A of the *Penalties and Sentences Act*.

For this reason it has concluded that the scheme should apply to all qualifying SVO offences currently listed in Schedule 1 of the *Penalties and Sentences Act*, as well as offences that involve counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in Schedule 1. The list of offences in Schedule 1 is broad, and captures what the Council considers are the majority of those serious violent offences and sexual offences which are of concern to community members, informed by the responses by those who made submissions to the Reference.

By a majority, the Council recommends that serious drug offences to which Part 9A of the *Penalties and Sentences Act* apply be prescribed offences for the purposes of the operation of the new SNPP of 65 per cent. It is recognised that offences attracting a sentence of five years or more are generally very serious offences and should be included on this basis.

A minority of the Council is of the view that drug offences included in Schedule 1 should not be prescribed offences for the purposes of the new SNPP of 65 per cent, although they would remain in Schedule 1 as offences in relation to which a serious offence declaration may be made. These Council members are concerned that drug offences were not initially contemplated in the Terms of Reference as offences to which a new SNPP scheme should apply, and do not consider that any changes are warranted to the current approach to sentencing for offenders convicted of these offences.

The Council acknowledges that some of the offences currently listed in Schedule 1 will fall outside the usual application of the new SNPP 65 per cent scheme, as the offence has a maximum penalty of less than five years. For example, the offence of riot attracts a maximum penalty of three years unless aggravating circumstances apply; if a circumstance of aggravation does apply, the maximum penalty is seven years or life imprisonment, depending on the circumstances. The benefit of retaining these offences in Schedule 1 is that it will allow the court to apply the new SNPP of 65 per cent to offenders sentenced for an aggravated offence, or where a term of imprisonment for these offences is ordered to be served cumulatively on another term of imprisonment imposed for a prescribed offence. The Council also acknowledges the historical Parliamentary objective for the inclusion of these offences in Schedule 1 when the SVO scheme was first introduced as reflecting offences 'in which serious violence is used or contemplated or which results in serious harm'.[402]

Recommended modifications to the SVO scheme offences

To accommodate the new SNPP scheme, the Council recommends the following modifications to the existing SVO scheme.

First, the Council recommends that existing SVO offences should be recast as 'serious offences', acknowledging that actual violence against the person is not an element of some offences included in the current SVO scheme (such as drug offences).

Second, the Council recommends that the following sexual offences in the *Criminal Code* which are included in the definition of 'sexual offences', but excluded from the list of SVOs in Schedule 1, should be included as prescribed offences for the purposes of the new SNPP:

- using electronic communication (eg the internet) to procure children under 16 (s 218A)
- obscene publications and exhibitions (s 228)
- involving a child in the making of child exploitation material (s 228A)
- making child exploitation material (s 228B)
- distributing child exploitation material (s 228C)
- possessing child exploitation material (s 228D)
- permitting a young person or a person with an impairment of the mind to be at a place used for prostitution (s 229L), and
- bestiality (s 211).

Increasingly, there is recognition that these offences are serious and ordinarily warrant an immediate term of imprisonment. The inclusion of child exploitation material offences and all forms of child sexual offences was strongly supported by many members of the community who made submissions, and also by a number of other stakeholders.

By adopting this modified list of offences, the offences to which the Queensland scheme will apply will be different from, and in some respects broader than, the offences in some other SNPP schemes – for example, a smaller number and narrower range of offences apply in the NT to murder and certain sexual offences, and in NSW to violent and sexual offences as well as some drug offences and firearms offences (but where a number of sexual offences are currently excluded).

With the proposed amendments, the new form of SNPP scheme will capture most sexual offences against children, a broad range of sexual offences against adults, offences of violence and serious drug offences. Because of the way the Council has recommended that the scheme be structured – to apply to offences only attracting a sentence of five years or more – it will automatically target offences at the higher end of offence seriousness.

RECOMMENDATION 15

Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) should be retitled 'Serious Offences'.

RECOMMENDATION 16

The new minimum standard non-parole period should apply to the same list of offences to which the current Serious Violent Offence Scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) applies; that is, the offences listed in Schedule 1 of the Act, or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in Schedule 1, as well as the following *Criminal Code* (Qld) sexual offences:

- using electronic communication (eg the internet) to procure children under 16 (s 218A)
- obscene publications and exhibitions (s 228)
- involving a child in the making of child exploitation material (s 228A)
- making child exploitation material (s 228B)
- distributing child exploitation material (s 228C)
- possessing child exploitation material (s 228D)
- permitting a young person or a person with an impairment of the mind to be at a place used for prostitution (s 229L), and
- bestiality (s 211).

5.5 The application of the SNPP to manslaughter, rape and unlawful carnal knowledge

In referring the issue of SNPPs to the Council, the Terms of Reference specifically ask the Council to consider the offences of manslaughter, rape and unlawful carnal knowledge and how a SNPP scheme might apply to these offences given the significant differences in the circumstances in which these offences are committed and the range of conduct captured.

Manslaughter

Manslaughter is committed where a person unlawfully kills another person under such circumstances as not to constitute murder.[403] Manslaughter carries a maximum penalty of life imprisonment, but unlike the penalty for murder this is not a mandatory penalty.[404] The Consultation Paper discussed in detail sentencing and parole practices for offenders sentenced for the offence of manslaughter and provided case examples. It also discussed a number of arguments for the inclusion and exclusion of manslaughter from a SNPP scheme.

One of the most compelling arguments against including manslaughter in a SNPP scheme is the issue of case variability. In the Consultation Paper the Council noted that manslaughter represents a broad range of conduct and levels of offender culpability, ranging from deliberate, vicious and unprovoked attacks just falling short of murder, to cases where there is no intention to cause harm, but that involve criminal negligence. An example of the latter was the case of an offender, KC, who was a former drug addict with four young daughters (aged eight, seven, five and three) who had recently been returned to her care after a lengthy period in foster care because of the offender's drug addiction. KC failed to call an ambulance when the youngest child slipped in the shower and hit her head. This resulted in an injury that led to her death from a subdural haemorrhage a significant time after the accident. KC was sentenced to five years imprisonment, with a recommendation for parole after 18 months.[405] As illustrated by this case, and the following sample of other cases involving convictions for manslaughter, even if the automatic application of the new SNPP is limited to sentences of imprisonment of five years or over, but less than 10 years, it would still capture offences with a broad range of case variability:

Case 1: sentence of five years imprisonment with non-parole period of nine months

The offender killed his father with several blows to the face and head while armed with a pipe. There was a long-standing abusive relationship between the father and the offender and his mother. Both the father and offender had alcohol dependency problems and the offender was diagnosed as a paranoid schizophrenic. The matter went to the Mental Health Court; the court found the accused had a state of abnormality of the mind. The offender pleaded guilty and was sentenced to five years imprisonment with a recommendation for parole after serving nine months.

Case 2: sentence of six years imprisonment with non-parole period of two years

The offender, a woman, was in a volatile relationship with the deceased. Both had been drinking and when an argument ensued, the offender stabbed the deceased once in the throat with a knife. She was sentenced to six years imprisonment with a recommendation for parole after serving two years.

Case 3: sentence of seven years imprisonment with non-parole period of two years

The offender had been drinking at a hotel and invited some people back to her house. After police attended the party because of a noise complaint, the deceased was asked to leave but he later returned. An argument occurred between the offender and the deceased during which the deceased smashed a bottle and made approaches to the accused. As the deceased approached the accused, she picked up a knife and stabbed the deceased once. She tried to stop the bleeding and called for an ambulance and the police. She was sentenced to imprisonment for seven years with a recommendation for parole after serving two years.

Case 4: sentence of seven years and six months imprisonment with a non-parole period of three years
The offender and his co-offender killed the deceased during a brawl after a drinking bout. They later disposed of the body. The offender pleaded guilty and offered to give evidence against his co-offender. He was sentenced to seven and a half years imprisonment, with a non-parole period of three years (including more than two years time spent in pre-sentence custody).

Case 5: sentence of eight years imprisonment with a non-parole period of three years
The offender smothered her five-year-old daughter. The matter went to the Mental Health Court, and she was found to have had a substantial impairment of the mind at the time of the killing. She pleaded guilty to manslaughter and was sentenced on the basis of diminished responsibility at the time of the offence. She was sentenced to eight years imprisonment with parole eligibility after serving three years.

Case 6: sentence of nine years imprisonment with a non-parole period of four years and six months
The offender and another male killed the deceased, who was out for an evening walk. The deceased was strangled. The offender pleaded guilty and stated that they had only intended to rob the deceased. The co-offender was sentenced for a number of serious offences to 12 years imprisonment. The offender was sentenced to nine years imprisonment, with no SVO declaration or parole recommendation (resulting in parole eligibility after serving 50% of the sentence, or four years and six months).

Case 7: sentence of nine years imprisonment with a non-parole period of three years
The offender, who pleaded guilty to manslaughter, had an altercation with his de facto after spending the day drinking with his father, which resulted in her death. The offender could not remember the circumstances surrounding the altercation, and had gone to bed after it, but woke some time later to find the deceased in the hall. He attempted cardiopulmonary resuscitation and called 000.

Applying a standard non-parole period of 65 per cent would result in an increase in all non-parole periods for the cases outlined above, ranging from three years and three months for a five-year sentence, to around five years and 10 months for a nine-year sentence.

The approach in other jurisdictions

Manslaughter is not included in the NSW SNPP scheme, nor has it been the subject of a guideline judgment in Australia. The decision to exclude manslaughter from the NSW scheme was revisited as part of a 2003 review of the law of manslaughter. This review concluded that the broad range of cases falling into the offence category of 'manslaughter' did not lend itself to a structured scheme of manslaughter and penalties (including SNPPs).[406]

A 2004 review of aspects of the NT *Criminal Code* reached a similar conclusion, recommending against the extension of SNPPs to manslaughter.[407]

The offence of manslaughter is, however, captured by the SA form of SNPP scheme, which is a standard percentage scheme – four-fifths (80%) of the head sentence. Under s 32A of the *Criminal Law (Sentencing) Act 1988* (SA), a mandatory minimum non-parole period is the non-parole period for an offence at the lower end of the range of objective seriousness. A court may set a shorter non-parole period if satisfied that special reasons exist for doing so, but can only have regard to a set list of matters, namely whether:

- the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct
- if the offender pleaded guilty to the charge of the offence – that fact and the circumstances surrounding the plea
- the degree to which the offender co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.[408]

The Council's view

The Council acknowledges that manslaughter, which involves the death of a person, is one of the most serious of criminal offences and, on this basis, the community has a reasonable expectation that the seriousness of the harm caused should be reflected in the sentences imposed for this offence. At the same time, there are some persuasive reasons for excluding manslaughter, including the broad scope of conduct and culpability of offenders captured within this offence category. At the less serious end of cases falling into the five to 10 year sentencing range, manslaughter cases include cases of criminal negligence where there is no intention to cause death or serious injury.[409] Cases falling into this sentencing range would also include some instances where victims of domestic violence have killed their abusive partners or abusive family members.[410]

Because the Council recommends that a court be permitted to depart either up or down from the SNPP in circumstances where it is satisfied that it would be unjust for the SNPP to apply, a majority of the Council does not consider it necessary to exclude manslaughter from the operation of the scheme. In circumstances where the conduct involved is at the lower level of culpability, in combination with other mitigating factors such as an early plea of guilty, justify a shorter non-parole period being set, it will be open to the court to find that it is unjust to apply the SNPP. As the scheme is a standard percentage rather than a defined term SNPP scheme, a court will also be able to adjust the head sentence, where appropriate, to take into account the individual circumstances of the case.

A minority of the Council is in favour of excluding manslaughter from the scheme on the basis that, because the offence of manslaughter is committed in such a wide range of circumstances, and the conduct and culpability of offenders vary so significantly, it is desirable to retain a high level of flexibility in the way parole eligibility dates for manslaughter are set. These Council members further recognise it is possible that, although the Council's recommended grounds for departure may support courts setting a lower non-parole period in some cases, the existence of a SNPP for the offence may inappropriately influence the level at which the non-parole period is set. For example, courts may be less willing to set the non-parole period at a third of the head sentence, taking into account the SNPP of 65 per cent that would ordinarily apply, even when there are compelling reasons to do so.

Rape

The Terms of Reference request the Council to 'consider the appropriate length of the minimum standard non-parole period, given those matters set out in s 349 of the *Criminal Code*', which is the offence provision for rape.

Following amendments to the *Criminal Code* in 2000, the definition of rape in s 349 of the *Criminal Code* was extended to include penetration by the offender of the vagina, vulva or anus of the victim by any body part or object, and penetration of the mouth of the victim by the offender's penis. This conduct was previously captured within the scope of the offence of sexual assault.[411]

The Consultation Paper discussed in detail sentencing and parole practices for offenders sentenced for the offence of rape and provided case examples. It also discussed a number of arguments for the inclusion or exclusion of rape from a SNPP scheme.

Although Queensland courts have been careful to recognise that the seriousness of a particular example of rape must turn on the facts of the case, courts have recognised that some subcategories of the offence, without aggravating features, may be viewed as less serious. For example, the Court of Appeal in *R v Colless* recognised:

> While the Criminal Code establishes the same maximum penalty, whether the rape be accomplished by penetration by the penis or digitally, it is reasonable to observe that, without additional aggravating features (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc), a rape accomplished digitally may generally be seen as somewhat less grave than a rape accomplished by penile penetration. That

> is because it may be less invasive, would not carry a risk of pregnancy, and would ordinarily carry substantially reduced risk of infection.[412]

The Council's view

For similar reasons to those which apply to manslaughter, the Council supports rape being included in the list of offences to which the SNPP is to apply. Any differences in offence seriousness can be accommodated by the courts when sentencing by setting the head sentence accordingly and, in appropriate cases, considering whether the application of the SNPP would be unjust in the circumstances.

Unlawful carnal knowledge

Although the Terms of Reference note the Queensland Government's intention that a SNPP scheme will apply to the offence of unlawful carnal knowledge under s 215 of the *Criminal Code*, it asks the Council to consider how to accommodate the scenario of a young offender engaged in a consensual but unlawful sexual relationship with an underage partner. Consent is not a defence to this offence.

Section 9(5) of the *Penalties and Sentences Act* provides that, in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years of age, the offender must serve a term of imprisonment unless there are exceptional circumstances. However, it states that in considering whether there are exceptional circumstances 'a court may have regard to the closeness in age between the offender and the child'.[413] This recognises the lower level of culpability that is generally involved in the commission of this offence where the sexual relationship is between two young people and there is no power imbalance.

The Council's view

Given the existence of s 9(5) of the *Penalties and Sentences Act* and for similar reasons to those which apply to manslaughter and rape, the Council is of the view that any difference in offence seriousness arising from factors such as the closeness in age between the offender and the child and their relationship can be accommodated by the courts when sentencing, by setting the head sentence accordingly. In the very unlikely event that a sentence of five years or more is imposed on a young person who commits such an offence, the suggested grounds for departure should also be sufficiently broad to allow the court to set a shorter non-parole period than the SNPP.

The Council further recommends that the courts' approach to sentencing for manslaughter, rape and carnal knowledge after the introduction of the new Serious Offences SNPP Scheme, including the circumstances in which courts are departing from the SNPP, should be considered as part of the broader evaluation of the scheme recommended by the Council after the scheme has been in operation for a three-year period (see Recommendation 21).

RECOMMENDATION 17

17.1 The *Criminal Code* (Qld) offences of manslaughter (ss 303, 310), rape (s 349) and unlawful carnal knowledge (s 215) should be included in the list of prescribed serious offences under Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) to which the new minimum standard non-parole period will apply.

17.2 The application of the new minimum standard non-parole period to manslaughter, rape and unlawful carnal knowledge, and the circumstances in which courts have departed from the minimum standard non-parole period in sentencing for these offences, should be considered as part of the formal evaluation of the scheme.

5.6 The exclusion of murder

The Terms of Reference specifically contemplate the inclusion of murder in a Queensland SNPP scheme. Murder, which is the most serious offence against the person in Queensland, carries a mandatory life sentence.[414]

Murder is the unlawful killing of another person in circumstances where:

- the offender intended to cause the death of the person killed or that of some other person, or to do to the person killed or some other person grievous bodily harm, or
- the death was caused by an act done in the prosecution of an unlawful purpose and the act is of such a nature as to be likely to endanger human life (for example, in the course of an armed robbery), or
- the offender intended to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime, or
- the death was caused by administering any stupefying or overpowering thing for either of the purposes mentioned previously above, or
- death is caused by wilfully stopping the breath of any person for either of such purposes.[415]

There are separate statutory provisions that govern the release on parole of prisoners sentenced for murder. An offender convicted of more than one murder, or who has previously been convicted of murder, must serve a minimum of 20 years imprisonment or longer (as ordered by the court) before being eligible to apply for release on parole.[416] In other cases, the offender is eligible for parole after serving 15 years of their prison sentence, or on a later date fixed by the court under Part 9, Division 3 of the *Penalties and Sentences Act*. In effect, murder already has a 'standard' or rather a 'minimum' non-parole period that applies automatically.

Consultations and submissions

As discussed in Chapter 4, very limited feedback was provided during consultations on the inclusion of offences attracting a life sentence, such as murder. Of submissions received through the online response form, 141 supported the inclusion of murder in a SNPP scheme. These responses were submitted despite the response form indicating that murder already carries a mandatory minimum non-parole period of 15 years imprisonment, or 20 years in some cases.

In its submission, the QLS commented that, as there is a current non-parole period regime that applies to offenders sentenced to life imprisonment, 'there seems little need to alter that current position'.[417] Bravehearts supported excluding offenders sentenced to life imprisonment for murder who are subject to a minimum non-parole period of 20 years.[418]

The Catholic Prison Ministry supported the mandatory minimum sentence for murder being abolished.[419]

Some comments were made in submissions from community members relating to the adequacy of the current non-parole periods for murder; the majority of these expressed dissatisfaction with people convicted and sentenced for murder being able to be released on parole. Comments included the following:

> Life for murder and manslaughter no parole; they have taken a life so they need to spend the term of their life behind bars.[420]

> There should be mandatory sentencing for people who kill policemen. … The term should be life with no parole period.[421]

The Council's view

As discussed in Chapter 4, because the Council recommends the adoption of a standard percentage scheme, it recommends that any offence for which a life sentence is imposed (such as murder) or an indefinite sentence is ordered should automatically be excluded from a Serious Offences SNPP Scheme. Further, as murder and other offences for which an offender is sentenced to life imprisonment already carry what is effectively a mandatory minimum SNPP of 15 years, or 20 years in some cases, the Council is of the view that there is no need to include this offence in a new Serious Offences SNPP Scheme.

5.7 Focusing on specific criminal conduct

In determining what offences should be included in the SNPP scheme, the Council has been asked to consider whether it would be appropriate to single out specific types of criminal conduct, such as 'glassing' in and around licensed premises, to be subject to a SNPP or whether the preferable approach would be for the SNPP to apply to the offence or offences that would ordinarily capture that conduct. 'Glassing' is defined in s 96 of the *Liquor Act 1992* (Qld) as 'an act of violence that involves the use of regular glass and causes injury to any person'.

Crime data collected by the Queensland Police Service indicate that the number of reported assault offences[422] where glass was used as a weapon increased from 2005 to 2009, before decreasing in 2010.[423] There were 297 assaults involving glass in 2005, compared with 422 in 2009. In 2010, this decreased to 294. The rate per 100,000 persons of reported assaults involving glass was seven in 2005 and 10 in 2009.[424] The rate decreased to six in 2010.[425] Increased attention to 'glassing' incidents in licensed areas led to the 2009 Government Inquiry into Alcohol-Related Violence.[426]

Issues

The difficulty of targeting the scheme at specific criminal conduct rather than at particular offences is that specific criminal conduct can fall within a range of different offences, depending on the behaviour involved. For example, an incident involving a glassing may result in the offender being charged with unlawful wounding, assault occasioning bodily harm while armed, or grievous bodily harm. Each of these offences carries its own maximum penalty, ranging from seven years for unlawful wounding (s 323 *Criminal Code*) and 14 years for grievous bodily harm (s 320 *Criminal Code*) to life imprisonment for acts intended to cause grievous bodily harm and other malicious acts (s 317 *Criminal Code*).

Another example of specific criminal conduct that could be targeted under a SNPP scheme is sexual offending against children. There is a wide range of child sexual offences that carry different maximum penalties, ranging from five years to life imprisonment.

Arguably, another example of this type of approach is found in s 9 of the *Penalties and Sentences Act*. Sections 9(2) to 9(6B) identify the factors to which a court must pay primary regard in sentencing for specific types of offences (rather than a list of specific offences) and excludes the application of the principles that imprisonment should be a sentence of last resort, and that a sentence that allows the offender to stay in the community is preferable, to offences categorised as:

- offences 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 (s 9(3))
- offences of a sexual nature committed in relation to a child under 16 years (s 9(5)), and
- specific offences involving child exploitation or child abuse material (s 9(6A)).

There has been judicial consideration of whether particular categories of offences qualify within these definitions. For example, in *R v Lovell*[427] the Court of Appeal found that the offence of attempted armed robbery in the circumstances did qualify because there was physical force used in that case by the applicant against the proprietor of the shop. The Court referred to the earlier Victorian case of *Butcher* which expressed the view that, although unnecessary to decide the matter, the expression 'an act of violence' would include a threat of violence '[i]f threats are made personally to intimidate or seeking to intimidate'.[428] This case was subsequently followed in *McCrossen*.[429]

Consultations and submissions

There was very limited feedback provided on whether a scheme should apply to specific forms of conduct or, alternatively, whether the scheme should apply to the offences that would ordinarily capture that conduct.

The QLS opposed targeting specific aspects of facts that would attract a SNPP on the basis that

such an approach 'would be unduly difficult and confusing'. It supported a SNPP scheme attaching to specific offences, rather than conduct, on this basis.[430]

Consistent with the position of the QLS, discussion at other consultations, including at the legal issues roundtable,[431] highlighted the complexities of targeting behaviour rather than offences.

The QPUE in its submission argued that it would be appropriate to include certain types of offending behaviour within the scheme (such as any form of assault against police), and suggested that behaviour within offences could result in an offence being considered more serious.[432]

The Council's view

Because the Council has recommended a standard percentage scheme that will apply to all prescribed serious offences, it has not been necessary for the Council to examine whether specific forms of conduct should be captured rather than the offences under which that conduct will be charged. In the event that the conduct concerned falls under one of the prescribed offences and is serious enough to warrant a sentence of five years or more to which the new SNPP of 65 per cent is to apply, it will be subject to the new SNPP or, in cases in which a serious offence declaration is made under Part 9A of the *Penalties and Sentences Act*, to a minimum non-parole period of 80 per cent of the term of imprisonment.

RECOMMENDATION 18

The new minimum standard non-parole period should apply to prescribed offences listed in Schedule 1 of the *Penalties and Sentences Act 1992* (Qld) and otherwise identified as 'prescribed offences' rather than specific forms of conduct that fall under these offence categories (eg 'glassing').

CHAPTER 6
IMPLEMENTATION OF A QUEENSLAND SNPP SCHEME

This chapter explores issues related to the implementation of a Queensland SNPP scheme, including the possible impacts of the scheme on the Queensland criminal justice system, whether the scheme should apply prospectively or retrospectively and the need for ongoing monitoring and evaluation.

6.1 Introduction

In referring the issue of what form a Queensland SNPP scheme should take, the Attorney-General referred to the impact of the introduction of the SNPP regime in NSW on its criminal justice system as a relevant consideration.

The Council is also concerned to ensure that the possible effects of the scheme in the form recommended are fully considered and that the scheme is adequately resourced and funded prior to commencement.

When looking at the factors that may affect the successful implementation of a Queensland SNPP scheme, the Council has focused on:

- the possible impacts of a SNPP scheme on the Queensland criminal justice system, including any potential increase in costs to legal practitioners, the courts and Queensland Corrective Services, professional training required in the operation of the new scheme, and changes to information management systems
- commencement issues, including when the scheme should come into operation, whether the scheme should be introduced in stages (eg to a limited number of offences initially, and then expanded over time), and whether it should apply prospectively (to offences committed after the introduction of the scheme), or be wholly or partly retrospective in application, and
- how to evaluate the scheme to measure its impacts, ensure it is meeting its objectives and assess the ongoing need for such a scheme.

Whatever form of scheme is eventually adopted, further consultation with key agencies will be necessary to ensure that the transition to the new arrangements runs smoothly, that the risks of any

unintended negative outcomes are minimised, and that practitioners and the courts are properly prepared for the scheme's commencement.

6.2 Possible impacts of a SNPP scheme on the Queensland criminal justice system

The NSW experience

As discussed in the Consultation Paper, the NSW experience provides the best guide to the possible impacts of a SNPP scheme on the Queensland criminal justice system. Although the impacts have not been quantified in dollar terms, NSW practitioners and others with whom the Council Secretariat met were concerned that the scheme had increased costs considerably across all parts of the NSW criminal justice system.[433] Costs identified were those associated with more people being sentenced to prison for SNPP offences, and spending longer periods in prison (including longer periods in maximum security), as well as the additional work and time required by legal practioners to prepare for sentencing hearings and to make sentencing submissions, and for judicial officers to draft their sentencing remarks to reduce potential for error. A number of people also believed that the number of appeals to the Court of Criminal Appeal had increased.

The concerns raised by NSW practitioners about changes to sentencing patterns and appeal rates are broadly consistent with the findings of the NSW Judicial Commission's 2010 evaluation of the NSW SNPP scheme.[434] Although the evaluation found there was no real change in the overall incarceration rate for offenders subject to the scheme, the imprisonment rate grew significantly for some offences. The evaluation also found evidence to suggest that the new sentencing scheme increased the length of sentences and non-parole periods for SNPP offences. The impact of the sentencing scheme on sentence length and non-parole periods varied in relation to the type of offence and the plea status of the offender, with significant increases recorded for offenders pleading not guilty.[435]

There remain a number of concerns about the effectiveness of the NSW scheme, as reflected in comments expressed publicly by the Chief Judge of the NSW District Court that one of the reasons for the size of the gaol population in NSW 'is clearly the fact that this State is the only jurisdiction in Australia to introduce standard non-parole periods'.[436] He went on to say that the Judicial Commission study into SNPPs 'clearly identifies the regime of standard non-parole periods as a major contributor' to the increase in sentences in NSW and that this raised the question 'Should we now review that regime which is still peculiar to NSW and amend or abolish it?'[437] There is also concern that the growth of correctional costs in NSW to over a billion dollars a year is partly attributable to this increase in sentence lengths.[438] Others with whom the Council Secretariat met pointed to changes in the bail provisions as also having had a substantial impact in that state on prisoner numbers and costs. In introducing such a scheme in Queensland, it is to be expected that, whatever the levels at which SNPPs are set, sentence lengths may increase, as has occurred in NSW, with an associated rise in the cost of administering the increased prison population.

Consultations and submissions

Queensland legal practitioners and offenders' advocates consulted by the Council in the early stages of this reference were concerned that the NSW experience would be replicated in Queensland if a SNPP scheme was to be introduced. This was supported in later formal submissions by some of these groups during the consultation period.

The Queensland Law Society (QLS) commented that the introduction of a defined term SNPP scheme, in particular, would have these results:

> Greater complexity in the system, more appeals and further strains on the higher courts and [Director of Public Prosecutions] are inevitable as experienced in New South Wales. Other risks such as overcharging of offences, bail difficulties and pressures to enter a plea of guilty (to avoid a SNPP) would be greater with a defined term, particularly for offences which attract a wide range of sentences.[439]

Reflecting these concerns, the Bar Association of Queensland (BAQ) and Legal Aid Queensland (LAQ) also identified a range of possible negative impacts of a Queensland SNPP scheme, including:

- an increase in not guilty pleas and consequently matters going to trial:

> If [minimum standard non-parole periods] are introduced there is, in our experience, absolutely no doubt that some offenders will proceed to trial in circumstances where they would otherwise plead guilty.[440]

- as a result of the increased complexity such a scheme would bring, additional preparation time, adjournments and court time for sentencing hearings, and an increase in appeals because of the potential for error by the courts[441]
- a reduced willingness of offenders to become informants as offenders may elect not to co-operate and give evidence against a co-offender if the offence is subject to a SNPP, and greater pressure on prosecuting authorities to not prosecute an offender who is offering cooperation if authorities, because of a SNPP, cannot offer the offender the option of a generous non-parole period and the offender refuses to cooperate unless the prosecution against the offender is discontinued:

> If MSNPPs are introduced, there is a real danger that they will interfere with the ability of a sentencing judge to give proper discount to an offender who is prepared to give evidence against his co-accused.[442]

- a reduction in head sentences to accommodate the new SNPP and ensure the sentence imposed is just in all the circumstances.[443]

The submission of the Chief Justice of the Supreme Court of Queensland on behalf of the Court echoed the concerns raised by the QLS, LAQ, the BAQ and others. The Chief Justice highlights the implications of a SNPP scheme for the Court's resources and the consequential substantial delays this would bring not only in the sentencing of offenders but also in bringing matters to trial.

The Chief Justice notes that these delays 'should be avoided for many 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 Chief Justice goes on to suggest that the complexity of such a scheme is likely to increase the number of appeals.[444]

During consultations and in some submissions, concerns were also raised about the impact of a SNPP scheme on vulnerable groups in the community. In particular, many questioned how the scheme would apply to Aboriginal or Torres Strait Islander offenders and whether the scheme would be compatible with the *Aboriginal and Torres Strait Islander Justice Strategy 2011–14*. Other concerns related to how a SNPP scheme could take into account the individual circumstances of an offender, particularly those with mental health problems or an intellectual impairment.

In contrast, those stakeholders who supported the introduction of a SNPP scheme, including Bravehearts and the Queensland Police Union of Employees (QPUE), submitted that any impacts of the introduction of a SNPP scheme would be minimal or positive. Although Bravehearts acknowledged the potential of SNPPs to increase prisoner numbers and reduce judicial discretion, its submission pointed to a number of positive aspects of a SNPP scheme:

- increased consistency and certainty in the sentencing process
- increased transparency in the sentencing process
- higher levels of community confidence
- a reduction in court costs, and
- increased admissions of guilt (reducing court time and costs).[445]

The QPUE acknowledged the possible negative impacts discussed in the Consultation Paper, but submitted that:

- concerns of overcharging can easily be resolved by proper supervision and the Director of Public Prosecutions (DPP) and the Queensland Police Service acting cooperatively
- there is no issue of concern that offenders

charged with a SNPP offence will not get bail or that it will increase the workload for the ODPP
- the scheme the QPUE proposes would apply regardless of a plea of guilty
- concern about more offences being dealt with on indictment is not an issue, particularly if the scheme applies to offences dealt with both summarily and on indictment, and
- if the court places all reasons for a departure from the SNPP on the record, this may reduce the number of appeals.[446]

The Council's view

Whatever scheme is introduced in Queensland, it is highly probable it will have cost implications across the criminal justice system, including due to some offenders spending longer periods in prison.

As noted in Chapter 3, in 2009–10, Queensland had a prison population of 5,631 prisoners at a cost of $181.10 per prisoner per day. Any increase in these numbers, and consequent reduction in the number of prisoners on parole, will not be cost neutral. The Council has undertaken an analysis of courts data to give an indication of the number of defendants who may be affected by the proposed new 65 per cent SNPP after its introduction. The results of this analysis, which was based on the most serious offence sentenced by the courts for the case, are summarised in Table 2 and Figures 3–5.[447]

Table 2 presents information on the number of defendants sentenced by the Queensland higher courts for the period 2005–06 to 2009–10. It shows that 25,560 defendants were sentenced in the higher courts over this period and that 968 of these defendants received a sentence of five years or more, but less than 10 years, for a prescribed offence under the Council's recommendations. It is therefore anticipated that the 65 per cent SNPP will apply to about 200 defendants per year if recent offending and sentencing patterns continue.

Table 2: Number of defendants sentenced in the higher courts and possible impact of the proposed 65 per cent SNPP, 2005–06 to 2009–10

	All defendants	Aboriginal & Torres Strait Islander	Non-Indigenous	Male	Female
Total defendants sentenced	25,560	4,063	19,179	21,586	3,960
Sentenced for a prescribed serious violent offence or sexual offence	12,270	2,458	8,927	10,689	1,579
Sentenced to immediate full-time imprisonment for a prescribed serious violent offence or sexual offence	5,597	1,383	3,818	4,993	604
Possibly affected by new SNPP of 65% (prescribed serious violent offence or sexual offence and sentenced to a term of imprisonment of 5 years or more, but less than 10 years	968	146	746	913	55
Number potentially affected per year	194	29	149	183	11

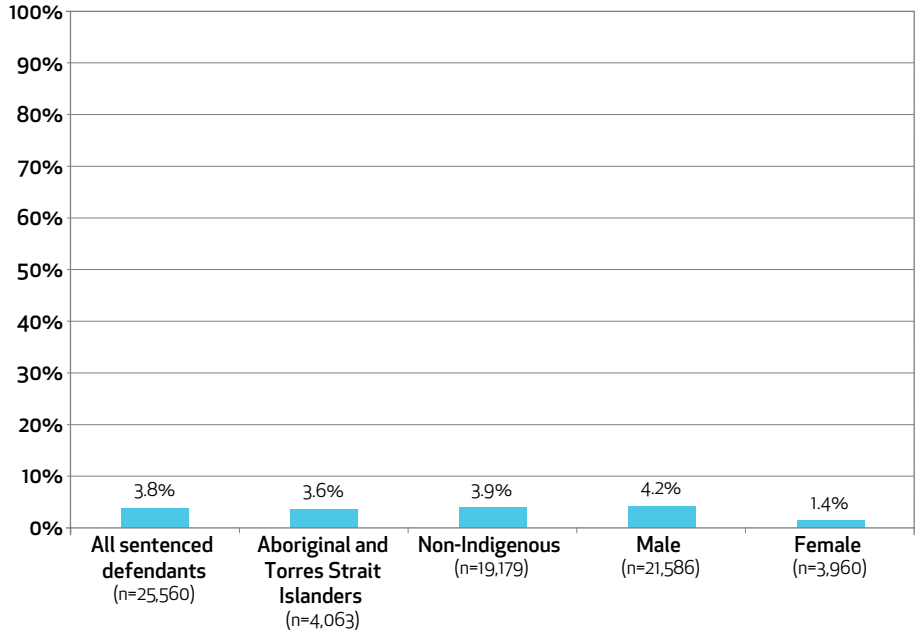
Source: Queensland Courts database maintained by OESR.
Notes:
1. Individuals returning to court on different charges are treated as different defendants.
2. Numbers reflect the most serious offence receiving a sentence.
3. Analyses of Aboriginal and Torres Strait Islander status and gender only include cases where that information is available in the data.
4. Analyses examining sentence length exclude cases where the length of sentence is missing.

The different offence and sentence length profile of Aboriginal and Torres Strait Islander offenders compared with non-Indigenous offenders means that the proposed SNPP scheme should minimise the risks that the scheme will disproportionately affect Aboriginal and Torres Strait Islander offenders sentenced in the higher courts.[448]

Figure 3 shows that, over the five-year period 2005–06 to 2009–10, a similar proportion of Aboriginal and Torres Strait Islander and non-Indigenous offenders (3.6% and 3.9% respectively) sentenced in the higher courts might have been impacted by the operation of the proposed new SNPP had it been in operation. However, of all offenders sentenced for a prescribed serious violent offence or sexual offence during that period, a smaller proportion of Aboriginal and Torres Strait Islander offenders (6%) than non-Indigenous offenders (8%) might have been affected (Figure 4). Similarly, out of all offenders sentenced for a serious violent offence or sexual offence sentenced to an immediate term of full-time imprisonment, Aboriginal and Torres Strait Islander offenders would have been about half as likely as non-Indigenous offenders (11% versus 20%) to have been captured by the new 65 per cent SNPP (Figure 5). In overall numbers, this represents about 30 Aboriginal and Torres Strait Islander offenders per year, compared with 150 non-Indigenous offenders.[449]

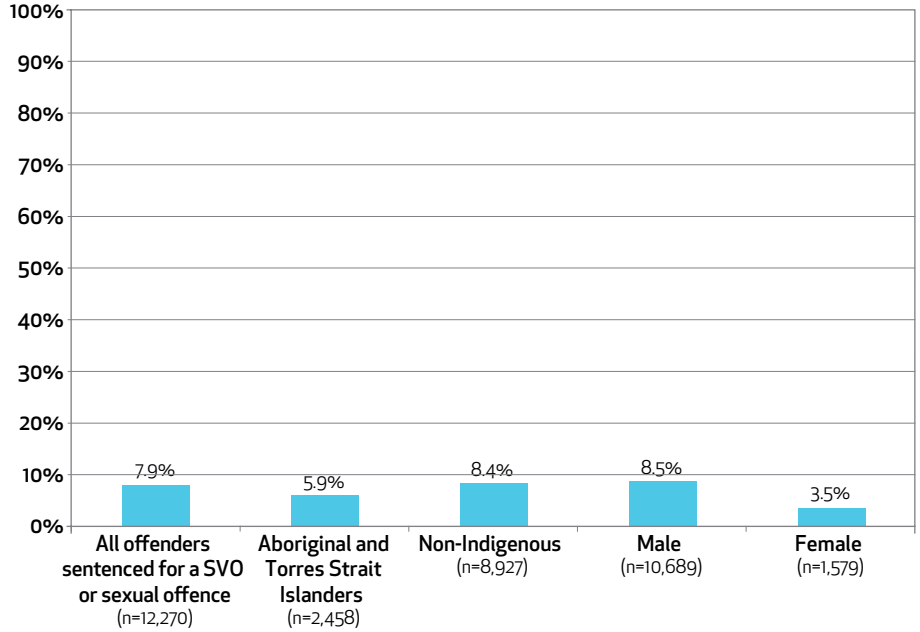
The form of SNPP scheme recommended by the Council is also likely to have a more limited effect on female offenders than on male offenders, again because of their different offending profile and sentencing patterns. As illustrated in Figure 3, over the five years analysed, the new SNPP of 65 per cent would have affected about one per cent of all sentenced women (about 10 per year), compared with four per cent of sentenced men (about 180 per year). The scheme would have affected four per cent of female offenders and nine per cent of male offenders sentenced for a serious violent offence or sexual offence (Figure 4) and nine per cent of women compared with 18 per cent of men sentenced to an immediate term of full-time imprisonment (Figure 5).

Figure 3: Proportion of defendants sentenced in the higher courts who would have been affected by the proposed 65 per cent SNPP: out of all sentenced defendants, 2005–06 to 2009–10



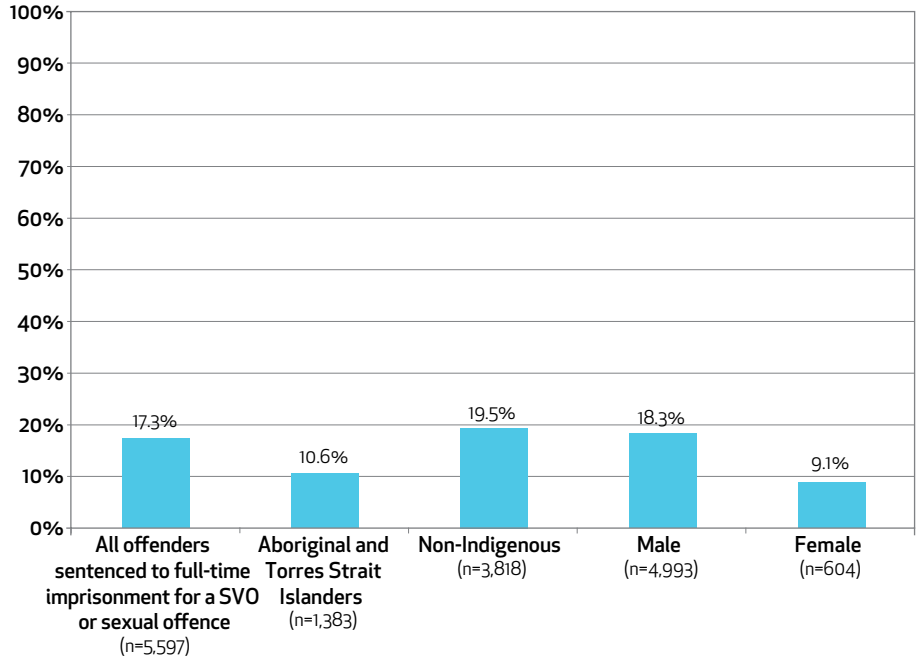
Source: Queensland Courts database maintained by OESR.
Notes:
1. Individuals returning to court on different charges are treated as different defendants.
2. Numbers reflect the most serious offence receiving a sentence.
3. Analyses of Aboriginal and Torres Strait Islander status and gender only include cases where that information is available in the data.
4. Analyses examining sentence length exclude cases where the length of sentence is missing.

Figure 4: Proportion of defendants sentenced in the higher courts who would have been affected by the proposed 65 per cent SNPP: out of all defendants sentenced for a prescribed serious violent offence or sexual offence, 2005–06 to 2009–10



Source: Queensland Courts database maintained by OESR.
Notes:
1. Individuals returning to court on different charges are treated as different defendants.
2. Numbers reflect the most serious offence receiving a sentence.
3. Analyses of Aboriginal and Torres Strait Islander status and gender only include cases where that information is available in the data.
4. Analyses examining sentence length exclude cases where the length of sentence is missing.

Figure 5: Proportion of defendants sentenced in the higher courts who would have been affected by the proposed 65 per cent SNPP: out of all defendants sentenced for a prescribed serious violent offence or sexual offence sentenced to immediate full-time imprisonment, 2005–06 to 2009–10



Source: Queensland Courts database maintained by OESR.
Notes:
1. Individuals returning to court on different charges are treated as different defendants.
2. Numbers reflect the most serious offence receiving a sentence.
3. Analyses of Aboriginal and Torres Strait Islander status and gender only include cases where that information is available in the data.
4. Analyses examining sentence length exclude cases where the length of sentence is missing.

Corrections costs are likely to increase should the scheme result in longer average stays in prison. Determining the specific costs of implementing the scheme will require detailed modelling to assess the possible effects of delayed release on prisoner numbers.

As well as the additional costs to Queensland Corrective Services, it is likely there will be costs for other parts of the criminal justice system. For example, some allowance will need to be made to inform legal practitioners, courts and other criminal justice professionals about how the new sentencing scheme is intended to operate.

The appropriate timeline for such an education program will also need to be planned to allow enough lead time for those involved directly in the application of the scheme to become familiar with the new scheme. There will also be costs associated with delivery of training to legal practitioners by their respective professional associations, the QLS and the BAQ.

If the end result of a SNPP scheme is that significant numbers of offenders are serving longer periods of actual incarceration, there will need to be an associated increase in the availability of programs to address offending behaviour and increase rehabilitation of offenders in the State's prisons. This point was strongly made through the Council's consultation process by those who were of the view that longer terms of imprisonment should achieve some benefit beyond punishment and incapacitation.

It is important that Queensland Corrective Services, the responsible body for the delivery of such programs, is provided with adequate levels of funding to ensure that prisoners affected by the new system will have access to appropriate programs, both inside and outside prison, to assist in rehabilitation and post-release support, and to reduce the risks of re-offending after extended periods of incarceration.

The Council recommends that the Queensland Government should ensure there is an adequate level of investment in rehabilitation services to ensure that offenders convicted of serious violent offences and sexual offences receive the necessary programs and support to minimise the risk of re-offending.

RECOMMENDATION 19

The Queensland Government should ensure there is an adequate level of investment in rehabilitation services as they apply to offenders convicted of prescribed serious violent offences and sexual offences, to support reduced rates of re-offending and to improve community safety.

6.3 Should the scheme operate retrospectively?

Another issue considered by the Council relating to implementation, is whether the scheme should apply prospectively (that is, to offenders who commit an offence after the scheme's introduction), or to all offenders regardless of when the offence for which they are being sentenced was committed. The initial SNPP scheme in NSW did not apply retrospectively, applying only to those listed offences after the commencement date of the scheme,[450] while the later amendments to the legislation applied to offences 'whenever committed'.[451]

Section 11(2) of the *Criminal Code* provides:

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

This is consistent with article 15.1 of the United Nations International Covenant on Civil and Political Rights ratified by Australia on 13 August 1980:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.[452]

This can be overridden by legislation where there is an express intention that a provision should operate retrospectively.

Arguably, by providing for a presumptive SNPP, it will result in offenders being liable to serve longer periods in prison and therefore to be punished to 'a greater extent than was authorised by the former law'.

Some guidance can be drawn from the approach taken to the introduction of the SVO scheme in 1997. Immediately after its introduction, there was some debate in the courts about whether the new SVO scheme was to apply retrospectively, as had ss 9(5) and (6) of the Act when they were inserted in 2003. Sections 9(5) and (6) were amendments to the Act made under the *Sexual Offenders (Protection of Children) Amendment Act 2003* (Qld),[453] and were specifically intended to operate retrospectively as provided for by s 211 of the Act,[454] which states that:

> Section 9 as amended by the *Sexual Offences (Protection of Children) Amendment Act 2003*, section 28, applies to the sentencing of an offender **whether the offence or conviction happened before or after the commencement of that section**. (emphasis added)

The point of distinction between the SVO provisions introduced in 1997 under Part 9A of the Act, and these earlier amendments, was that there was no specific legislative intention for Part 9A to operate retrospectively.

The Queensland Court of Appeal decided, first in *R v Inkerman & Attorney-General of Queensland*[455] and then in *R v Mason and Saunders*,[456] that the only interpretation that could be taken was that the SVO provisions in Part 9A were to act prospectively only. The Court predominantly relied on s 11(2) of the *Criminal Code*, as well as s 20C(3) of the *Acts Interpretation Act 1954* (Qld), which provides:

> If an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences.

The view of the Court was that to apply the SVO provisions to an offender being sentenced for an offence that was committed prior to the amendments being introduced 'punishes an offender to a greater extent than was authorised by the former law, within the meaning of s 11(2) and increases the penalty for the offence within the meaning of s 20C(3) of the *Acts Interpretation Act*'.[457]

The Court went on to say that in its view 'neither s 11(2) nor s 20C(3) should be given a narrow technical construction',[458] and that the application of the SVO provision in the circumstances (that is, retrospectively) would contravene each of these provisions.

R v Inkerman and *R v Mason and Saunders* were cited as authority for this proposition in the more recent matter of *R v Carlton*.[459]

Taking these authorities as an example of how these principles might apply in circumstances where the consequence under the new SNPP scheme is that offenders must serve a greater proportion of their sentence in prison, it seems likely that the new SNPP scheme would not be considered to act retrospectively by the courts unless such an application was specifically called for in the drafting of any amending legislation.

In Queensland, when drafting new legislation or amending current legislation, it is also necessary to be guided by the fundamental principles underpinning all legislation in this State. Fundamental legislative principles are 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'.[460] The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

Explanatory notes for any proposed legislation are required to contain a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.[461]

To address the need to comply with the fundamental legislative principles, it would need to

be shown that the legislation to establish a SNPP scheme in Queensland has sufficient regard to rights and liberties of individuals, including that it does not adversely affect rights and liberties (of offenders and victims alike), or impose obligations, retrospectively. A strong argument is required to justify an adverse affect on rights and liberties, or the imposition of obligations, retrospectively.

Consultation and submissions

Few comments were received about this issue. Of those who did comment:

- Bravehearts and the QPUE suggested that the scheme should apply to all offences dealt with after the scheme's commencement whenever committed,[462] and
- the QLS suggested that the scheme should only apply to offences committed on or after the commencement date.[463]

The Council's view

Taking into account the potential for the scheme to result in offenders spending longer minimum periods in prison and the general principle against retrospective punishment, the Council recommends that the new Serious Offences SNPP Scheme should apply only to offences committed on, or after, the commencement of the scheme.

As the new Serious Offences SNPP Scheme is intended to integrate the existing SVO provisions with a new SNPP rather than replace them, the Council recommends that, after the commencement of the scheme, offenders sentenced for an offence committed before the commencement of the new SNPP scheme, and who would have been eligible to be declared convicted of a SVO, should be sentenced in accordance with the existing Part 9A provisions.

RECOMMENDATION 20

20.1 The new minimum standard non-parole period of 65 per cent of the term of imprisonment for a prescribed offence, which applies to immediate terms of full-time imprisonment of five years or more, but less than 10 years, should apply to all relevant offences committed on, or after, the commencement of the scheme and exclude those committed before this date.

20.2 Following the commencement of the new Serious Offences Standard Non-Parole Period Scheme, offenders sentenced for an offence committed before the commencement of the new scheme and who would have been eligible to be declared convicted of a serious violent offence, should be sentenced in accordance with the existing provisions under Part 9A of the *Penalties and Sentences Act 1992* (Qld).

6.4 Monitoring and evaluation

Inevitably, any new criminal justice sentencing scheme will have unforeseen consequences on the criminal justice system as a whole. Although NSW has had a SNPP for eight years, it is likely that the Queensland experience will be different because of local factors and differences in the relevant legal frameworks, operating arrangements, and even cultural factors.

Ensuring a Queensland SNPP scheme is properly monitored and evaluated from the date of commencement is one way of identifying any unintended consequences that may arise, and may perhaps identify ways of addressing these. It will also allow assessment to be made of whether the scheme is meeting its stated objectives, and assist in responding to any concerns about whether such a scheme should be retained.

The NSW Judicial Commission evaluation released in 2010[464] confirmed that, although the NSW SNPP scheme has predominantly resulted in a greater uniformity of, and consistency in, sentencing outcomes, it has also confirmed the early claims that there would be an increase in the severity of penalties imposed and the duration of sentences of full-time imprisonment. The evaluation suggests this could have been, in part, a result of the relatively high levels at which the standard non-parole periods were set for

some offences. However, the study also found significant increases in sentences for offences with a proportionately low ratio of standard non-parole period to maximum penalty. Interestingly, the study concluded that, insofar as consistency of sentencing is concerned, it was not possible to tell whether dissimilar cases were being treated uniformly in order to comply with the statutory scheme, thus giving an impression of consistency in sentencing.[465]

One advantage of introducing such a scheme in Queensland is that the Sentencing Advisory Council will be in a position to monitor the scheme's impact from the time it becomes operational. However, a challenge in working with courts and correctional services data is that this information is collected for administrative rather than research or evaluative purposes. For example, it has not been possible for the Council to report on the number of offenders falling outside the mandatory application of the SVO scheme who have been declared convicted of a serious violent offence. Some modifications to current databases and data collection practices may therefore be required to ensure that information on qualifying offences is captured and can be used for later analysis. This may increase the costs associated with the introduction of the scheme.

It is unlikely, however, that the scheme can be formally evaluated until it has been in operation for a period of time. Assuming the scheme's commencement by mid-2012, the first group of offences being sentenced under the scheme may not come before the courts until late 2012.

Consultations and submissions

Most stakeholders who made comment on this issue supported the need for ongoing monitoring of the scheme and for it to be evaluated, including on the basis of its costs and the impact (if any) on crime rates. LAQ supported a comprehensive evaluation of the costs of the scheme and its impacts following implementation, further commenting:

> Such evaluation should include assessment of the increased costs to the courts, prosecution and Legal Aid Queensland, and the costs associated with any increase in prisoner numbers as well as the impact on sentencing outcomes, the length of sentences, imprisonment rates, prisoner numbers and most importantly – crime rates.[466]

The QPUE supported the scheme being evaluated 'after 12 months and then every three years after that in accordance with the review of legislation in Queensland once implemented'.[467] Bravehearts submitted an initial implementation review should be conducted after the scheme had been in operation for six months, with further reviews after 12 and 24 months.[468] Both the QPUE and Bravehearts supported stakeholders being consulted as part of this process.[469]

The QLS also supported the ongoing monitoring of a SNPP scheme, including any increase in sentence lengths attributable to its introduction and appeals data.[470]

The Council's view

The Council considers it important to monitor and evaluate the impacts of the new scheme. As a guide, the Council suggests that the scheme be formally evaluated three years after its commencement. Although it will not be possible to measure the impact of the scheme at this time in terms of increasing prisoner numbers or, for example, rates of return to custody for offenders sentenced under the scheme, this evaluation should be able to assess what the immediate impacts of its implementation have been, including preliminary data on changes in sentencing patterns and impact on the courts.

The Council suggests that the evaluation should include, but should not be limited to, an assessment of any changes that can be attributed to the scheme's introduction to:

- charging practices
- sentencing and parole practices and outcomes
- rates of guilty pleas
- rates of appeals, and
- the time taken to finalise matters.

Taking into account the concerns of a number of stakeholders about the possible negative impacts on Aboriginal and Torres Strait Islander offenders and other vulnerable offenders, including

offenders with an intellectual impairment or mental illness, the Council recommends the evaluation should also examine and report on outcomes for Aboriginal and Torres Strait Islander offenders, as well as other vulnerable groups.

The Council notes that modifications to current databases and data collection practices may be necessary to ensure that information on prescribed offences that qualify for the new SNPP is captured and can be used for later analysis.

RECOMMENDATION 21

21.1 The new Queensland Serious Offences Standard Non-Parole Period Scheme should be monitored and evaluated to assess its impacts on the operation of the criminal justice system.

21.2 The initial evaluation of the scheme should be scheduled for three years after the scheme has commenced operation and include, but not be limited to, an assessment of any changes that can be attributed to the scheme's introduction to charging practices, sentencing and parole practices and outcomes, rates of guilty pleas, rates of appeals, time taken to finalise matters and impact on the courts. The evaluation should also examine and report on outcomes for Aboriginal and Torres Strait Islander offenders, as well as other vulnerable groups such as offenders with an intellectual impairment or mental illness.

RECOMMENDATION 22

The Queensland Government should ensure that the necessary arrangements are made to support any future evaluation of the Serious Offences Standard Non-Parole Period Scheme, including ensuring information on prescribed offences falling within the scope of the scheme can be collected, and is recorded, for future analysis.

APPENDIXES

Appendix 1: Terms of Reference

Terms of Reference – Sentencing Advisory Council

Minimum standard non-parole periods

I, Cameron Dick, Attorney-General and Minister for Industrial Relations, having regard to:

- the concern of the Queensland Government that the penalties being imposed for serious violent offences and sexual offending are not always commensurate with community expectations;
- the expectation of the Queensland Government that offenders who commit serious violent offences and sexual offences serve an appropriate period of actual incarceration;
- the need to promote public confidence in the criminal justice system;
- the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases;
- the impact of the introduction of the standard non-parole regime in New South Wales on its criminal justice system;
- current Queensland sentencing practices for offenders aged 17 years and over; and
- the sentencing principles set out in the *Penalties and Sentences Act 1992*

refer to the Sentencing Advisory Council, pursuant to section 200(1) of the *Penalties and Sentences Act 1992*, an examination of:

1. the appropriate offences to which a minimum standard non-parole period should apply; and
2. the appropriate length of the minimum standard non-parole period for each of the offences identified.

In undertaking this reference, the Sentencing Advisory Council will:

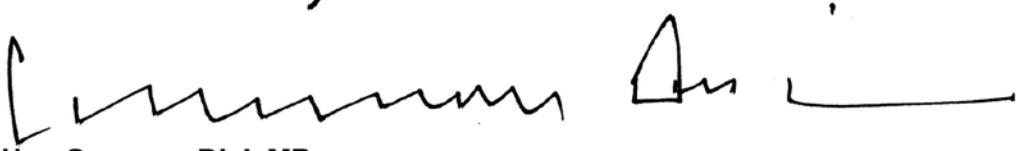
- consider applying the approach to standard non-parole periods as prescribed in the *Crime (Sentencing Procedure) Act 1999* (NSW);
- recommend specific offences to which a minimum standard non-parole period should apply;
- note the Queensland Government's intention that the new regime of minimum standard non-parole periods will apply to serious violent offences and sexual offences, and its expectation that it will, as a minimum, apply to the Criminal Code offences of murder (sections 300, 305); manslaughter (sections 303, 310); rape (section 349); and child sexual offending such as, maintaining a sexual relationship with a child (section 229B); indecent treatment of children (section 210); sodomy (section 208); and unlawful carnal knowledge (section 215);
- consider whether the offence of manslaughter sufficiently lends itself to a minimum standard non-parole period, given that the circumstances

surrounding the offence and the moral culpability of an offender may vary greatly from case to case. If considered appropriate, recommend how best to accommodate the wide sentencing range for this particular offence;

- with regard to the offence of rape, consider the appropriate length of the minimum standard non-parole period, given those matters set out in section 349 of the *Criminal Code*;
- with regard to the offence of unlawful carnal knowledge, consider how to accommodate the scenario of a young offender engaged in a consensual but unlawful sexual relationship with an underage partner;
- discuss the appropriateness of singling out specific criminal conduct to be subject to a standard non-parole period (for example, 'glassing' incidents that occur in and around licensed premises) or whether the preferable approach is for the standard non-parole period to apply to the offence/s that would ordinarily capture that specific conduct (for example, wounding (section 323), assault occasioning bodily harm while armed (section 339) or grievous bodily harm (section 320), but with the knowledge that it would necessarily have general application;
- consider how the minimum standard non-parole regime is to operate in Queensland in the context of the existing provisions, pursuant to Part 9A of the *Penalties and Sentences Act 1992*, relating to serious violent offences; including what reforms, if any, are recommended to ensure continuity of the Serious Violent Offence provisions and their complementary operation with the new standard non-parole regime;
- consider and recommend to government the minimum standard non-parole periods appropriate for each of the offences to which the regime is to apply;
- consider and make recommendations on the grounds upon which sentencing judges should be permitted to depart from the prescribed standard non-parole periods, to either increase or decrease those periods; and
- advise on any other matter to give effect to this reference.

The Sentencing Advisory Council is to report to the Attorney-General and Minister for Industrial Relations by 30 June 2011.

Dated the 20th day of December 2010.



Hon Cameron Dick MP
Attorney-General and Minister for Industrial Relations

Appendix 2: Consultations

Preliminary Roundtables –February 2011

Date & time	Roundtable	Venue
Thursday, 17 February 2011 (5.30–7.30 pm)	Legal Issues Roundtable I	Level 25, State Law Building, 50 Ann Street, Brisbane
Friday, 18 February 2011 (2.00–4.00 pm)	Community Issues Roundtable I	Level 25, State Law Building, 50 Ann Street, Brisbane
Monday, 21 February 2011 (2.00–4.00 pm)	Community Issues Roundtable II	Brisbane Square Library, 266 George Street, Brisbane
Tuesday, 22 February 2011 (5.30–7.30 pm)	Legal Issues Roundtable II	Level 25, State Law Building, 50 Ann Street, Brisbane

Organisations represented at these roundtables included:

- Aboriginal and Torres Strait Islander Legal Service
- Anti-Discrimination Commission of Queensland
- Bravehearts Inc
- Brisbane Domestic Violence Advocacy Service
- Centre Against Sexual Violence Inc
- Domestic Violence Court Assistance Network
- Gold Coast Centre Against Sexual Violence
- Murri Chaplains
- Prison Fellowship Queensland
- Prisoners' Legal Service
- Protect All Children Today Inc
- Queensland Advocacy Inc
- Queensland Council for Civil Liberties
- Queensland Homicide Victims Support Group
- Queensland Law Society
- Queensland Police Service
- Relationships Australia
- Sisters Inside Inc
- Stonewall Medical Practice
- Victims Assist Queensland
- Women Working with Women with Intellectual and Learning Disabilities (WWILD)

Meetings with NSW representatives – March 2011

Date & time	Roundtable	Venue
Thursday, 10 March 2011		
9.30–11.30 am	Corrective Services NSW and the State Parole Authority	Henry Deane Building, 20 Lee St, Sydney
12.30–1.30 pm	Judge Mark Marien SC, President of the Children's Court	2 George St, Parramatta
2.00–3.00 pm	Public Defenders Office, Department of Justice and Attorney-General	Carl Shannon Chambers, Level 13, 175 Liverpool St, Sydney
3.30–4.30 pm	Victims Services, NSW Department of Justice and Attorney-General and Victims of Crime Assistance League	Level 13, 10 Spring St, Sydney
5.00–6.00 pm	Criminal Law Committee, Law Society of NSW	170 Phillip St, Sydney
Friday, 11 March 2011		
9.30–10.30 am	Office of the Director of Public Prosecutions	Level 15, 175 Liverpool St, Sydney
12.00–1.30 pm	Community Legal Centres NSW (representatives from the Intellectual Disability Rights Service and Wirringa Baiya Aboriginal Women's Legal Service)	Suite 2C, 199 Regent St, Redfern
2.30–3.30 pm	The Honourable Justice R O Blanch AM, Chief Judge of the NSW District Court	Downing Centre, 143–147 Liverpool St, Sydney
3.45–4.30 pm	Director, Criminal Law Review Division, Department of Justice and Attorney-General	Level 13, 10 Spring St, Sydney
5.00–6.00 pm	Criminal Law Committee, Bar Association of NSW	Selbourne Chambers, 174 Phillip St, Sydney

Statewide consultations – June to July 2011

Date & time	Location	Venue
Tuesday 21 June	Mt Isa	Mt Isa Civic Centre, 23 West St, Mount Isa
Thursday 23 June	Townsville	Riverway Arts Centre, 20 Village Blvd, Thurwingowa
Friday 1 July	Brisbane	Meeting Room 1, 80 George St, Brisbane
Monday 4 July	Thursday Island	Port Kennedy Association Hall, 64–66 Douglas St, Thursday Island
Thursday 7 July	Cairns	Cairns Regional Council, Civic Reception Rooms, 119–145 Spence St, Cairns
Friday 8 July	Lotus Glen	Lotus Glen Correctional Centre
Tuesday 12 July	Gold Coast	Southport Community Centre, 6 Lawson St, Southport
Wednesday 13 July	Ipswich	Ipswich Civic Centre, Cnr Limestone & Nicholas St, Ipswich
Wednesday 13 July	Mackay	Mackay Entertainment Centre, Meeting Room 2, Alfred St, Mackay
Thursday 14 July	Maroochydore	Sunshine Coast Institute of TAFE, 170 Horton Pde, Maroochydore
Friday 15 July	Rockhampton	Dreamtime Centre, Bruce Highway, Parkhurst
Friday 15 July	Brisbane	Room 4, 80 George St, Brisbane
Monday 18 July	Toowoomba	Highfields Cultural Centre, O'Brien Rd, Highfields
Tuesday 19 July	Caboolture	Centenary Lakes Function Centre, 16-18 Stringfellow Rd, Caboolture
Wednesday 20 July	Bundaberg	Quality Hotel Burnett Riverside, 7 Quay St, Bundaberg

Other consultations

Date & time	Roundtable	Venue
Thursday, 4 August 2011 (4.00–6.00 pm)	Legal Issues Roundtable	Level 18, State Law Building, 50 Ann Street, Brisbane

Organisations represented at this roundtable included a number of key legal professional associations and services, including the Aboriginal and Torres Strait Islander Legal Service, Legal Aid Queensland, the Queensland Bar Association, the Queensland Law Society and Sisters Inside Inc.

The roundtable was also attended by representatives of a number of criminal justice agencies and observers including the Queensland Police Service, Queensland Corrective Services, the Queensland Anti-Discrimination Commission, and Courts Innovation Programs, Department of Justice and Attorney-General.

Views referred to in this report are those of representatives of non-government agencies in attendance only.

Appendix 3: Submissions

1. Written submissions[1]

Submission No	Date received	Name of submitter
1	14/06/2011	Glen
2	14/06/2011	P Kerans
3	14/06/2011	Confidential
4	14/06/2011	V Key
5	14/06/2011	D Hertel
6	14/06/2011	P & L Russell
7	14/06/2011	M Billing
8	14/06/2011	Confidential
9	14/06/2011	Confidential
10	14/06/2011	A Mansfield
11	14/06/2011	Confidential
12	14/06/2011	B Mulholand
13	15/06/2011	Confidential
14	16/06/2011	J M Taylor
15	16/06/2011	J Chan
16	17/06/2011	Confidential
17	20/06/2011	L Crighton
18	21/06/2011	J Knight
19	21/06/2011	S C Porter
20	22/06/2011	M White
21	27/06/2011	Anonymous
22	29/06/2011	P Pearce
23	29/06/2011	Mt Isa Community Development Assoc Inc
24	29/06/2011	I Pack
25	30/06/2011	Confidential
26	30/06/2011	K & E Catlin
27	4/07/2011	C L Miller
28	5/07/2011	R & J Barrell
29	5/07/2011	G Fraser
30	5/07/2011	Andre
31	7/07/2011	G Thornton
32	18/07/2011	Qld Body Corporate Association
33	18/07/2011	M de Ross
34	18/07/2011	L Campbell
35	19/07/2011	Coen Local Justice Group
36	19/07/2011	Confidential
37	19/07/2011	Protect All Children Today Inc
38	25/07/2011	Queensland Law Society
39	25/07/2011	Catholic Prison Ministry

Submission No	Date received	Name of submitter
40	25/07/2011	Legal Aid Queensland
41	25/07/2011	R Speering
42	25/07/2011	Commission for Children and Young People and Child Guardian
43	25/07/2011	Anti-Discrimination Commission Queensland
44	25/07/2011	A Ireland
45	25/07/2011	Prof Patrick Keyser and Phillipa Goddard, Centre for Law, Governance and Public Policy, Bond University
46	25/07/2011	Potts Lawyers
47	26/07/2011	Bravehearts Inc
48	28/07/201	Sisters Inside Inc
49	27/07/2011	Prison Fellowship Australia Queensland
50	28/07/2011	K Allen
51	29/07/2011	Bar Association of Queensland
52	29/07/2011	Queensland Police Union of Employees
53	2/08/2011	Prisoners' Legal Service Inc
54	2/08/2011	S O'Brien
55	10/08/2011	Department of Communities
56	12/08/2011	The Hon Paul de Jersey AC, Chief Justice of Queensland on behalf of the Supreme Court of Queensland

Notes: 1. Submissions received from victims of crime and their family members have been treated for the purposes of this reference as made in a confidential capacity.

2. Interviews

Date of interview	Name of submitter
29/07/2011	B Spencer

3. Online response form (alphabetical order – last name)

This list only includes those respondents who indicated they were happy to be identified in this report and for their comments to be attributed to them personally.

Name of submitter
C Aderian
J Anderson
A Arden
R Baek
K Bingley
C Brackett
L Branch
B Burt
R Byrnes

Name of submitter
A Calderon
A Christie
P Cliffin
N Craig
J Effer
L Egan
K Edwards
R Edwards
M Hannigan

Name of submitter
R Harmer
L Henley
Jaclyn
A Jackson
D Kays
B Levinge
R Lockman
K McCabe
S Mack
I McKay
D Magee
J Matuka
D Miller
J Millin
K Morris
M O'Malley
T Patterson
B Pittman
J Poxon
K Prentice
M Reid
C Roberts
L Rosealie
N Rostedt
D Sharp
J Stickens
D Taylor
S Toft
J Truskett
G Whitaker
J Wood

Appendix 4: Serious violent offences and sexual offences in Queensland

Table 3: Qualifying 'serious violent offences'[1] and 'sexual offences'[2] for the purposes of Parts 9 and 9A of the *Penalties and Sentences Act 1992* (Qld), applicable maximum penalties, the availability of an indefinite sentence[3] and ability to be dealt with summarily

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
***Criminal Code* (Qld)**							
61	**Riot** The offence of riot is committed if 12 or more persons who are present together (assembled persons) use or threaten to use unlawful violence to a person or property for a common purpose; and their conduct taken together would cause a person in the vicinity to reasonably fear for the person's personal safety. Each of the assembled persons commits the crime of taking part in a riot.	- Offence simpliciter[4] - If the offender causes grievous bodily harm, an explosive substance to explode or destroys a building etc - If property was damaged	3 years Life 7 years	✓	N/A	X	Yes – s 61(1)(c) only
75	**Threatening violence** If a person with intent to intimidate or annoy any person, by words or by conduct, threatens to enter or damage a dwelling or other premises or with intent to alarm any person, discharges loaded firearms or does any act that is likely to cause any person in the vicinity to fear bodily harm to any person or damage to any property, the person commits an offence of threatening violence.	- Offence simpliciter - If the offence was committed at night (between 9pm and 6am)	2 years 5 years	✓	N/A	X	Yes
142	**Escape by persons in lawful custody** Escape by persons in lawful custody involves a person who – (a) aids a person in lawful custody to escape, or to attempt to escape, from lawful custody; or (b) conveys anything to a person in lawful custody, or to a place where a person is or will be in lawful custody, with the intention of aiding a person to escape from lawful custody; or (c) frees a person from lawful custody without authority.	N/A	7 years	✓	N/A	X	Yes – on prosecution election (*Criminal Code* s 552A)
208	**Unlawful sodomy** Sodomy is an unlawful act for any person < 18. The offence involves a range of conduct (that may in some cases be consensual) associated with anal intercourse. The offence is committed: (a) if a person sodomises a person < 18 years; (b) if a person permits person < 18 to sodomise him or her; (c) if a person sodomises a person with an impairment; or (d) if a person permits a person with an impairment to sodomise him or her. If the conduct is non-consensual, a charge of rape would be preferred.	- Sodomy of a person 12 < 18 years - Sodomy of a child < 12 - Sodomy of a child or a person with an intellectual impairment who is to the knowledge of the offender: - his or her lineal descendant; or - under his or her guardianship or care	14 years Life Life	✓	✓	✓	Yes – unless defendant elects otherwise, provided: - no circumstance of aggravation - the complainant was 14 years or over - the defendant pleads guilty (*Criminal Code* s 552B)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
210	**Indecent treatment of children under 16** This offence involves a range of conduct that may be committed against a male or female child: (a) unlawfully and indecently dealing with a child < 16; (b) unlawfully procuring a child < 16 to commit an indecent act; (c) unlawfully permitting himself or herself to be indecent dealt with by a child < 16; (d) wilfully and unlawfully exposing a child < 16 to an indecent act; (e) without legitimate reason wilfully exposing a child < 16 to any indecent object or indecent film, videotape, audiotape, picture, photograph, printed or written matter; and (f) without legitimate reason taking any indecent photograph or record by means of any device, any indecent visual image of a child < 16 years. The definition of 'indecent' is judged in light of time, place, and circumstance and consideration is given to conduct that offends against current acceptable standards of decency. Sentencing factors include: - touching of the genitals on the outside or inside of clothing - if the offender is in a position of trust - the nature of the conduct – genitals versus other body parts (hand or mouth) or objects used.	- Offence simpliciter - If the child is < 12 years or is the offender's lineal descendant or the offender is the guardian of the child or, for the time being, has the child under his or her care	14 years 20 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
211	**Bestiality** It is an offence for a person to have sexual relations with an animal. The offence is constituted by either vaginal or anal intercourse between a man or a woman and an animal.	N/A	7 years	X	✓	X	Yes – unless defendant elects otherwise provided defendant pleads guilty (*Criminal Code* s 552B)
213	**Owner etc permitting abuse of children on premises** This offence involves a range of conduct. The offence is committed if a person is: - the owner or occupier of premises; or - has or had (or acted or assisted in) the management or control of premises; and that person - induces, or - knowingly permits, a child under the prescribed age to be in or upon the premises for the purposes of any person doing a proscribed act in relation to the child. A proscribed act is defined to constitute an offence in s 208 sodomy; s 210 indecent treatment child under 16; or s 215 carnal knowledge with or of children under 16.	- Offence simpliciter - If the child is < 12 years - If the child is < 12 years and the proscribed act is defined as unlawful sodomy or carnal knowledge with or of child < 16 years	10 years 14 years Life	✓	✓	✓	Yes – in certain circumstances (as for s 208)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
215	**Carnal knowledge with or of children under 16** Involves carnal knowledge or attempting to have carnal knowledge with a girl < 16 years. Carnal knowledge is complete upon penetration to any extent of the vagina. This offence does not include an act of sodomy.	- If the child is < 12 years - If the child is > 12 years - If the offender is the guardian of the child and has the child under their care - Attempt to have carnal knowledge if child < 12 or the offender is the guardian of the child and has the child under their care	Life 14 years Life 14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
216	**Abuse of persons with an impairment of the mind** This offence involves a range of conduct: - carnal knowledge: if a person has or attempts to have carnal knowledge with a person with an intellectual impairment; - indecent dealing: if a person unlawfully and indecently deals with an intellectually impaired person; - procuring: if a person unlawfully procures an intellectually impaired person to commit an indecent act; - permitting indecent dealing: if a person permits himself or herself to be indecently dealt with by an intellectually impaired person; - exposing to indecent act: if a person wilfully and unlawfully exposes an intellectually impaired person to an indecent act by the accused (or another); - exposing to indecent thing: if a person wilfully exposes an intellectually impaired person to an indecent object (or other specified indecent thing) and the accused did so without legitimate reason; and - recording indecent visual image: if a person takes an indecent photograph (or recorded an indecent visual image) of an intellectually impaired person and the accused does so without legitimate reason.	- Offence simpliciter - If the offence involves an attempt to have carnal knowledge - If the offender is the guardian of that person or, for the time being, has that person under the offender's care where: - offence is having unlawful carnal knowledge or an attempt to have unlawful carnal knowledge - other conduct - If the person is to the knowledge of the offender, his or her lineal descendant	10 years 14 years Life 14 years 14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
217	**Procuring young person etc for carnal knowledge** This offence involves person knowingly enticing or recruiting for sexual exploitation either a person < 18 years or a person who is intellectually impaired, for the purposes of carnal knowledge (either in Queensland or elsewhere).	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
218	**Procuring sexual acts by coercion etc** Involves a range of conduct of a sexual nature: (1) A person by threats or intimidation of any kind procured another person to engage in a sexual act (either in Queensland or elsewhere). (2) A person by a false pretence procured another person to engage in a sexual act (either in Queensland or elsewhere). (3) A person administered to another person (or caused a person to take) a drug or other thing; and did so intending to stupefy or overpower the person so as to enable a sexual act to be engaged in with that person.	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
218A	**Using internet etc to procure children under 16** It is an offence for a person >18 years to use electronic communication to procure a person < 16 years to engage in a sexual act or to expose a person < 16 years to indecent matter. The section further extends criminal liability to activity where the accused believes the relevant person to be <16 years. The offence does not need to involve physical contact.	- Offence simpliciter - If the child is < 12 years, or the offender believes the child is < 12 years	5 years 10 years	X	✓	X	Yes – in certain circumstances (as for s 208)
219	**Taking child for immoral purposes** A person takes (or entices) away or detains a child, for the purpose of any person doing a proscribed act in relation to the child and the child is not the spouse of the accused. A proscribed act involves conduct that would be an offence pursuant to: s 208 sodomy; s 210 indecent treatment of a child under 16; s 215 carnal knowledge with or of a child under 16.	- Offence simpliciter - If the child is < 12 and: - the proscribed act is defined as unlawful sodomy or carnal knowledge with or of children < 16 yrs - any other case	10 years Life 14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
221	**Conspiracy to defile** A person conspired with another to induce a person by false pretence or other fraudulent means to permit another to have unlawful carnal knowledge with (or of) him or her.	N/A	10 years	X	✓	✓	Yes – in certain circumstances (as for s 208)
222	**Incest** A person commits incest if they have carnal knowledge with or of their offspring or other lineal descendant or sibling, parent, grandparent, uncle, aunt, nephew or niece and they know that the other person bears that relationship to him or her, or some relationship of that type to him or her. Consent to participate in the conduct is irrelevant.	N/A	Life (attempt – 10 yrs)	✓	✓	✓	Yes – in certain circumstances (as for s 208)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
228	**Obscene publications and exhibitions** A person commits an offence who knowingly, and without lawful justification or excuse – (a) publicly sells, distributes or exposes for sale any obscene book or other obscene printed or written matter, any obscene computer generated image or any obscene picture, photograph, drawing, or model, or any other object tending to corrupt morals; or (b) exposes to view in any place to which the public are permitted to have access, whether on payment of a charge for admission or not, any obscene picture, photograph, drawing, or model, or any other object tending to corrupt morals; or (c) publicly exhibits any indecent show or performance, whether on payment of a charge for admission to see the show or performance or not.	- Offence simpliciter - If the matter involves: - a depiction of a person who is or is represented to be a child < 16 years or public exhibit of any indecent show or performance if the person appearing is, or is reported to be, a child < 16 years - a depiction of a person who is or is represented to be a child < 12 years or public exhibit of any indecent show or performance if the person appearing is, or is represented to be, a child < 12 years.	2 years 5 years 10 years	X	✓	X	Yes – s 228(1) offence only
228A	**Involving a child in making child exploitation material** A person who involves a child in the making of child exploitation material commits an offence. In relation to this offence, 'involves' includes involving a child in any way in the making of child exploitation material; and attempting to involve a child in the making of child exploitation material. In relation to the offences found in ss 228A to 228D – child exploitation material means any material that contains data from which text, images or sound can be generated, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child <16 years in: (a) a sexual context; (b) in an offensive or demeaning context; or (c) being subjected to abuse, cruelty or torture. Child exploitation material can include fictional characters.	N/A	10 years	X	✓	X	No
228B	**Making child exploitation material** A person who makes child exploitation material commits a crime. To 'make' includes producing or attempting to make child exploitation material.	N/A	10 years	X	✓	X	No
228C	**Distributing child exploitation material** A person who distributes child exploitation material commits a crime. To distribute includes: (a) communicate, exhibit, send, supply or transmit child exploitation material to someone, whether to a particular person or not; (b) make child exploitation material available for access by someone, whether by a particular person or not; (c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and (d) attempt to distribute child exploitation material.	N/A	10 years	X	✓	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
228D	**Possessing child exploitation material** A person who knowingly possesses child exploitation material.	N/A	5 years	X	✓	X	No
229B	**Maintaining sexual relationship with a child** The offence involves maintaining a sexual relationship with a child under the prescribed age over a period of time. A sexual relationship is defined to be more than one sexual act (sodomy, indecent treatment, carnal knowledge, incest, rape, attempted rape or sexual assault) over a period of time. The prescribed age, for a child means: - if the relationship involved an act or acts of sodomy < 18 years - in any other case <16 years. The Director DPP or AG must provide consent to prosecute a person for this offence.	Factors relevant to sentencing include: - the age of the child when the relationship began - the length of the relationship period - if penile rape occurred - if carnal knowledge occurred - if the victim bore a child to the offender - if there was a parental or protective relationship between the offender and the victim - any physical violence by the offender - any blackmail or other manipulation of the victim	Life	✓	✓	✓	Yes – in certain circumstances (as for s 208)
229L	**Permitting young person etc to be at place used for prostitution** A person who knowingly causes or permits a person < 18 years or a person with an impairment of the mind to be at a place used for the purposes of prostitution by 2 or more prostitutes commits an offence.	N/A	14 years	X	✓	X	Yes – unless defendant elects otherwise (*Criminal Code* s 552B)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
302, 305	**Murder** Murder involves unlawfully killing another person under any of the following circumstances: (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or some other person grievous bodily harm (it is immaterial if the offender did not intend to hurt the particular person that was killed) or (b) if the death is caused by means of an act done in the prosecution of an unlawful purpose and the act is of such a nature as to be likely to endanger human life (it is immaterial that the offender did not intend to hurt any person) or (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime (it is immaterial that the offender did not intend to cause death or did not know that death was likely to result) or (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned above in (c) (it is immaterial that the offender did not intend to cause death or did not know that death was likely to result) or (e) if death is caused by wilfully stopping the breath of any person for either of such purposes (it is immaterial that the offender did not intend to cause death or did not know that death was likely to result).	If an offender is: - being sentenced for more than one murder; or - another murder conviction is taken into account; or - the person has previously been sentenced for murder; - the court can order that the offender not be released on parole until the offender has served 20 years or more imprisonment. Life imprisonment must be imposed that cannot be varied or mitigated.	Life	X	N/A	✓	No
303, 310	**Manslaughter** Where a person unlawfully kills another person in such circumstances which does not constitute murder	N/A	Life	✓	N/A	✓	No
306	**Attempt to murder** Any person who attempts unlawfully to kill another; or with intent unlawfully to kill another does any act, or omits to do any act which it is the person's duty to do, such act or omission being of such a nature as to be likely to endanger human life; commits an offence.	N/A	Life	✓	N/A	✓	No
309	**Conspiring to murder** It is an offence to conspire with any other person to kill any person, whether such person is in Queensland or elsewhere.	N/A	14 years	✓	N/A	✓	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
313	**Killing unborn child** This offence is committed in circumstances where: (a) a person has prevented a child from being born alive, and that prevention was unlawful, and it occurred when a woman was about to be delivered of a child; or (b) if a person assaults a pregnant woman and such assault was unlawful causing: - the death of unborn child; - grievous bodily harm to the unborn child; or - the transmission of a serious disease to the unborn child.	N/A	Life	✓	N/A	✓	No
315	**Disabling in order to commit indictable offence** Any person who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of an offence.	N/A	Life	✓	N/A	✓	No
316	**Stupefying in order to commit indictable offence** Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer, any stupefying or overpowering drug or thing to any person, is guilty of an offence.	N/A	Life	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
317	**Acts intended to cause grievous bodily harm and other malicious acts** The offence is committed if a person: (a) unlawfully wounds, does grievous bodily harm or transmits a serious disease to any person; (b) unlawfully strikes or attempts to strike another person with a projectile or anything else capable of achieving the required intention; (c) unlawfully causes an explosive substance to explode; (d) sends or delivers any explosive substance or dangerous or noxious thing to any person; (e) causes any explosive substance or dangerous or noxious thing to be taken or received by any person; (f) puts any corrosive fluid or destructive or explosive substance in any place; or (g) unlawfully casts or throws any corrosive fluid or destructive or explosive substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person; (2) with intent to: (a) maim, disfigure or disable any person; (b) do some grievous bodily harm or transmit a serious disease to any person; (c) resist or prevent the lawful arrest or detention of any person; or (d) resist or prevent a public officer from acting in accordance with lawful authority. Examples include: throwing sulphuric acid with intent to, and which did, disfigure, shooting of a victim during the course of an armed robbery, intentionally transmitting the HIV virus.	N/A	Life	✓	N/A	✓	No
317A (1)	**Carrying or sending dangerous goods in a vehicle** The offence involves a range of conduct associated with the carrying of dangerous goods in or on a vehicle: (a) Carriage of dangerous goods in or on a vehicle – if the accused carries or places dangerous goods in or on a vehicle. (b) Delivering dangerous goods for the purpose of being placed in or on a vehicle – if the accused delivers dangerous goods to another person, and the delivery is for the purpose of the goods being placed in or on a vehicle. (c) Having dangerous goods in possession in or on a vehicle – if the accused has dangerous goods in his or her possession, and the possession is in or on a vehicle.	N/A	14 years	✓	N/A	X	No
318	**Obstructing rescue or escape from unsafe premises** It is an offence to unlawfully obstruct anyone, in that person's efforts to save the life of another who is in or escaping from dangerous, destroyed or unsafe premises.	N/A	Life	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
319	**Endangering the safety of a person in a vehicle with intent** It is an offence to do anything that endangers, or is likely to endanger, the safe use of a vehicle, with intent to injure or endanger the safety of any person in or on the vehicle. The offence is also constituted by omitting to do a thing which the person has a duty to do.	N/A	Life	✓	N/A	X	No
320	**Grievous bodily harm** A person commits the offence of grievous bodily harm if the consequences of their conduct on the complainant cause: (a) loss of a distinct part or an organ of the body; (b) serious disfigurement; or (c) any bodily injury of such a matter that, if left untreated, would endanger or be likely to endanger life, or cause to be likely to cause permanent injury to health (irrespective whether or not treatment is or could have been available). Grievous bodily harm does not include assault as an element of the offence.	N/A	14 years	✓	N/A	X	No
320A	**Torture** Involves the intentional infliction of severe pain and suffering on a person by an act or series of acts done on one or more than one occasion. 'Pain or suffering' includes any physical, mental, psychological or emotional pain or suffering whether temporary or permanent.	N/A	14 years	✓	N/A	✓	No
321	**Attempting to injure by explosive or noxious substances** It is an offence to unlawfully put any explosive or noxious substance in any place, with intent to do bodily harm to another.	N/A	14 years	✓	N/A	✓	No
321A	**Bomb hoaxes** This section involves two types of offending: (a) if the accused places an article or substance in any place or sends an article or substance in any way, and the accused intended to induce a belief in another person that the article or substance is likely to explode, ignite or discharge a dangerous or noxious substance. (b) if the accused (in Queensland or elsewhere) makes a statement or conveys information to another, and the accused knows the statement or information is false and he or she intends to induce that person or another to believe that an explosive or noxious substance, acid or other thing of a dangerous or destructive nature was present in a place in Queensland.	- An offence pursuant to para (a) - An offence of making a false statement pursuant to para (b)	7 years 5 years	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
322	**Administering poison with intent to harm** A person who unlawfully caused a poison or another noxious thing to be administered to, or taken by, any person with intent to injure or annoy another person.	- Offence simpliciter - If the poison or other noxious thing endangers the life of, or does grievous bodily harm to, the person to whom it is administered or by whom it is taken	7 years 14 years	✓	N/A	✓	No
323	**Wounding** An offence of wounding involves conduct that causes the complainant's true skin to be broken. Example of unlawful wounding may include a person cut with a broken bottle or stabbed with a knife. An assault is not an element of the offence of wounding but it may be part of the incident.	N/A	7 years	✓	N/A	X	Yes – unless defendant elects otherwise (*Criminal Code* s 552B)
326	**Endangering life of children by exposure** A person who unlawfully abandons or exposes a child < 7 years and the life of the child was (or was likely to be) endangered or whose health was (or was likely to be) permanently injured commits an offence.	N/A	7 years	✓	N/A	X	No
328A	**Dangerous operation of a vehicle** A person who operates, or in any way interferes with, the operation of a vehicle dangerously commits a misdemeanour. Where the offender is adversely affected by an intoxicating substance, excessively speeding or taking part in an unlawful race or unlawful speed trial, or has been previously convicted either upon indictment or summarily of an offence against this section (s 328A(2)), the person commits a crime.	- Offence simpliciter - If the offender is adversely affected by an intoxicating substance, excessively speeding or taking part in an unlawful race or unlawful speed trial, or has been previously convicted either upon indictment or summarily of an offence against this section - An offence causing death or GBH - An offence causing death or GBH where adversely affected by an intoxicating substance, excessively speeding, or taking part in an unlawful race or unlawful speed trial; or offender leaves the scene of the incident other than to obtain medical or other help	3 years 5 years 10 years 14 years	X ✓ ✓ ✓	N/A	X	328A(2) only – yes, unless defendant elects otherwise (*Criminal Code* s 552B)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
339	**Assault occasioning bodily harm** Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime. Bodily harm means any bodily injury which interferes with health or comfort. Being armed means being armed with a dangerous or offensive weapon. For example a pistol or a revolver is a dangerous weapon. An offensive weapon includes for example bludgeons, clubs and anything not in common use for any other purpose than a weapon. Assault is defined as: 1. the striking, touching, moving of, or application of force of any kind to the person of another; - either directly or indirectly; - without the other person's consent or with consent, if the consent is obtained by fraud; or 2. by any bodily act or gesture; - attempting or threatening to apply force of any kind to the person of another; - without the other person's consent; - in circumstances where the person making the attempt or threat has, actually or apparently, a present ability to effect that purpose.	- Offence simpliciter - If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons	7 years 10 years	✓	N/A	X	339(1) – Yes (unless defendant elects for jury trial) (*Criminal Code* s 552B) 339(3) – Yes (see *Fullard v Vera & Byway* [2007] QSC 50 (5 March 2007))
340	**Serious assault** A serious assault is committed if a person – (a) assaults another with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person; (b) assaults, resists, or wilfully obstructs, a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting; (c) unlawfully assaults any person while the person is performing a duty imposed on the person by law; (d) assaults any person because the person has performed a duty imposed on the person by law; (e) assaults any person in pursuance of any unlawful conspiracy respecting any manufacture, trade, business, or occupation, or respecting any person or persons concerned or employed in any manufacture, trade, business, or occupation, or the wages of any such person or persons; (f) unlawfully assaults any person who is 60 years or more; or (g) unlawfully assaults any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device.	N/A	7 years	✓	N/A	X	Yes – on prosecution election (*Criminal Code* s 552A)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
349	**Rape** Involves the following sexual conduct without a person's consent: (a) sexual or anal intercourse with a person; (b) penetrating a female's vulva or vagina or a person's anus to any extent with a thing or a part of the person's body that is not a penis; or (c) penetrating the mouth of the other person to any extent with the person's penis. If the victim is a child < 12 years an offence of rape would be preferred rather than indecent treatment or carnal knowledge, as a child < 12 years is incapable of giving consent.	N/A	Life	✓	✓	✓	Yes – in certain circumstances (as for s 208)
350	**Attempt to commit rape** Any person who attempts to commit rape is guilty of a crime.	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
351	**Assault with intent to commit rape** The section makes it an offence for a person to assault another person with intent to commit rape.	N/A	14 years	✓	✓	✓	Yes – in certain circumstances (as for s 208)
352	**Sexual assaults** This offence is committed if a person: (a) unlawfully and indecently assaults another person; or (b) procures another person, without the person's consent – (i) to commit an act of gross indecency; or (ii) to witness an act of gross indecency by the person or any other person.	- Offence simpliciter - If the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person - If: (a) immediately before, during, or immediately after, the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with any other person; or (b) for an offence defined in subsection (1)(a), the indecent assault includes the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis; or (c) for an offence defined in subsection (1)(b)(i), the act of gross indecency includes the person who is procured by the offender penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the body of the person who is procured that is not a penis.	10 years 14 years Life	✓	✓	✓	Yes – in certain circumstances (as for s 208)

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
354	**Kidnapping** A person kidnaps another person if the person unlawfully and forcibly takes or detains the other person with intent to gain anything from any person or to procure anything to be done or omitted to be done by any person.	N/A	7 years	✓	N/A	X	No
354A	**Kidnapping for ransom** The offence of kidnapping for ransom involves any person who – (a) with intent to extort or gain anything from or procure anything to be done or omitted to be done by any person by a demand containing threats of detriment of any kind to be caused to any person, either by the offender or any other person, if the demand is not complied with, takes or entices away, or detains, the person in respect of whom the threats are made; or (b) receives or harbours the said person in respect of whom the threats are made, knowing such person to have been so taken or enticed away, or detained.	- Offence simpliciter - If the person kidnapped has been unconditionally set free without having suffered any GBH - Attempts to kidnap another person for ransom	14 years 10 years 7 years	✓	N/A	X	No
364	**Cruelty to children under 16** A person who, having the lawful care or charge of a child < 16 years, causes harm to the child by any prescribed conduct that the person knew or ought reasonably to have known would be likely to cause harm to the child commits an offence. 'Harm' to a child means any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing, whether temporary or permanent. 'Prescribed conduct' means: (a) failing to provide the child with adequate food, clothing, medical treatment, accommodation or care when it is available to the person from his or her own resources; (b) failing to take all lawful steps to obtain adequate food, clothing, medical treatment, accommodation or care when it is not available to the person from his or her own resources; (c) deserting the child; or (d) leaving the child without means of support.	N/A	7 years	✓	N/A	X	No
409 & 411	**Robbery** Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen.	- Offence simpliciter - If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, the offender wounds or uses any other personal violence to any person	14 years Life	✓	N/A	✓ (only s 411(2) offence)	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
412	**Attempted robbery** Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen.	- Offence simpliciter - If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons - If the offender is armed with any dangerous or offensive weapon, instrument or noxious substance, and at or immediately before or immediately after the time of the assault the offender wounds, or uses other personal violence to, any person by the weapon, instrument or noxious substance	7 years 14 years Life	✓	N/A	✓	No
417A	**Taking control of an aircraft** This offence involves taking control of an aircraft directly or indirectly.	- Offence simpliciter - If another person not being an accomplice is on board the aircraft - If the offender uses or threatens actual violence to any person or property or is armed with any dangerous or offensive weapon or instrument or is in company or takes or exercises such control by any fraudulent representation, trick, device or other	7 years 14 years Life	✓	N/A	X	No
419	**Burglary** (s 419(1) if s 419(3)(b)(i) or (ii) applies) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits an offence. A person who breaks any part, whether external or internal, of a dwelling or any premises, or opens, by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar, flap, or other thing, intended to close or cover an opening in a dwelling or any premises, or an opening giving passage from one part of a dwelling or any premises to another, is said to break the dwelling or premises. A person is said to enter a dwelling or premises as soon as any part of the person's body or any part of any instrument used by the person is within the dwelling or premises. A person who obtains entrance into a dwelling or premises by means of any threat or artifice used for that purpose, or by collusion with any person in the dwelling or premises, or who enters any chimney or other aperture of the dwelling or premises permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the dwelling or premises.	If the offender – - uses or threatens to use actual violence (s 419(3)(b)(i)); or - is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance (s419(3)(b)(ii))	Life	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
Corrective Services Act 2006 **(Qld)**							
122(2)	**Taking part in a riot or mutiny** A prisoner must not take part in a riot or mutiny. 'Prisoner' means a prisoner in a corrective services facility. 'Mutiny' is defined as three or more prisoners collectively challenging authority under this Act, with intent to subvert the authority, if the security of the corrective services facility is endangered. 'Riot' means an unlawful assembly that has begun to act in so tumultuous a way as to disturb the peace.	- If the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, property and the security of the facility is endangered by the act - If the prisoner demands something be done or not be done with threats of injury or detriment to any person or property - If the prisoner escapes or attempts to escape from lawful custody, or helps another prisoner to escape or attempt to escape - If the prisoner wilfully and unlawfully damages or destroys, or attempts to damage or destroy, any property - otherwise.	Life 14 years 14 years 10 years 6 years	✓	N/A	X	No
124(a)	**Other offences – prepare to escape from lawful custody** A prisoner must not prepare to escape from lawful custody.	N/A	2 years	✓	N/A	X	Yes
Drugs Misuse Act 1986 **(Qld)**							
5	**Trafficking in dangerous drugs** This offence involves a person who carries on the business of unlawfully trafficking in a dangerous drug. The penalty is dependent on the type of drug involved.	- Schedule 1 *Drugs Misuse Regulation 1987* - Schedule 2 *Drugs Misuse Regulation 1987*	25 years 20 years	✓	N/A	X	No
6	**Supplying dangerous drugs** (if the offence is one of aggravated supply) This offence involves a person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland. 'Supply' means: (a) to give, distribute, sell, administer, transport or supply; (b) to offer to do any act specified in paragraph (a); (c) to do or offer to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in paragraph (a). An aggravated supply involves if the offender is an adult and the person to whom the supply is made is a minor or an intellectually impaired person, or the supply is within an educational institution or a correctional facility, or the person does not know he or she is being supplied with the thing. The penalty is dependent on the type of drug involved.	- Schedule 1 *Drugs Misuse Regulation 1987* - Schedule 2 *Drugs Misuse Regulation 1987*	25 years 20 years	✓	N/A	X	No

Sect	Offence description	Subcategory	Max penalty	Serious violent offence	Sexual offence	Indefinite sentence	Summary disposal
8	**Producing dangerous drugs** (if the circumstances mentioned in paras (a) or (b) apply which refer to the type of drug involved). This section creates the offence of unlawfully producing dangerous drugs. The penalty is dependent on the type and amount of the drug.	- Schedule 1 *Drugs Misuse Regulation 1987* of or exceeding the quantity specified in Schedule 4 - Schedule 1 *Drugs Misuse Regulation 1987* of or exceeding the quantity specified in Schedule 3 but less than the quantity specified in Schedule 4 and: - person is drug dependent - otherwise.	25 year 20 years 25 years	✓	N/A	X	No

Notes:

1 As defined for the purposes of Part 9A *Penalties and Sentences Act* and set out in Schedule 1 to the Act. In addition to those offences listed in this table, Schedule 1 includes equivalent offences since repealed by the *Criminal Law Amendment Act 1997* (Qld) (*Criminal Code* s 208 – unlawful anal intercourse; s 221 – conspiracy to defile; s 222 – incest by a man; s 223 – incest by adult female; s 318 – preventing escape from wreck) and the *Corrective Services Act 2006* (Qld) (*Corrective Services Act 2000* (Qld) s 92(2) – unlawful assembly, riot and mutiny; and s 94(a) – other offences).

2 As defined in s 160 of the *Penalties and Sentences Act* but, for the purposes of this table, excluding offences under the *Classification of Computer Games and Images Act 1995* (Qld), *Classification of Films Act 1991* (Qld) and *Classification of Publications Act 1991* (Qld), as well as Commonwealth offences under the *Crimes Act 1914* (Cth), *Criminal Code* (Cth) and *Customs Act* (Cth). Section 160 defines a 'sexual offence' as a sexual offence within the meaning of the *Corrective Services Act 2006* (Qld). In addition to those offences listed in this table, sexual offences in Schedule 1 of the *Corrective Services Act* include equivalent offences since repealed by the *Criminal Law Amendment Act 1997* (Qld) (*Criminal Code* s 208 – unlawful anal intercourse; s 221 – conspiracy to defile; s 222 – incest by a man; s 223 – incest by adult female; s 318 – preventing escape from wreck) and the *Corrective Services Act 2006* (Qld) (*Corrective Services Act 2000* (Qld) s 92(2) – unlawful assembly, riot and mutiny; and s 94(a) – other offences).

3 As defined for the purposes of Part 10 of the *Penalties and Sentences Act*. 'Qualifying offences' for an indefinite sentence also include offences: repealed by the *Criminal Law Amendment Act 1997* (Qld) (*Criminal Code* s 208 – unlawful anal intercourse; s 221 – conspiracy to defile; s 222 – incest by a man; s 223 – incest by adult female); amended, renumbered or repealed by the *Criminal Law Amendment Act 2000* (Qld) (*Criminal Code* s 215 – carnal knowledge of girls under 16; s 336 – assault with intent to commit rape; s 337 – sexual assaults; s 347 – rape; and s 349 – attempt to commit rape); and s 209 of the *Criminal Code* (attempted sodomy) repealed by the *Criminal Code and Other Acts Amendment Act 2008* (Qld).

4 'Offence simpliciter' means the basic offence without any circumstance of aggravation. A circumstance of aggravation is a further element of the offence that increases the seriousness of the offence and penalty.

Appendix 5: Results of sensitivity analysis on impacts of proposed new SNPP

This appendix reports the results of a sensitivity analysis which tests whether excluding cases which were missing information on sentence length, Aboriginal and Torres Strait Islander status or gender (as relevant) had a meaningful impact on the results reported in Chapter 6 (Table 2 and Figures 3–5).

The new analyses assign the cases with missing information on sentence length, Aboriginal and Torres Strait Islander status or gender (as relevant) all to one category. For example, one set of calculations presumes that all cases missing gender status were male; another set of calculations treats all the missing cases as female.

Note that the results reported represent the most extreme situation, with all the cases with missing information assigned to only one category (eg only males), rather than being split across the two (eg males *and* females). The 'true' picture is likely to be somewhere between the two extremes reported.

With one exception (Aboriginal and Torres Strait Islander status), comparisons of the original analyses (reported in Chapter 6) and the new analyses shows no appreciable change caused by the inclusion of missing cases. The inclusion of cases missing information on sentence length or gender would cause a change of less than 0.1 per cent (one-tenth of a per cent) to the results.

However, excluding the cases missing information on Aboriginal and Torres Strait Islander status may have a potential effect on those results. If *all* of the cases missing Aboriginal and Torres Strait Islander status were in fact Aboriginal and Torres Strait Islander defendants, then the proportion of those sentenced to immediate full-time incarceration for serious violent offences and sexual offences would increase by two percentage points (11% to 13%) (Table 4). The other two proportions reported would change by less than one percentage point each. In addition, the number of Aboriginal and Torres Strait Islander defendants affected would increase by an estimated 15 defendants a year.

As noted above, this outcome represents the extreme case, as it is unlikely that all the cases missing Aboriginal and Torres Strait Islander status related to Aboriginal and Torres Strait Islander defendants. This sensitivity analysis indicates that even assuming all offenders missing information on Aboriginal and Torres Strait Islander status were Aboriginal and Torres Strait Islander, the proposed SNPP scheme would still affect a smaller proportion of Aboriginal and Torres Strait Islander defendants than non-Indigenous defendants.

Table 4: The potential impact of missing information on Aboriginal and Torres Strait Islander status on the number of defendants sentenced in the higher courts who would have been affected by the proposed SNPP scheme, 2005–06 to 2009–10

	Baseline		Number of additional cases (missing information on ATSI status)	ATSI			Non-Indigenous		
	ATSI	Non-Indigenous		Baseline	Adding missings	Change	Baseline	Adding missings	Change
Sentenced offenders	4,063	19,179	2,318	3.6%	3.5%	-0.1%	3.9%	3.8%	-0.1%
Sentenced for serious violent offences and sexual offences	2,458	8,927	885	5.9%	6.6%	0.7%	8.4%	8.4%	0.0%
Sentenced to immediate full-time incarceration for serious violent offences and sexual offences	1,383	3,818	396	10.6%	12.5%	1.9%	19.5%	19.5%	0.0%
Affected by SNPP scheme	146	746	76	146	222	+76	746	822	+76
Number affected per year	29	149	–	29	44	+15	149	164	+15

Source: Queensland Courts database maintained by OESR.

Notes:

1. Individuals returning to court on different charges are treated as different defendants.
2. Numbers reflect the most serious offence receiving a sentence.

GLOSSARY

Aggravating factor	A factor that may increase a sentence for an offence – for example, the use of violence or targeting a vulnerable victim.
Bench book	Bench books are guidelines made available to the courts on relevant topics, to assist the courts in a number of areas.
Common law	Also known as case law. It is developed through decisions of the courts rather than through legislation.
Compensation order	A compensation order requires an offender to make a payment for any personal injury suffered by the complainant. This order can be made in addition to any other sentence.
Community service order	This is a penalty that requires an offender to perform unpaid community service for a set number of hours, and comply with reporting and other conditions.
Concurrent sentence	If an offender is found guilty of more than one offence and sentenced to multiple terms of imprisonment, the individual imprisonment terms can be ordered to run concurrently with one another. The period of imprisonment that the offender must serve is the highest sentence of imprisonment imposed by the court for an offence that forms part of the sentence.
Culpability	The degree of individual fault for an offence.
Cumulative sentence	If an offender is ordered to serve imprisonment for more than one offence, the court may order the terms of imprisonment to be served one after the other, as opposed to concurrently.
Fine	A monetary penalty imposed with or without recording a conviction.
Full-time imprisonment	An order of imprisonment that must be served in custody until parole is granted. It excludes partially or wholly suspended sentences.
Head sentence	The total period of the sentence including the non-parole period and the parole period. For example, if a court sentences an offender to five years imprisonment with a non-parole period of two years, five years is the head sentence.
Indefinite sentence	This is a penalty that the court may impose on its own initiative or after an application by the prosecution. It requires an offender to be held indefinitely in prison. An indefinite sentence continues until a court orders it discharged.
Indictable offence	An indictable offence is a type of offence that is usually dealt with in the higher courts (the District and Supreme Courts). Such offences are heard by a judge and jury or a judge alone. In some instances an indictable matter can be heard in the Magistrates Court.
Indictment	A formal charge or accusation of a crime (for adults sentenced in Queensland, in the District Court or Supreme Court)
Intensive correction order	If a court sentences a person to 12 months imprisonment or less, the court may make an intensive correction order. The effect of the order is that the offender serves the sentence in the community, not in a prison, and must comply with strict requirements. See *Penalties and Sentences Act 1992* (Qld) pt 6.
Mandatory sentence	The only sentence that can be imposed for an offence that cannot be deviated from or mitigated by the sentencing court. For example, murder carries a mandatory life sentence, which means that all offenders sentenced for murder must be sentenced to life imprisonment.

Maximum penalty	This is the maximum penalty that can be imposed on an offender for a given offence. Each criminal offence has a maximum penalty, and Parliament decides what this should be.
Maximum sentence	Of the range of sentences imposed on different offenders for the same offence, the maximum sentence represents the highest sentence imposed on any offender for that offence.
Minimum sentence	Of the range of sentences imposed on different offenders for the same offence, the minimum sentence represents the lowest sentence imposed on any offender for that offence.
Mitigating factor	A factor that may reduce a sentence imposed on an offender for an offence – for example, pleading guilty or cooperating with police.
Non-parole period	The period during which an offender is serving their sentence in prison, prior to any eligibility date for release on parole.
Offence	An illegal act as defined by legislation.
Offence simpliciter	An offence simpliciter is the basic offence without any circumstance of aggravation. A circumstance of aggravation is a further element of the offence that increases the seriousness of the offence and penalty. For example, for the offence of assault occasioning bodily harm (*Criminal Code* (Qld) s 339), assault occasioning bodily harm is the offence simplicter and attracts a penalty of seven years imprisonment. If a person is, or pretends to be, armed with a dangerous or offensive weapon or instrument, or is in company with one more people, these are circumstances of aggravation and a higher maximum penalty of 10 years imprisonment applies.
Parole	The period of time when a person serving a term of imprisonment is released from prison to serve out the remainder of their sentence in the community under strict supervision.
Parole boards	The parole boards are independent statutory bodies responsible for determining if prisoners are released to parole. There are three parole boards in Queensland – the Queensland Parole Board, the Southern Queensland Regional Parole Board and the Central and Northern Queensland Regional Parole Board.
Parole eligibility date	A parole eligibility date is the date at which an offender is eligible to apply for parole. The parole eligibility date is set by the courts or by legislation.
Parole release date	A parole release date is a date set by the court upon which the offender is to be released from prison.
Partially suspended sentence	The partial suspension of a term of imprisonment. The court can impose a partially suspended sentence if an offender is sentenced to imprisonment for five years or less. See *Penalties and Sentences Act 1992* (Qld) pt 8.
Penalty	The sentence or sanction imposed by a court for an offender found guilty of an offence.
Period of imprisonment	The unbroken duration of imprisonment that an offender is to serve for two or more terms of imprisonment, whether ordered to be served concurrently or cumulatively.
Prescribed offences	Under the Council's recommendations, prescribed offences are offences listed in Schedule 1 of the *Penalties and Sentences Act 1992* (Qld), sexual offences in the *Criminal Code* (Qld) not currently listed in Schedule 1 (ss 218A, 229L, 228, 228A, 228B, 228C, 228D and 211) and an offence of counselling or procuring the commission of, or attempting or conspiring to commit one of these offences.

Probation	Probation is a sentencing order that allows the offender to remain in the community under strict requirements set by the court and Queensland Corrective Services. See *Penalties and Sentences Act 1992* (Qld) pt 5.
Queensland Sentencing Information Service (QSIS)	QSIS is a computer-based recording system that contains a large collection of linked sentencing-related information, including full-text criminal Queensland Court of Appeal Judgments, case summaries, and revised Sentencing Remarks from the Supreme and District Courts, dating back to 1999.
Recognisance order	This is a penalty that allows an offender to remain in the community if they agree to a court order to be of good behaviour and comply with any other conditions the court thinks is appropriate. The offender may or may not be required to pay a surety. See *Penalties and Sentences Act 1992* (Qld) pt 3, divs 2, 3, 3A.
Restitution order	A restitution order requires an offender to make payment for or replace property that was taken or damaged as a result of the offender's conduct. This order can be made in addition to any other sentence.
'Serious violent offence' (SVO) as defined in the *Penalties and Sentences Act 1992* (Qld)	A qualifying 'serious violent offence' for the purposes of Part 9A of the *Penalties and Sentences Act 1992* (Qld), is an offence listed in Schedule 1 of the Act or of counselling or procuring the commission of, or attempting or conspiring to commit, an offence listed in Schedule 1, as well as other offences involving the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against the person, or that result in serious harm to another person in circumstances where a court makes a declaration that the offender is convicted of a 'serious violent offence'. If a court makes such a declaration it means that the offender must serve a minimum of 80 per cent of the sentence or 15 years in prison (whichever is the lesser) before being eligible to apply for release on parole. This declaration is mandatory if the offender has been sentenced for a qualifying offence to 10 years imprisonment or more.
Serious violent offence	A serious violent offence, in the ordinary use of the term, means an offence involving serious violence against the person.
Standard non-parole periods	A standard non-parole period is a legislated period intended to provide guidance to courts on the minimum length of a non-parole period to be set for a given offence.
Summary offence	Summary offences are dealt with in the Magistrates Court and are heard by a magistrate alone.
Surety	A surety is a sum of money paid to the court in accordance with certain conditions. If those conditions are breached, the money may be forfeited to the court. For example, a surety may be made in conjunction with a good behaviour bond or in relation to bail.
Term of imprisonment	The duration of imprisonment imposed for a single offence (see *Penalties and Sentences Act 1992* (Qld) s 4).
Wholly suspended sentence	The complete suspension of a term of imprisonment. The court can impose a wholly suspended sentence if an offender is sentenced to imprisonment for five years or less. See *Penalties and Sentences Act 1992* (Qld) pt 8.

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ENDNOTES

Executive Summary

1 *Penalties and Sentences Act 1992* (Qld) s 9(1)(a).

2 Queensland Corrective Services, *Is Community Supervision Effective?*, Research Brief No 17 (2011) (forthcoming).

3 Ibid.

Chapter 1

4 Sentencing Advisory Council (Qld), *Minimum Standard Non-Parole Periods: Consultation Paper* (2011).

5 Sentencing Advisory Council (Qld), *Sentencing of Serious Violent Offences and Sexual Offences in Queensland* (2011).

6 Of 288 submissions received in response to the online response form, 19 did not have a unique IP address. Most of these responses involved two or three forms being submitted from the same IP address. It was not possible in all cases to identify whether these submissions were made by unique individuals as respondents were not required to provide their contact details. An IP address is an online address which identifies either an individual computer or a single computer network. It is possible that multiple responses from the one IP address could mean that one respondent has submitted multiple responses, or that different respondents have used the same computer or network to submit their individual responses. For the purposes of the this report, each response form submitted has been treated as if it has been submitted by a unique individual respondent.

7 Queensland Government, *Draft Aboriginal and Torres Strait Islander Justice Strategy 2011–2014: for consultation* (2011).

8 Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 198.

9 See Sentencing Advisory Council (Qld) (2011), above n 5.

10 See further Sentencing Advisory Council (Qld) (2011), above n 4, 37–41.

11 Arie Freiberg, 'Guideline Judgments: An Overview' (Paper presented at the Australasian Institute of Judicial Administration Appellate Courts Conference, Brisbane, 2010).

Chapter 2

12 Sentencing Advisory Council (Qld), above n 4, 59–60.

13 Terms of Reference were issued by the NSW Attorney-General to the NSW Sentencing Council on 30 March 2009; see NSW Sentencing Council, Current Projects <http://www.lawlink.nsw.gov.au/Lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_current_projects#Standardnon-paroleperiods>.

14 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A, Table–Standard Non-Parole Periods.

15 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2) (emphasis added).

16 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

17 *R v Way* (2004) 60 NSWLR 168, 182.

18 *R v Way* (2004) 60 NSWLR 168, 192.

19 *Muldrock v The Queen* [2011] HCATrans 55 (11 March 2011). The grounds for the appeal were argued in June 2011: *Mahmud v The Queen; Muldrock v The Queen* [2011] HCATrans 147 (8 June 2011) and *Muldrock v The Queen* [2011] HCATrans 150 (9 June 2011). Leave was also sought in the matter of *R v Mahmud* [2011] HCATrans 106 (18 April 2011) with one of the grounds of appeal relating to the constitutional validity of the NSW SNPP scheme. The High Court has since refused special leave in this matter finding 'the characterisation of the impugned provisions [of the *Crimes (Sentencing Procedure) Act 1999* (NSW)] advanced by the applicant is not sustainable' (French CJ). In doing so, the Court rejected the contention that the provisions created a rule for the determination of non-parole periods in fixing sentences that impermissibly interfered with judicial discretion thereby distorting '[t]he institutional integrity guaranteed for all State courts by Chapter III of the Constitution': *Mahmud v The Queen; Muldrock v The Queen* [2011] HCATrans 147 (8 June 2011).

20 *R v Burgess* [2006] NSWCCA 319 (6 October 2006). For more information on the operation of the NSW SNPP scheme, see Sentencing Advisory Council (Qld), above n 4, 43–50.

21 See, for example, *R v Way* (2004) 60 NSWLR 168, 195; *R v Henry* [2007] NSWCCA 90 (2 April 2007) [26].

22 See, for example, Kate Warner, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8, 14.

23 By virtue of the operation of s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

24 *Hillier v DPP* (NSW) (2009) 198 A Crim R 565.

25 See, for example, *R v Hopkins* [2004] NSWCCA 105 (10 May 2004).

26 See, for example, *R v Sellars* [2010] NSWCCA 133 (25 June 2010); *R v McEvoy* [2010] NSWCCA 110 (21 May 2010); *R v Cheb* [2009] NSWCCA 134 (1 May 2009); *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338; *Dunn v The Queen* [2010] NSWCCA 128 (16 June 2010); *R v Farrawell-Smith* [2010] NSWCCA 144 (14 July 2010); *Mitchell v The Queen* [2010] NSWCCA 145 (12 July 2010); *Hyunwook Oh v The Queen* [2010] NSWCCA 148 (19 July 2010); *R v LP* [2010] NSWCCA 154 (21 July 2010).

27 In the matter of *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338 an appeal case from a first instance decision in which the sentencing judge described the objective seriousness of the offence as being 'at least in the mid-range of objective seriousness', Howie J found that this approach constituted an error and that 'Although such an assessment cannot be made with absolute precision, it must at least indicate whether the offence is assessed as below, of, or above midrange of seriousness with some indication as to the degree to which it departs from the midrange if that is the finding' (at 346 [39]).

28 See, for example, *R v McEvoy* [2010] NSWCCA 110 (21 May 2010).

29 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5816 (Bob Debus, Attorney-General).

30 A list of meetings with NSW representatives appears in Appendix 2 to this paper.

31 See *Sivell v The Queen* [2009] NSWCCA 286 (3 December 2009) [2]–[5] (McClellan CJ). See also *Georgopolous v The Queen* [2010] NSWCCA 246 (5 November 2010) [31]–[32] (Howie AJ); and *Okeke v The Queen* [2010] NSWCCA 266 (1 December 2010) [32] (Howie AJ).

32 *Georgopolous v The Queen* [2010] NSWCCA 246 (5 November 2010) [30] (Howie AJ).

33 These meetings were attended by representatives of the Council Secretariat and took place in Sydney on 10–11 March 2011. For a list of these meetings, see Appendix 2.

34 Judicial Commission of NSW, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South*

Wales (2010, Research Monograph 33).

35 See n 13 above.

36 See NSW Sentencing Council, Current Projects <http://www.ipc.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_current_projects>.

37 Judicial Commission of NSW (2010), above n 34. The Commission found that the prison rate significantly increased for two offences included in the scheme: s 61M(1) of the *Crimes Act 1900* (NSW) (aggravated indecent assault) from 37.3 per cent in the pre-period to 59.3 per cent in the post-period, and s 61M(2) of the *Crimes Act 1900* (NSW) (aggravated indecent assault – child under 10) from 57.1 per cent in the pre-period to 81.3 per cent in the post-period.

38 Ibid.

39 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2004* (Productivity Commission, 2004) vol 1, 7A – Corrective services attachment, Table 7A.6. Prison expenditure information presented in this section includes real recurrent expenditure. Figures do not include recurrent capital costs as they are not consistently reported in Report on Government Services publications.

40 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2010* (Productivity Commission, 2010) vol 1, 8A – Corrective services attachment, Table 8A.8.

41 Steering Committee for the Review of Government Service Provision (2004), above n 39.

42 Steering Committee for the Review of Government Service Provision (2010), above n 40.

43 Judicial Commission of NSW (2010), above n 34, 50.

44 Ibid 60–1.

45 *Sentencing Act 1995* (NT) s 53A.

46 *Sentencing Act 1995* (NT) s 55.

47 *Sentencing Act 1995* (NT) s 55A. These offences are the *Criminal Code* offence of sexual intercourse or gross indecency involving a child under 16 (s 127); sexual intercourse or gross indecency by a provider of services to a mentally ill or handicapped person (s 130); attempts to procure a child under 16 (s 131); sexual relationship with a child (s 131A); indecent dealing with a child under 16 (s 132); incest (s 134); acts intended to cause serious harm or prevent apprehension (s 177(a)); serious harm (s 181); endangering the life of a child by exposure (s 184); harm (s 186); female genital mutilation (s 186B); common assault (s 188); and sexual intercourse and gross indecency without consent (s 192(4)).

48 *Sentencing Act 1995* (NT) ss 55, 55A.

49 *Sentencing Act 1995* (NT) ss 55(2), 55A(2).

50 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab).

51 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ba).

52 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(1).

53 *R v Ironside* (2009) 104 SASR 54, 63–4 [37]–[38] (Doyle CJ).

54 This opposition to the introduction of the scheme was acknowledged during the Second Reading Speech of the Bill by the then Minister for Police, Paul Holloway: South Australia *Parliamentary Debates,* Legislative Council, 24 July 2007, 447.

55 See, for example *R v Ironside* (2009) 104 SASR 54; *R v Barnett* (2009) 198 A Crim R 251; *R v Harkin* [2010] SASCFC 39 (14 October 2010); *R v Jones* (2010) 108 SASR 479. Additionally, in the matter of *R v A,D* (2011) 109 SASR 197, the Court of Criminal Appeal referred to a summary provided by counsel for A that summarised the differing opinions that have been expressed by the court regarding the operation of the legislation: 203–204 [28].

56 These offences include murder; manslaughter; child homicide; defensive homicide; causing serious injury intentionally; threats to kill; rape; assault with intent to rape; incest (in circumstances other than where both people are aged 18 or older and each consented as defined in s 36 of the *Crimes Act 1958* (Vic) to engage in the sexual act); sexual penetration of a child under the age of 16; persistent sexual abuse of a child under the age of 16; abduction or detention; abduction of a child under the age of 16; kidnapping; armed robbery; sexual penetration of a child under the age of 10; sexual penetration of a child aged between 10 and 16; an offence that, at the time it was committed, was a serious offence; either of the common law offences of rape or assault with intent to rape; an offence of conspiracy to commit, incitement to commit or attempting to commit, an offence referred to in this list: *Sentencing Act 1991*(Vic) s 3(1).

57 Terms of Reference issued on 13 April 2011 by the Victorian Attorney-General the Hon Robert Clark, to the Victorian Sentencing Advisory Council on baseline sentences and gross violent offences, see <http://www.sentencingcouncil.vic.gov.au/page/our-work/projects/baseline-sentences>. The Council has also been asked whether any offences additional to those committed to by the Victorian Government should be included, either in the additional introduction of baseline sentences or subsequently.

58 See Sentencing Advisory Council (Victoria), Our Projects <http://www.sentencingcouncil.vic.gov.au/landing/our-work/projects>.

59 The Hon Robert Clark MP, Attorney-General and Minister for Finance, 'New Sentencing Survey Seeks Views of All Victorians' (Media Release, 31 May 2011).

60 This comment was made by Professor Arie Freiberg in his capacity as the Dean of Law at Monash University: Peter Munro, 'Sentencing Expert Criticises Government's "Flawed" Crime Poll', *The Age*, 5 June 2011 <http://www.theage.com.au/victoria/sentencing-expert-criticises-governments-flawed-crime-poll-20110604-1fmgm.html>. See also Josh Gordon and Mex Cooper, 'Lawyers Slam Sentencing Survey', *The Age*, 1 June 2011 <http://www.theage.com.au/victoria/lawyers-slam-sentencing-survey-20110531-1fepv.html>.

61 See <http://myviews.justice.vic.gov.au/>. The survey was due to close on 26 August 2011.

62 *Crimes Act 1914* (Cth) s 19AG. Section 3 further defines a 'terrorism offence' as an offence against sub-div A of div 72 of the *Criminal Code* or an offence against pt 5.3 of the *Criminal Code*.

63 *Crimes Act 1914* (Cth) s 19AG(3).

64 *Migration Act 1958* (Cth) ss 233B, 233C, 234A.

65 These provisions were inserted into the *Sentencing Act 2002* (NZ) on 1 June 2010 by the *Sentencing and Parole Reform Act 2010* (NZ).

Chapter 3

66 The Hon Anna Bligh (Premier and Minister for Arts) and the Hon Cameron Dick (Attorney-General and Minister for Industrial Relations), 'Standard Minimum Jail Terms Part of Sentencing Reform' (Joint Media Release, 25 October 2010).

67 Ibid.

68 Terms of Reference – Minimum Standard Non-Parole Periods issued to the Sentencing Advisory Council (Qld) on 20 December 2010. The Terms of Reference are reproduced in Appendix 1 of this report.

69 Madonna King, Interview with the Hon Cameron Dick MP, Attorney-General (Radio Interview ABC 612 Brisbane, 26 October 2010).
70 For example, Submission 46 (Potts Lawyers).
71 See Judicial Commission of NSW (2010), above n 34, 19 and Sentencing Advisory Council (Qld) (2011), above n 5, 32–3. Over the period 2005–06 to 2009–10, 92 per cent of offenders convicted of a qualifying serious violent offence or sexual offence in the higher courts in Queensland pleaded guilty. This compares with a guilty plea rate of 78 per cent for offences included in the NSW SNPP scheme prior to its introduction, which increased to 86 per cent after its introduction.
72 For a discussion of these issues, see Sentencing Advisory Council (Qld) (2011), above n 5, 36–40.
73 Ibid. The Council found that for manslaughter the interquartile range (IQR), a measure of dispersion among values representing the middle 50 per cent of values, was only slightly higher relative to other offences at 2.1 years. A smaller IQR represents less variability in sentencing outcomes. An analysis based on the median absolute derivation, another measure of sentence variation, also found low variation in sentence lengths for manslaughter.
74 Submission 11 (confidential).
75 Submission 1 (Glen).
76 Submission 17 (L Crighton).
77 Submission 28 (R & J Barrell).
78 Submission 47 (Bravehearts).
79 Submission 52 (QPUE).
80 Submission 36 (confidential).
81 Submission 51 (BAQ).
82 Submission 53 (Prisoners' Legal Service Inc).
83 Submission 56 (Supreme Court of Queensland).
84 Ibid.
85 Submission 40 (LAQ).
86 Ibid.
87 Submission 56 (Supreme Court of Queensland).
88 Ibid.
89 Submission 40 (LAQ).
90 Submission 46 (Potts Lawyers).
91 Ibid.
92 Submission 45 (Bond University – Centre for Law, Governance and Public Policy).
93 Submission 36 (confidential).
94 For example, submissions 35 (Coen Local Justice Group) and 45 (Bond University – Centre for Law, Governance and Public Policy).
95 For example, submissions 38 (QLS) and 49 (Prison Fellowship Qld).
96 'Justice reinvestment' has been described by the former Social Justice Commissioner in a *Social Justice Report 2009* released by the Australian Human Rights Commission as 'a localised criminal justice policy approach that diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders': cited in Submission 43 (Anti-Discrimination Commission Qld).
97 Submission 43 (Anti-Discrimination Commission Qld).
98 Submission 42 (CCYPCG).
99 Submission 35 (Coen Local Justice Group).
100 Queensland Government (2011), above n 7. The strategy, at the time of these consultations, was still in draft.
101 Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009–2015* (Australian Government Attorney-General's Department, 2010).
102 Queensland Government (2011), above n 7.
103 Commonwealth of Australia, *National Disability Strategy 2010-2020* (2011).
104 Standing Committee of Attorneys-General Working Group on Indigenous Justice (2010), above n 101, 17, Strategy 2.2.1.
105 Queensland Government (2011), above n 7.
106 Ibid 4.
107 *Queensland Aboriginal and Torres Strait Islander Justice Agreement* signed by the Queensland Government and the Aboriginal and Torres Strait Islander Advisory Board on 19 December 2000.
108 Queensland Government (2011), above n 7, 4.
109 Commonwealth of Australia (2011), above n 103, 39.
110 Ibid 41.
111 The Hon Anna Bligh (Premier and Minister for Arts) and the Hon Cameron Dick (Attorney-General and Minister for Industrial Relations), above n 66.
112 Terms of Reference – Minimum Standard Non-Parole Periods (2010), above n 68.
113 Online submission 10 (S Toft).
114 Online submission 12 (J Stickens).
115 Online submission 40 (confidential).
116 Online submission 102 (confidential).
117 Online submission 242 (B Levinge).
118 Online submission 210 (confidential).
119 Online submission 277 (G Young).
120 For example, submissions 2 (P Kerans – armed robbery, violent crime, murder and manslaughter), 4 (V Key – child sexual offences and murders of police), 7 (M Billing – violent crimes), 14 (J M Taylor – murders of police) and 28 (R & J Barrell). Those calling for mandatory minimum sentences, or fixed sentences, included submissions 1 (Glen), 18 (J Knight), 19 (S C Porter) and 22 (P Pearce).
121 For example, Cairns consultation (7 July 2011).
122 For example, Submissions 38 (QLS) and 46 (Potts Lawyers).
123 Submission 44 (A Ireland).
124 Submission 38 (QLS).
125 For example, a study measuring public confidence in the NSW criminal justice system found that 66 per cent of NSW residents believed that sentences are too lenient: Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public Confidence in the New South Wales Criminal Justice System' (Crime and Justice Bulletin No 118, New South Wales Sentencing Council and NSW Bureau of Crime Statistics and Research, 2008). See also Karen Gelb, *Myths and Misconceptions: Public Opinion Versus Public Judgement About Sentencing* (Sentencing Advisory Council (Victoria), 2006) 11.
126 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' (2007) *Criminal Law Review* 769.
127 See Karen Gelb (2006), above n 125; Julian Roberts and David Indermaur, *What Australians Think About Crime and Justice: Results from the 2007 Survey of Social Attitudes* (Australian Institute of Criminology, 2009); and Smart Justice Victoria, 'Public Opinion and Sentencing Factsheet' (2010).
128 Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World* (Syracuse University Press, 1991) cited in Karen Gelb, M*easuring Public Opinion About Sentencing* (Sentencing Advisory Council (Victoria), 2008).
129 See, for example, John Walker, Mark Collins and Paul Wilson 'How the Public Sees Sentencing: An Australian Survey' (Trends and Issues in Crime and Criminal Justice No 4, Australian Institute of Criminology, 1987). The

study randomly selected 2,551 participants from the Australian public. This national study demonstrated that views on sentencing vary in relation to attitudes towards the seriousness of the crime, the culpability of offenders and/or the punitive nature of the sentences. It found that a period of imprisonment is the preferred sentence option for offences involving violence or drug trafficking, while non-custodial sentences are generally preferred for non-violent offences.

130 See, for example, Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Trends and Issues in Crime and Criminal Justice No 407, Australian Institute of Criminology, 2011).

131 Julian Roberts, 'Public Opinion and Sentencing Policy' in Sue Rex and Michael Tonry, *Reform and Punishment: The Future of Sentencing* (Willan Publishing, 2002) 25–6.

132 Sentencing Advisory Council (Qld) (2011), above n 5.

133 Terms of Reference – Minimum Standard Non-Parole Periods (2010), above n 68.

134 Mackenzie and Stobbs (2010), above n 8, 54.

135 See *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

136 Sentencing Advisory Council (Qld) (2011), above n 5.

137 This comprises 5,201 male prisoners and 430 female prisoners; see Department of Community Safety, *Annual Report 2009–2010* (State of Queensland, 2010) 94.

138 Ibid 95.

139 Ibid 52.

140 These Terms of Reference can be viewed on the Council's website <http://www.sentencingcouncil.qld.gov.au/our-projects>. The Council must report to the Deputy Premier and Attorney-General by 31 January 2012 on the child sexual offences reference and by 31 July 2012 on the armed robbery reference.

141 Online submission 73 (confidential).

142 Submission 23 (Mt Isa Community Development Association Inc).

143 Submission 47 (Bravehearts).

144 *Penalties and Sentences Act 1992* (Qld) s 3(c).

145 See, for example, *Hili v The Queen; Jones v The Queen* (2010) 272 ALR 465, 478 [49].

146 See *Penalties and Sentences Act 1992* (Qld) ss 9(4), (6), (6B).

147 *Penalties and Sentences Act 1992* (Qld) ss 9(3), (5)(a), (6A).

148 *Markarian v The Queen* (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

149 *Penalties and Sentences Act 1992* (Qld) s 3(g).

150 The Hon Martin Moynihan AC QC, *Review of the Civil and Criminal Justice System in Queensland* (2008).

151 Submission 38 (QLS).

152 Submission 37 (PACT).

153 Submission 3 (QLS).

154 Submission 56 (Supreme Court of Queensland).

155 See n 68 above.

156 Submission 51 (BAQ).

157 Submission 48 (Sisters Inside Inc).

158 *Mahmud v The Queen; Muldrock v The Queen* [2011] HCATrans 147 (8 July 2011).

159 Ibid [802]–[811].

160 Submission 56 (Supreme Court of Queensland).

161 Submission 46 (Potts Lawyers).

162 Madonna King, interview with the Hon Cameron Dick MP Attorney-General, above n 69.

163 Sentencing Advisory Council (Qld) (2011), above n 4, 37–41.

164 Chief Justice of Queensland, the Honourable Paul de Jersey AC, 'Launch of the Queensland Sentencing Information Service' (Speech delivered at the Banco Court, Supreme Court of Queensland, Brisbane, 27 March 2007).

165 The power of the Queensland Court of Appeal to issue formal guideline judgments was introduced by the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) which inserted Part 2A into the *Penalties and Sentences Act 1992* (Qld). These provisions came into operation on 26 November 2010 (2010 SL No 330).

166 For example, Submission 56 (Supreme Court of Queensland).

167 Stephen Smallbone and Meredith McHugh, *Outcomes of Queensland Corrective Services Sexual Offender Treatment Programs: Final Report* (School of Criminology and Criminal Justice, Griffith University, 2010) x [10]. The evaluation involved data obtained on 409 adult males who had served a term of imprisonment in Queensland for a sexual offence, and who had been discharged between 4 April 2005 and 30 June 2008. Seventy-three (17.8%) identified as Indigenous. Almost one in four (23.2%) had a prior history of sexual offences, and 35.5% had a prior history of nonsexual violent offences. The mean age at discharge was 45 years; 189 offenders (46.2%) were discharged with no community supervision, 190 (46.5%) were discharged under a standard community supervision order (eg parole), and 30 (7.3%) were discharged under a post-sentence *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld) order; 158 (39%) had completed a sexual offender program.

168 Ibid xi [14].

169 Losel and Schmucker (2005) as cited in Smallbone and McHugh (2010), above n 167, 8.

170 Smallbone and McHugh (2010), above n 167, 8.

171 Queensland Corrective Services (2011), above n 2.

172 Ibid.

173 Queensland Corrective Services (2011), above n 2 referring to the findings of Melinda D Schlager and Kelly Robbins, 'Does Parole Work? – Revisited' (2008) 88 *The Prison Journal* 234.

174 Queensland Corrective Services (2011), above n 2.

175 Ibid.

176 Karen Gelb, *Alternatives to Imprisonment: Community Views in Victoria* (Sentencing Advisory Council (Victoria), 2011).

177 Ibid 1.

178 Ibid 4.

179 The Victorian research was conducted in conjunction with a national survey (including Queensland) of public perceptions of sentencing funded by the Australian Research Council. The findings of this research are in the process of being published.

180 Submission 25 (confidential).

181 Submission 39 (Catholic Prison Ministry).

182 Submission 47 (Bravehearts). Bravehearts has released a position paper on its proposed 'two-strike' approach to sentencing for child sexual offenders which is available on its website <www.bravehearts.org.au/docs/pos_paper_two_strikes.pdf>.

183 See Devon Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011); Tony Butler et al, 'Mental Disorders in Australian Prisoners: A Comparison with a Community Sample' (2006) 40(3) *Australian and New Zealand Journal of Psychiatry* 272.

184 See Department of Corrective Services, *Intellectual Disability Survey* (Queensland Government, 2002); Phillip French, *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland* (Queensland Advocacy Incorporated, 2007); Indig et al (2011), above n 183.

185 See Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2009* (Cat no PHE 123, 2010).

186 See Stuart A Kinnar, 'The Post-Release Experience of Prisoners in Queensland' (Trends and Issues in Crime and Criminal Justice No 325, Australian Institute of Criminology, 2006); Michelle Torok et al, 'Conduct Disorder as a Risk Factor for Violent Victimization and Offending Among Regular Illicit Drug Users' (2011) 41(1) *Journal of Drug Issues* 25.

187 (1984) 154 CLR 606, 610–11.

188 For a review of the effectiveness of mandatory sentencing, see Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council (Victoria), 2008).

189 Peter Sallmann, 'Mandatory Sentencing: A Bird's-Eye View' (2005) 14(4) *Journal of Judicial Administration* 177, 189–90, citing Neil Morgan, 'Mandatory Sentencing in Australia: Where Have We Been and Where are We Going?' (2000) 24(3) *Criminal Law Journal* 164.

Chapter 4

190 *Penalties and Sentences Act 1992* (Qld) s 9(1)(a).

191 Queensland Government (2011), above n 7.

192 Standing Committee of Attorneys-General Working Group on Indigenous Justice (2010), above n 101.

193 Commonwealth of Australia (2011), above n 103.

194 This applies if the person is being sentenced for murder and s 305(2) of the *Criminal Code* (Qld) applies; that is, the offender is being sentenced on more than one conviction of murder, or another offence of murder is taken into account, or the person has on a pervious occasion been sentenced for another offence of murder.

195 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54(B). The power to impose an aggregate sentence of imprisonment under s 53A of the Act was introduced by the *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) sch 2 [14] which commenced operation on 14 March 2011.

196 In Queensland, there is a presumption under s 155 of the *Penalties and Sentences Act 1992* (Qld) that terms of imprisonment will be served concurrently. Section 155 provides that sentences of imprisonment are to run concurrently unless otherwise provided by the Act, or the court imposing the prison sentence orders otherwise. However, the court must make an order that the sentences are to be served cumulatively in certain circumstances: *Penalties and Sentences Act 1992* (Qld) s 156A.

197 Sentencing Advisory Council (Qld) (2011), above n 5, 42, Figures 11 and 12.

198 For example, Gold Coast (12 July 2011).

199 Submission 37 (PACT).

200 Ibid.

201 The Law Society notes in its submission that it has long campaigned for 17-year-olds to be regarded as children for the purposes of the criminal law in Queensland: Submission 38 (QLS).

202 Submission 38 (QLS).

203 Legal Issues Roundtable (4 August 2011, Brisbane).

204 Submission 47 (Bravehearts).

205 Submission 52 (QPUE).

206 For example, comments made at the Rockhampton consultation (15 July 2011).

207 [2007] 2 Qd R 87.

208 [2003] 1 Qd R 398, 431 [111].

209 *R v McDougall and Collas* [2007] 2 Qd R 87 [18] citing the earlier statement of this principle by Fryberg J in *R v Eveleigh* [2003] 1 Qd R 398, 430–31 [111].

210 *Penalties and Sentences Act 1992* (Qld) s 161B(5).

211 The Court referred to the judgment of McMurdo P in *R v Eveleigh* [2003] 1 Qd R 398 citing the majority view in *R v DeSalvo* (2002) 127 A Crim R 229.

212 *R v McDougall and Collas* [2007] 2 Qd R 87, [19] (citations omitted).

213 [2010] QCA 216, [39].

214 See, for example, *R v Richardson* [2010] QCA 216 at [53] (White JA, with whom Fraser JA and Mullin J agreed) referring to the earlier decisions of *R v Orchard* [2005] QCA 141 and *R v Keating* [2002] QCA 19.

215 *R v MJH* (Unreported, District Court of Queensland, Brisbane, 24 June 2011, Tutt J). Note: An appeal has been lodged in relation to this sentence. The name of the defendant in this matter has been abbreviated to initials as access to the QSIS database from which it has been drawn is restricted.

216 *R v ASB* (Unreported, District Court of Queensland, Cairns, 3 June 2011, Everson J). The name of the defendant in this matter has been abbreviated to initials as access to the QSIS database from which it has been drawn is restricted.

217 *R v GGR* (Unreported, District Court of Queensland, Beenleigh, 27 May 2011, Dearden J). The name of the defendant in this matter has been abbreviated to initials as access to the QSIS database from which it has been drawn is restricted.

218 Submission 37 (PACT).

219 Submission 38 (QLS).

220 Submission 52 (QPUE).

221 Online submission 73 (confidential).

222 Online submission 79 (confidential).

223 For example, online submissions 9 (confidential), 107 (confidential), 165 (confidential), 179 (J Millin), 196 (K Edwards) and 235 (anonymous).

224 Online submission 9 (confidential).

225 Online submission 3 (anonymous).

226 Legal Issues Roundtable (4 August 2011, Brisbane). This issue was also raised in earlier roundtables hosted by the Council in February 2011.

227 Sentencing Advisory Council (Qld) (2011), above n 5, 42, Figures 11 and 12.

228 Submission 38 (QLS).

229 Submission 52 (QPUE).

230 Submission 47 (Bravehearts).

231 *R v Powderham* [2002] 2 Qd R 417, 421 [12]. The Court found that the wording of s 161C was ambiguous and therefore an interpretation that gives a wider and more extensive operation or effect to s 161C should be avoided given that a declaration under s 161B is 'penal and prejudicial to the liberty of the person being sentenced': 421–22 [13].

232 See Sentencing Advisory Council (Qld) (2011), above n 5, 32–3. Over the period 2005–06 to 2009–10, 92 per cent of offenders convicted of a qualifying serious violent offence or sexual offence in the higher courts in Queensland pleaded guilty.

233 *Criminal Code* (Qld) s 305(1).

234 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1)(a).

235 *Sentencing Act 1995* (NT) s 53.

236 *Sentencing Act 1995* (NT) s 53A.

237 *Crimes Act 1914* (Cth) s 19AG(3).

238 Submission 38 (QLS).

239 Submission 47 (Bravehearts). However, Bravehearts' support for this position was expressed only in relation to offenders

convicted of murder in circumstances where the offender must serve a minimum of 20 years prior to being eligible for parole.

240 Submission 39 (Catholic Prison Ministry).

241 *Mental Health Act 2000* (Qld) s 97.

242 E-mail communication from Commissioner's Representative, Parole Boards Queensland to Thomas Byrne, 10 May 2011.

243 *Criminal Code* (Qld) ss 613, 645, 647.

244 *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 23, 52. The 'limiting term' as this period is referred to, operates as the maximum period the person can be detained as a forensic patient for the offence which was the subject of the special hearing.

245 *Penalties and Sentences Act 1992* (Qld) s 144.

246 *Penalties and Sentences Act 1992* (Qld) ss 112, 113.

247 *Penalties and Sentences Act 1992* (Qld) s 92(1)(b).

248 *Penalties and Sentences Act 1992* (Qld) s 160A(6).

249 *Sentencing Act 1995* (NT) s 40.

250 *Criminal Law (Sentencing) Act 1978* (SA) s 38.

251 (Unreported, Supreme Court of South Australia, Sulan J, 13 April 2011). The Court of Criminal Appeal refused an application by the Director of Public Prosecutions to appeal this decision: *R v Narayan* [2011] SASCFC 61 (1 July 2011).

252 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12.

253 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12.

254 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54C. However, the failure of the court to comply with this section does not invalidate the sentence: s 54C(2).

255 *Crimes Act 1914* (Cth) ss 19AG, 20AB(6). See also *Lodhi v R* (2007) 179 A Crim R 470.

256 This issue was raised at a number of consultations, including a Legal Issues Roundtable (4 August 2011, Brisbane).

257 Submission 47 (Bravehearts); *Penalties and Sentences Act 1992* (Qld) s 9(5). 'Exceptional circumstances' is not defined, but s 9(5A) states that, in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.

258 *Penalties and Sentences Act 1992* (Qld) s 160B(2). This applies to parole cancelled under ss 205 or 209 of the *Corrective Services Act 2006* (Qld). In these circumstances, the court must fix the date the offender is eligible to apply for release on parole, rather than a parole release date.

259 Submission 47 (Bravehearts).

260 Submission 52 (QPUE).

261 *Criminal Code* (Qld) s 552H(1)(a).

262 *Criminal Code* (Qld) s 552H(1)(b). This applies only if only if the prosecuting authority and the offender have consented to the offence being prosecuted summarily pursuant to s 20(2) of the *Drug Court Act 2000* (Qld).

263 *Criminal Code* (Qld) s 552D. This includes on the basis that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction.

264 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2).

265 For example ss 186 (harm) and 188 (common assault) of the *Criminal Code* (NT).

266 *Criminal Law (Sentencing) Act 1978* (SA) ss 32(5)(ba), 32(10)(d) (definition of 'a serious offence against the person').

267 Submission 38 (QLS); Submission 49 (Prison Fellowship Qld).

268 Legal Issues Roundtable (4 August 2011, Brisbane).

269 Ibid.

270 Submission 52 (QPUE).

271 *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld). The relevant amendments to the *Criminal Code* commenced on 1 November 2010 (2010 SL No 236). These changes followed the review of the civil and criminal justice system by the Hon Martin Moynihan AC QC – *Review of the Civil and Criminal Justice System in Queensland* (2008).

272 Submission 47 (Bravehearts).

273 The *Youth Justice Act 1992* (Qld) defines a 'child' as a person who is yet to turn 17 years of age: sch 4.

274 *Children (Criminal Proceedings Act 1987* (NSW) s 3 (definition of 'child'); *Children, Youth and Families Act 2005* (Vic) s 3(1) (definition of 'child'); *Young Offenders Act 1993* (SA) s 4 (definition of 'youth'); *Young Offenders Act 1994* (WA) s 3 (definition of 'young person'); *Children and Young People Act 2008* (ACT) pt 1.3, ss 11, 12 (definitions of 'child' and 'young person') and *Legislation Act 2001* (ACT), dictionary, pt 1 (definition of 'adult'); *Youth Justice Act 2005* (NT) s 6 (definition of 'youth'); and *Youth Justice Act 1997* (Tas) s 3 (definition of 'youth').

275 Section 144 of the *Youth Justice Act 1992* (Qld) provides that the court must have regard to the fact the offender was a child at the time the offence was committed and the sentence that might have been imposed on the offender if sentenced as a child. The court is also prevented from ordering the offender to serve a term of imprisonment that is longer than the period of detention the court would have ordered the offender to serve if sentenced as a child or to pay an amount by way of a fine, restitution or compensation that is greater than it would have ordered if the offender was sentenced as a child.

276 UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations*, *Australia*, 20 October 2005, 40th Session (UN Doc CRC/C/15/Add 268) 15–16 [74].

277 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3).

278 *Criminal Law (Sentencing) Act 1988* (SA) s 31A.

279 *Youth Justice Act 2006* (NT) s 85. This applies unless the court considers that the nature of the offence, the past history of the offender, or the circumstances of the particular case make the fixing of such a period inappropriate.

280 Submission 55 (Department of Communities).

281 Submission 37 (PACT).

282 Submission 49 (Prison Fellowship (Qld)).

283 Submission 38 (QLS).

284 Submission 55 (Department of Communities). Principle 17 states that 'a child should be detained in custody … only as a last resort and for the least time that is justified in the circumstances': *Youth Justice Act 1992* (Qld) sch 1.

285 Ibid citing Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Re-offending: Report to the Criminology Research Council* (2009).

286 Submission 42 (CCYPCG).

287 Submission 37 (PACT).

288 Submission 38 (QLS).

289 For example, Cairns consultation (7 July 2011); Legal Issues Roundtable (4 August 2011, Brisbane).

290 Submission 47 (Bravehearts).

291 Submission 52 (QPUE).

292 For example, Townville (23 June 2011), Rockhampton (15 July 2011) and Cherbourg (21 July 2011).

293 Palm Island representatives attending the Townsville consultation (23 June 2011).

294 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November

1989. Entered into force 2 September 1990; entered into force in Australia 16 January 1991.

295 *Penalties and Sentences (Serious Violent Offences) Act Amendment Act 1997* (Qld) s 6. This Act inserted new ss 9(3) and (4) into the Act which provide that the principle that punishment is a sentence of last resort does not apply to offences 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 serious harm to another person, and set out a list of factors to which a court must have primary regard in sentencing for these offences.

296 *R v Lovell* [1999] 2 Qd R 79, 83 (Byrne J).

297 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

298 See, for example, *R v Way* (2004) 60 NSWLR 168.

299 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(1).

300 Submission 52 (QPUE).

301 Ibid.

302 Submission 47 (Bravehearts).

303 Submission 38 (QLS).

304 Ibid.

305 Ibid.

306 This survey was published on the Department of Justice's website: <http://myviews.justice.vic.gov.au>.

307 The Hon Robert Clark MP, above n 59.

308 Munro (5 June 2011), above n 60.

309 A 'serious violent offence' is defined as a serious violent offence of which an offender is convicted under s 161A of pt 9A of the Act: *Penalties and Sentences Act 1992* (Qld) s 4.

310 Section 160 of the *Penalties and Sentences Act 1992* (Qld) defines a 'sexual offence' for the purposes of pt 9 div 3 relating to the setting of parole release and eligibility dates as a sexual offence within the meaning of the *Corrective Services Act 2006* (Qld). This includes a broad range of offences, including a number of sexual offences under the *Criminal Code* (Qld) such as rape (s 349), sexual assault (s 352), child pornography offences (ss 228A–228D), maintaining a sexual relationship with a child (s 229B), and carnal knowledge with or of a child under 16 years (s 215).

311 *Penalties and Sentences Act 1992* (Qld) s 160B. This is what is referred to as 'court ordered parole'. The exception to this is parole cancelled under ss 205 or 209 of the *Corrective Services Act 2006* (Qld): *Penalties and Sentences Act 1992* (Qld) s 160B(2). In these circumstances, the court must fix the date the offender is eligible to apply for release on parole, rather than a parole release date.

312 See, for example, *Bugmy v The Queen* (1990) 169 CLR 525, 530–532 (Mason CJ and McHugh J).

313 (1974) 131 CLR 623, 629 (Barwick CJ, Menzies, Stephen and Mason JJ).

314 *Deakin v The Queen* (1984) 11 A Crim R 88, 89.

315 *R v Ross* [2009] QCA 7 (10 February 2009) (de Jersey CJ).

316 *R v Blanch* [2008] QCA 253 (29 August 2008) [24] (Keane JA) citing *R v Hoad* [2005] QCA 92, [31].

317 *R v McDougall & Collas* [2007] 2 Qd R 87, [14], [21]; *R v Assurson* (2007) 174 A Crim R 78, 82 [22] (Williams JA), 83 [27] (Keane JA), and 84 [33]–[34] (Mullins J).

318 *R v Assurson* (2007) 174 A Crim R 78, 82 [22] (Williams JA) and 83 [29] (Keane JA).

319 R v *McDougall & Collas* [2007] 2 Qd R 87, [21].

320 *R v Kitson* [2008] QCA 86 (11 April 2008) [17] (Fraser JA, with whom Fryberg and Lyons JJ agreed). See also *R v Mayall* [2008] QCA 202.

321 The factors were referred to in the Second Reading Speech for the Bill introducing the scheme: New South Wales, *Parliamentary Debates*, above n 29, 5818–19.

322 See, for example, *R v Way* (2004) 60 NSWLR 168, 195; *R v Henry* [2007] NSWCCA 90 (2 April 2007) [26].

323 See, for example, Warner (2003), above n 22, 14.

324 See above n 13.

325 South Australia, *Parliamentary Debates*, House of Assembly, 8 February 2007, 1743, 1744 (M J Atkinson, Attorney-General).

326 *Crimes Act 1914* (Cth) s 19AG.

327 *Migration Act 1958* (Cth) s 236B. These penalties apply to offences under ss 233B, 233C and 234A of the Act.

328 Australian Law Reform Commission, *Sentencing* (ALRC Report No 44, 1988) 43 [82].

329 Ibid.

330 Ibid.

331 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report No 103, 2006) 292, Recommendation 9–4.

332 Ibid.

333 Although s 16A(1) of the *Crimes Act 1914* (Cth) establishes a general obligation to impose a sentence or order that is of a severity appropriate in all the circumstances of the offence.

334 *Hili v The Queen; Jones v The Queen* (2010) 272 ALR 465, 477 [44].

335 For example, submissions 2 (P Kerans), 4 (V Key – child sexual offences, murders of police), 7 (M Billing – violent crimes), 9 (confidential) and 28 (R & J Barrell).

336 Submission 8 (confidential).

337 Submission 37 (PACT).

338 Submission 38 (QLS).

339 Submission 52 (QPUE).

340 Ibid.

341 Queensland Corrective Services (2011), above n 2.

342 Ibid.

343 Sentencing Advisory Council (Qld), above n 5, 42, Figures 11 and 12. If no parole eligibility date is set by the court, the offender must serve 50 per cent of their sentence before being eligible to apply for release on parole: *Corrective Services Act 2006* (Qld) s 184.

344 Shlager and Robbins (2008), above n 173.

345 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).

346 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3)(b).

347 For example, in NSW, *R v Way* (2004) 60 NSWLR 168.

348 *Sentencing Act 1995* (NT) s 53A(4).

349 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(2)(a); *Sentencing Act 1995* (NT) s 53A(4) (murder).

350 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3); *Sentencing Act 1995* (NT) ss 53A(7)–(8) (murder).

351 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(c); *Sentencing Act 1995* (NT) ss 53A(5) (murder), 54(3) (minimum non-parole period), 55(2) (fixed non-parole period for prescribed sexual offences), 55A(2) (fixed non-parole period for prescribed offences against children under 16 years).

352 *R v KC* (Unreported, Supreme Court of Queensland, White J, 30 January 2008). The name of the defendant in this matter has been abbreviated to initials as access to the QSIS database from which it has been drawn is restricted.

353 Submission 47 (Bravehearts).

354 Submission 52 (QPUE).

355 Ibid.

356 Ibid.

357 Submission 38 (QLS).

358 Submission 51 (BAQ).

359 Submission 55 (Department of Communities).

360 Submission 37 (PACT).

361 Legal Issues Roundtable (4 August 2011, Brisbane).
362 (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).
363 *R v Kitson* [2008] QCA 86 (11 April 2008) [17] (Fraser JA, with whom Fryberg and Lyons JJ agreed).

Chapter 5

364 Section 4 of the *Penalties and Sentences Act 1992* (Qld) defines a 'serious violent offence' as 'a serious violent offence of which an offender is convicted under section 161A' which relates to the making of a declaration by a court that the offender is convicted of a serious violent offence. Section 160 defines a 'sexual offence' as 'a sexual offence within the meaning of the *Corrective Services Act 2006*'. Schedule 4 of the *Corrective Services Act 2006* (Qld) defines a 'sexual offence' as an offence listed in Schedule 1 of the Act.
365 *Penalties and Sentences Act 1992* (Qld) s 161B(4).
366 *Corrective Services Act 2006* (Qld) s 4 and sch 4.
367 *Penalties and Sentences Act 1992* (Qld) s 160D.
368 *Criminal Code* (Qld) s 228 (Obscene publications and exhibitions); s 228A (Involving child in making child exploitation material); s 228B (Making child exploitation material); s 228C (Distributing child exploitation material); and s 228D (Possessing child exploitation material).
369 *Crimes Act 1914* (Cth) s 50BA (Sexual intercourse with a child under 16); s 50BB (Inducing child under 16 to engage in sexual intercourse); s 50BC (Sexual conduct involving a child under 16); s 50BD (Inducing child under 16 to be involved in sexual conduct); s 50DA (Benefiting from offence against this Part); s 50DB (Encouraging offence against this Part); *Criminal Code* (Cth) s 270.6 (Sexual servitude offences) and s 270.7 (Deceptive recruiting for sexual services); and *Customs Act 1901* (Cth) s 233BAB (Special offence relating to tier 2 goods).
370 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A, Table–Standard Non-Parole Periods.
371 *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) s 3, sch 1 [8]–[9], [11]–[14].
372 *Crimes Amendment (Sexual Offences) Act 2008* (NSW) s 4, sch 2, 2.4[5].
373 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A, Table–Standard Non-Parole Periods, Items 1A, 1B and 1.
374 Section 19B of the *Crimes Act 1900* (NSW) inserted by *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW) s 3, which came into operation on 23 June 2011.
375 *Crimes Act 1900* (NSW) s 19B. This applies if the murder was committed while the police officer was executing his or her duty, or as a consequence of, or in retaliation for, actions undertaken by that or any other police officer in the execution of his or her duty, and if the person convicted of the murder: knew or ought reasonably to have known that the person killed was a police officer, and intended to kill the police officer or was engaged in criminal activity that risked serious harm to police officers.
376 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).
377 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1)(a).
378 New South Wales, *Parliamentary Debates*, above n 29, 5815–6.
379 New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668 (John Hatzistergos, Attorney-General and Minister for Justice).
380 *Criminal Law (Sentencing) Act 1988* (SA) s 32(10)(d).
381 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab).
382 *Sentencing Act 1995* (NT) s 53A.
383 *Sentencing Act 1995* (NT) s 55 and *Criminal Code* (NT) s 192(3).
384 *Sentencing Act 1995* (NT) s 55A.
385 *Sentencing Act 1995* (NT) ss 53A(5) (murder), 55(2) (sexual offences involving sexual intercourse without consent), 55A(2) (sexual offences against children under 16 years), 53(1) (life sentences).
386 *Crimes Act 1914* (Cth) s 19AG.
387 *Migration Act 1958* (Cth) ss 233B, 233C, 234A.
388 A 'serious violent offence' is defined in s 86A of the *Sentencing Act 2002* (NZ) and includes a broad range of sexual and serious violent offences under the *Crimes Act 1961* (NZ), including sexual violation (s 128B); sexual connection with dependent family member under 18 years (s 131(1)); sexual connection with child (s 132(1)); indecent act on child (s 132(3)); sexual connection with young person (s 134(1)); indecent act on young person (s 134(3)); indecent assault (s 135); murder (s 172); attempted murder (s 173); manslaughter (s 177); wounding with intent to cause grievous bodily harm or injure (s 188(1)); injuring with intent to cause grievous bodily harm (s 189(1)); aggravated wounding (s 191(1)); aggravated injury (s 191(2)); discharging firearm or doing dangerous act with intent to do grievous bodily harm or to injure (s 198(1)); kidnapping (s 209); aggravated burglary (s 232(1)); robbery (s 234); and aggravated robbery (s 235).
389 New Zealand, *Parliamentary Debates,* House of Representatives, 4 May 2010, 'Sentencing and Parole Reform Bill – Second Reading' (Judith Collins, Minister of Corrections) vol 662, 10,673.
390 Sentencing Advisory Council (Qld) (2011), above n 5, 47.
391 Based on the Council's analysis of the most serious offence profile of offenders sentenced to full-time imprisonment in the higher courts over the period 2005–06 to 2009–10, 8.5 per cent of Aboriginal and Torres Strait Islander offenders were convicted of wounding (compared with 2.1% of non-Indigenous offenders) and 20.2 per cent of assault occasioning bodily harm (compared with 9.7% of non-Indigenous offenders). Other offences for which Aboriginal and Torres Strait Islanders are over-represented are grievous bodily harm (8.1%, compared with 4.3% of non-Indigenous offenders) and serious assault (7.5%, compared with 2.9% of non-Indigenous offenders): Ibid 48, Table 2.
392 In addition to the subjective circumstances that a court must take into account in sentencing all offenders, s 9(2)(p) of the *Penalties and Sentences Act 1992* (Qld) requires a court, in sentencing an offender who is an Aboriginal or Torres Strait Islander person, to take into account any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including the offender's relationship to his or her community, any cultural considerations, or any considerations relating to programs and services established for offenders in which the community justice group participates.
393 Submission 30 (Andre).
394 Submission 16 (confidential).
395 Submission 37 (PACT).
396 Submission 47 (Bravehearts).
397 Submission 38 (QLS).
398 Submission 52 (QPUE). The QPUE submitted that sentences of less than 12 months should have no non-parole period set, with the offender required to serve the full sentence in prison.
399 Submission 42 (CCYPCG).
400 For example Brisbane consultation (15 July 2011) and Legal Issues Roundtable (4 August 2011, Brisbane). The Council also received two letters from Queensland prisoners convicted

of drug offences who are subject to the SVO scheme by virtue of receiving a prison sentence of 10 years or more (in which case a declaration that the offender is convicted of a serious violent offence is mandatory). These offenders questioned the rationale for the scheme applying to them automatically when other drug offenders convicted of Commonwealth offences may be eligible for parole much earlier, and ostensibly higher-risk offenders, such as repeat sex offenders sentenced to shorter periods of imprisonment, may not be subject to the scheme at all.

401 Legal Issues Roundtable (4 August 2011, Brisbane).

402 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 596 (Denver Beanland, Attorney-General).

403 *Criminal Code* (Qld) s 303. 'Unlawful' means that the killing was not authorised, justified or excused by law and, in the case of manslaughter, it does not matter that the person did not intend to kill the person or do the person any harm.

404 An offender convicted of manslaughter is 'liable to imprisonment for life' (*Criminal Code* (Qld) s 310) – in contrast to murder, for which a person is liable to imprisonment for life, which cannot be mitigated or varied under this Code or any other law' (*Criminal Code* (Qld) s 305(1)). An offender convicted of murder can also be sentenced to an indefinite sentence under pt 10 of the *Penalties and Sentences Act 1992* (Qld).

405 *R v KC* [2008] QSC (Unreported, White J, 30 January 2008). The name of the defendant in this matter has been abbreviated to initials as access to the QSIS database from which it has been drawn is restricted.

406 The Hon Mervyn Finlay QC, *Review of the Law of Manslaughter in New South Wales* (2003) 57–75.

407 Paul Fairall, *Review of Aspects of the Criminal Code of the Northern Territory* (2004) Recommendation 4.

408 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3). The South Australian Court of Criminal Appeal considered the basis on which a court can depart from the mandatory minimum non-parole period in the recent decision of *R v Jones* (2010) 108 SASR 479.

409 For example, *R v KC* [2008] QSC (Unreported, Supreme Court of Queensland, White J, 30 January 2008). The name of the defendant in this matter has been abbreviated to initials as access to the QSIS database from which it has been drawn is restricted.

410 See, for example *R v TLM* (Unreported, Supreme Court of Queensland, Cullinane J, 19 October 2006); *R v SLK* (Unreported, Supreme Court of Queensland, Cullinane J, 31 July 2006); and *R v LRN* (Unreported, Supreme Court of Queensland, Lyons J, 16 July 2007). The names of the defendants in these matters have been abbreviated to initials as access to the QSIS database from which they have been drawn is restricted.

411 *Criminal Law Amendment Act 2000* (Qld) s 24. These changes commenced on 27 October 2000 (2000 SL No 270).

412 [2010] QCA 26 [17] (23 February 2010) (de Jersey CJ, Holmes and Muir JJA) (citations omitted).

413 *Penalties and Sentences Act 1992* (Qld) s 9(5A).

414 *Criminal Code* (Qld) s 305(1). The only exception to this is where the court determines it appropriate to sentence the offender to an indefinite sentence under pt 10 of the *Penalties and Sentences Act 1992* (Qld).

415 *Criminal Code* (Qld) s 302(1).

416 *Criminal Code* (Qld) s 305(2) and *Corrective Services Act 2006* (Qld) ss 181(2), 181(4).

417 Submission 38 (QLS).

418 Submission 47 (Bravehearts).

419 Submission 39 (Catholic Prison Ministry).

420 Submission 2 (P Kerans).

421 Submission 14 (J Taylor).

422 This category consists of the offences of 'grievous assault' (including unlawful wounding), 'serious assault', 'serious assault (other)' and 'common assault'.

423 Queensland Police Service, unpublished data. The data are based on incidents where glass was the primary weapon. A glass weapon is identified as any type of glass (including drink glasses and shards/pieces of glass of any type of glass material, for example window or mirror and bottle). These data are preliminary and may be subject to change.

424 Queensland Police Service, unpublished data. Rates are calculated based on the estimated residential population as at 30 June of each year. These rates are preliminary and may be subject to change.

425 Ibid.

426 See also Peter Cassematis and Paul Mazerolle, *Understanding Glassing Incidents on Licensed Premises: Dimensions, Prevention and Control* (Griffith University and Queensland Government, 2009).

427 [1999] 2 Qd R 79.

428 [1986] VR 43, 50.

429 [1991] Tas R 1.

430 Submission 38 (QLS).

431 Legal Issues Roundtable (4 August 2011, Brisbane).

432 Submission 52 (QPUE).

Chapter 6

433 These meetings were attended by representatives of the Council Secretariat and took place in Sydney on 10–11 March 2011. For a list of these meetings, see Appendix 2.

434 Judicial Commission of NSW (2010), above n 34.

435 For more information on the outcomes of this evaluation, see Chapter 2 of this report.

436 The Hon Justice Reg Blanch, Chief Judge, District Court of NSW, Address to the NSW Legal Aid Criminal Law Conference (Sydney, 2 June 2010).

437 Ibid.

438 Ibid.

439 Submission 38 (QLS).

440 Submission 51 (BAQ).

441 Submission 40 (LAQ).

442 Submission 51 (BAQ).

443 Ibid.

444 Submission 56 (Supreme Court of Queensland).

445 Submission 47 (Bravehearts).

446 Submission 52 (QPUE).

447 As part of this analysis, the Council performed a sensitivity analysis to examine the potential impact of excluding cases missing information – sentence length, Aboriginal and Torres Strait Islander status or gender – on the calculated number of defendants affected by the proposed SNPP scheme. The impacts were negligible, with the exception of a possible increase in the number of Aboriginal and Torres Strait Islander defendants per year that might be affected by the proposed SNPP scheme. Details of the sensitivity analysis are reported in Appendix 5.

448 See Sentencing Advisory Council (Qld) (2011), above n 5, 47–51 for further information.

449 This is slightly lower than the Council's estimate of the total number of offenders likely to be affected as information on

Aboriginal and Torres Strait Islander status was not recorded for all sentenced offenders. For further information, see Appendix 5.

450 *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) s 3, sch 3, 3.1 [3]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 104, sch 2, pt 7.

451 *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) s 3, sch 1 [16]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 104, sch 2, pt 17. The SNPP provisions therefore applied to offences committed before the commencement of the amendments on 1 January 2008. The exception to this was if the court had already convicted the person being sentenced or the court had accepted a plea of guilty and the plea had not been withdrawn before the commencement of the amendments.

452 *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession on 16 December 1966 (entered into force 23 March 1976). Australia agreed to be bound by the ICCPR on 13 August 1980, subject to certain reservations. See further <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>.

453 *Sexual Offenders (Protection of Children) Amendment Act 2003* (Qld) s 28.

454 Inserted by *Sexual Offenders (Protection of Children) Amendment Act 2003* (Qld) s 29.

455 [1997] QCA 316.

456 [1998] 2 Qd R 186.

457 Ibid 189.

458 Ibid.

459 [2010] 2 Qd R 340, 347–8 [28].

460 *Legislative Standards Act 1992* (Qld) s 4(1).

461 *Legislative Standards Act 1992* (Qld) ss 23(1)(f), 24(1)(i)).

462 Submissions 47 (Bravehearts) and 52 (QPUE).

463 Submission 38 (QLS).

464 Judicial Commission of New South Wales (2010), above n 34.

465 Ibid 60–1.

466 Submission 40 (LAQ).

467 Submission 52 (QPUE).

468 Submission 47 (Bravehearts).

469 Submissions 52 (QPUE) and 47 (Bravehearts).

470 Submission 38 (QLS).